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Conflict of Laws

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"Conflict of Laws. Memorize thirteen different ways of saying, 'If you play in my yard, you play by my rules.' "[1]
-James D. Gordon III

UNFORTUNATELY, Professor James Gordon's observation is perhaps as good as any other explanation of conflict of laws cases. With this in mind, this Article surveys the cases applying Texas conflicts principles during the last Survey period. Although the Survey period only extends from October 1, 1991 through September 30, 1992, the Article discusses a Texas Supreme Court case from Summer 1991: *Maxus Exploration Co. v. Moran Brothers, Inc.*[2] *Maxus* is an appropriate starting point because it illustrates the complexity of choice of law analysis. Additionally, *Maxus* shows the practitioner that courts do not always do as they say when addressing choice of law issues.

Conflict of laws encompasses more than just choice of law. Properly understood, conflict of laws

> describes generally the body of law dealing with the questions of *when* and *why* the courts of one jurisdiction take into consideration the elements of foreign law or fact patterns in a case or consider the prior determination of another state or of a foreign nation in a case pending before them.[3]

Accordingly, this Article also surveys developments in Texas law in the following areas: personal jurisdiction;[4] recognition of foreign judgments;[5] and retroactivity.[6]

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* Judicial Clerk, Hon. Warren W. Matthews, Alaska Supreme Court; J.D. 1992, Southern Methodist University School of Law.

1. James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991).

2. 817 S.W.2d 50 (Tex. 1991).

3. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 1 (2d ed. 1992).

4. Extending Professor Gordon's aphorism, personal jurisdiction could be summarized as: "you step in my back yard, you listen to my parents."

5. Recognition of foreign judgments refers to the res judicata, collateral estoppel, Full Faith and Credit or other preclusive effect given by Texas courts to litigation conducted in another state or country. *See* SCOLES & HAY, *supra* note 3, at 950-53.

6. Although not typically addressed in this area of the Survey, *see, e.g.*, Sharon N. Freytag & Michelle E. McCoy, *Conflict of Laws, Annual Survey of Texas Law*, 45 SW. L.J. 149 (1991), Justice David Souter has recently referred to retroactivity as a question of intertemporal choice of law. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). Additionally, no other topic in this Survey collects the cases dealing with the doctrine of retroactivity. Lastly, I must confess that the topic is of particular interest to this author. *See* Paul E. McGreal, *A Tale of Two Courts: The Alaska Supreme Court, the United States Supreme Court, and Retroactivity*, 9 ALASKA L. REV. 305 (1992); Paul E. McGreal, *Back to*

I. CHOICE OF LAW

States apply nearly as many choice of law theories as there are states. Although somewhat of an exaggeration, neither the case law nor the commentary has reached a consensus on the proper choice of law doctrine.[7] Choice of law doctrines include the territorial approach of the First Restatement of Conflicts,[8] the "most significant relationship" approach of the Second Restatement of Conflicts,[9] Professor Brainerd Currie's analysis of states' interests,[10] and many others.[11] The Texas Supreme Court has adopted the Second Restatement as the choice of law rules for Texas.[12] Texas courts, however, have been uneven in applying the Second Restatement and the cases discussed in this Part are no exception.[13]

The outcome of choice of law cases under the Second Restatement necessarily will be difficult to predict. The Second Restatement contains many lists of multiple factors to be considered in arriving at the mythical state with the "most significant relationship."[14] Weighing these factors requires courts to undertake an amorphous inquiry into the facts and policies of each case. Courts should not be faulted for struggling with this mix of considerations in their own way. Instead, as in this Article, the focus should be upon whether the courts are considering the proper factors and focusing upon the crucial facts. Thus, the mission of this Article is not to indicate where this author would balance the factors differently from a given court, but, rather, to examine what factors the court weighed and why.

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the Future: The Supreme Court's Retroactivity Jurisprudence, 15 HARV. J.L. & PUB. POL'Y 595 (1992).

7. *See* Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 522 (1983) (summarizing choice of law theories).

8. *See, e.g.*, RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377 (1934) (in torts cases, apply law of the state that is the "place of [the] wrong").

9. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) (in torts cases, apply law of the state with "the most significant relationship to the occurrence and the parties").

10. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 263-68 (1958).

11. For a collection of writings on various choice of law theories see JAMES A. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW (1980). Professor Lea Brilmayer, in a recent book, advances a thought provoking approach to choice of law based on individual rights. LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991).

12. *See* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979).

13. This Article does not devote a textual discussion to every Texas conflicts case during the Survey period. Cases that merely restate an accepted rule or address a tangentially related point are discussed in footnotes to the relevant text.

One Texas case addressed the interpretation of a foreign nation's law. Pittsburgh-Corning Corp. v. Askewe, 823 S.W.2d 759 (Tex. App.—Texarkana 1992, writ dism'd w.o.j.), *cert. denied sub nom.*, Owens Corning Fiberglass Corp. v. Webb, 112 S. Ct. 1293 (1992), involved the "Act of State" doctrine. The Act of State doctrine "prevents the courts of this country, both federal and state, from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory." *Id.* at 760-61. The court found that none of the district court's actions attacked the validity of a foreign government's acts thus the Act of State doctrine was not implicated. *Id.*

14. *See, e.g.*, sources quoted *infra* note 20.

A. *MAXUS EXPLORATION*: HOW IS IT DONE?

In *Maxus Exploration Co. v. Moran Brothers*,[15] the Texas Supreme Court reaffirmed its commitment to the Second Restatement as the choice of law rule in contract cases.[16] Last year's Texas Survey contained a general discussion of *Maxus*.[17] This Article does not rehash that discussion. Instead, this Article addresses two points that illustrate the uncertainty of choice of law analysis.

Maxus involved an oil drilling contract between Maxus Exploration Company and Moran Brothers. Under the contract, Moran agreed to drill an oil well in Kansas. The contract included an indemnification provision under which each party promised to indemnify the other for personal injury claims of its own employees. An employee of one of Maxus' contractors was subsequently injured while working on Moran's rig. The employee, an Oklahoma resident, commenced litigation against Moran in a Kansas federal district court. After Moran settled with the employee, Maxus initiated a Texas action to determine the parties' rights under the indemnity provision of the drilling agreement. The trial court appeared to apply Kansas law to the parties' dispute in upholding the indemnity provision, while the court of appeals applied Texas law in reaching the same result.[18] Maxus then appealed to the Texas Supreme Court.

Choice of law analysis of an indemnity issue begins with the comments to section 173 of the Second Restatement. When addressing a *contractual* right to indemnity, comment b refers the reader to the general contract choice of law principles in sections 187 and 188.[19] Section 188(1) states the general contracts choice of law rule of the Second Restatement: apply the law of the State with the "most significant relationship" as determined by the factors in section 6.[20] Section 188(2), in turn, states the factors "to be taken into account in applying the principles in section 6":[21] "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, resi-

15. 817 S.W.2d 50 (Tex. 1991).

16. *Id.* at 53.

17. *See* Timothy R. McCormick & Adrianna S. Martinez, *Conflict of Laws, Annual Survey of Texas Law*, 45 Sw. L.J. 1471, 1497-1501 (1992).

18. *Maxus*, 817 S.W.2d at 52-53.

19. RESTATEMENT (SECOND) CONFLICT OF LAWS § 173 cmt. b (1971).

20. *Id.* § 188(1). Section 188(1) provides:

> The rights and duties of the parties with respect to an issue in a contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties stated in § 6.

Id. Section 6 provides:

> [T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in 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.

Id. § 6.

21. *Id.* § 188(2).

dence, nationality, place of incorporation and place of business of the parties."[22] In addition, the Second Restatement contains specific choice of law rules addressing particular types of contracts and contract issues. The *Maxus* court looked to the specific rule for services contracts stated in section 196. Section 196 states a preference for the law of the "place of performance" of the services.[23] These principles stated, the court proceeded with its analysis of the choice of law issue.

The *Maxus* court began its analysis with section 196, erecting a strong presumption in favor of the law of the place of performance.[24] This view accords generally with Texas case law, under which the place of performance is usually determinative of the choice of law for a services contract.[25] On this analysis, the law of Kansas — the place where the drilling services were performed — clearly governed the contract. Yet, perhaps to remove any doubt as to their conclusion, the court invoked an additional choice of law rule: "[i]n some instances . . . it is more appropriate to consider the disputed contractual issue separately from the contract as a whole."[26] The court then considered where the place of performance of the *indemnity obligation*, as opposed to the drilling operation, was located. The court concluded that the indemnity provision was also performable in Kansas since that is where Maxus was to defend Moran from the injured employee's lawsuit.[27] From this, the court felt secure in locating the place of performance in Kansas.

By discussing the place of performance of the *indemnity provision*, the supreme court actually weakened its argument in favor of Kansas law. Section 196 speaks of the place where the "*contract requires* that the services . . . be rendered."[28] The parties' contract, however, did not *require* performance of the indemnity provision in any particular forum. Rather, the place of performance (*i.e.*, the place where Maxus would have to defend Moran) depended solely upon the place where Moran would be sued. Quite conceivably, the employee who resided in Oklahoma might have brought suit against Moran in Oklahoma. Under the *Maxus* court's reasoning, then, the place of performance for the indemnity provision would be Oklahoma! Thus, under the indemnity provision *as written*, the place of performance was more "for-

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22. *Id.*

23. *Id.* § 196. Section 196 provides:

> The validity of a contract for the rendition of services and the rights created thereby are determined . . . by the local law of the state where the contract requires the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Id.

24. *Maxus*, 817 S.W.2d at 54.

25. *See* DeSantis v. Wackenhut, 793 S.W.2d 670, 679 (Tex.) ("As a rule, [the place of performance] alone is conclusive in determining what state's law is to apply."), *cert. denied*, 111 S. Ct. 755 (1990).

26. *Maxus*, 817 S.W.2d at 54.

27. *Id.*

28. RESTATEMENT (SECOND) CONFLICT OF LAWS § 196 (1971) (emphasis added).

tuitous" than certain.[29] In such cases, where the place of performance is uncertain at the time of contracting, some courts have simply applied the law of the place of contracting.[30] The supreme court ignored this ambiguity by focusing on the *actual* place of performance.[31] In doing so, the court has set a dangerous precedent by subjecting parties to another state's law based on the mere fortuity of the plaintiff's selection of forum.

Having established a presumption in favor of Kansas law as the place of performance, the court stated that Kansas law applies unless "some other state has a more significant relationship to the *parties* and their *transaction* under the principles of section 6 of the Restatement."[32] The court then decided that the section 6 factors did not displace Kansas law.[33] This conclusion, while quite defensible, is inconsistent with the opinion's earlier command that the section 6 factors be considered in light of the five factors listed in section 188(2).[34] The section 188(2) factors seem to favor Texas law. The parties negotiated and executed the contract in Texas. Both Maxus and Moran had their principal place of business in Texas. These Texas contacts strengthen when viewed in light of the indeterminate place of performance of the indemnity provision. Yet, none of these considerations entered into the supreme court's analysis.

In the end, perhaps none of the points raised by this Article would have changed the result in *Maxus*. These points, however, illustrate that a court's application of the choice of law principles may ignore critical facts (such as the indeterminacy of the place of performance) or the court's own principles (such as consideration of the section 188(2) factors in applying section 6). An understanding of these inconsistencies is key to understanding and presenting persuasive choice of law arguments.

B. TORTS

Only one case decided in the Survey period addressed Texas torts choice of law principles. In *Lutheran Brotherhood v. Kidder Peabody & Co.*[35] the Texarkana court of appeals faced a choice of law issue in an interstate securities fraud suit. The New York office of the defendant, Kidder Peabody & Company (Kidder), made phone solicitations of investors for a bond offering. These solicitations included phone calls to the plaintiffs at their respective places of business: Lutheran Brotherhood in Minnesota; Creditanstalt-Bankverien, Sprout Growth Limited (SGL), Sprout Growth, LP (SG), and DLJ Venture Capital Fund II, LP (DLJ) in New York; and American Gen-

29. *See* SCOLES & HAY, *supra* note 3, at 709.

30. *See* Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., 401 F. Supp. 1102 (E.D. Mich. 1975); Ketcham v. Hall Syndicate, Inc., 236 N.Y.S.2d 206 (N.Y. Sup. Ct. 1962), *aff'd*, 242 N.Y.S.2d 182 (N.Y. App. Div. 1963).

31. *Maxus*, 817 S.W.2d at 58.

32. *Id.* at 54 (emphasis added).

33. *Id.* at 57.

34. *Id.* at 53.

35. 829 S.W.2d 300 (Tex. App.—Texarkana), *vacated as moot*, 840 S.W.2d 384 (Tex. 1992).

eral Life Insurance Company, Variable Annuity Life Insurance Company, and Signal Capital Corporation in Texas. The plaintiffs claimed that Kidder made intentional misrepresentations in its solicitations and that these misrepresentations constituted, among other things, common law fraud. The district court determined that Texas law applied to the common law fraud claims.[36] On appeal, Kidder challenged this finding.

The court of appeals' choice of law discussion is quite unclear. The court first laid out the applicable provisions of the Second Restatement.[37] After stating these rules, however, the court never decided which state's law should apply under these provisions. Instead, the court dropped the choice of law discussion and turned to a discussion of federal constitutional due process.[38] Under the due process clause of the federal constitution,[39] a court cannot apply a particular state's law to all parties to a case unless that state has "a 'significant contact or aggregation of contacts' to the claims asserted by each . . . plaintiff."[40] This issue, however, is separate from and dependent upon the prior question of choice of law. In other words, the proper analysis is: (1) under the applicable choice of law rules which state's law applies?; and (2) do the choice of law rules yield a state law that violates due process? The court of appeals never answered the first question. Instead, the court merely decided that Texas did *not* have significant contacts with the five plaintiffs solicited outside Texas — Lutheran Brotherhood, SGL, SG, DLJ, and Creditanstalt — and, thus, application of Texas law to their fraud claims would violate due process.[41] The court of appeals then applied Texas law to the three Texas plaintiffs and New York law to the five non-Texas plaintiffs.[42]

At first, eliding the choice of law question may seem to have made no difference in the outcome of the case. The full import of the court's holding, however, cannot be appreciated without an understanding of what issues the court impliedly decided. For example, consider the three plaintiffs solicited in Texas. These plaintiffs had connections with *both* New York — the place they were solicited *from* — and Texas — the place they *received* the solicitations. For these plaintiffs, application of either Texas or New York law would not offend due process. Consequently, something other than due process — presumably some choice of law principle — guided the court's choice between Texas and New York law. The court of appeals applied Texas law to the three Texas plaintiffs.[43] Thus, from the court of appeals' ultimate choice of Texas law, we can only assume that it decided to apply the law of the place where the Texas plaintiffs *received* and *acted upon* the solicitation

36. *Id.* at 309.
37. *Id.* at 309-10 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6, 145, 148 (1971)).
38. *Id.* at 310.
39. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law.").
40. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985).
41. *Lutheran Brotherhood*, 829 S.W.2d at 310.
42. *Id.*
43. *Id.*

from Kidder. This choice of law squares generally with choice of law doctrine under the Second Restatement.[44]

The court of appeals' implied choice of law holding is also consistent with its application of New York law to the four plaintiffs solicited in New York. As with the Texas plaintiffs, they *received* and *acted upon* Kidder's solicitation in New York; the application of New York law to their fraud claims, then, accords with the Second Restatement.[45]

Plaintiff Lutheran Brotherhood, however, presents a different case. Lutheran Brotherhood *received* and *acted upon* the solicitation in Minnesota. Yet, the court of appeals applied New York law to Lutheran Brotherhood's fraud claim.[46] This conclusion runs counter to the court's implied decision to apply the law of the place where the plaintiff received and acted upon Kidder's solicitation. If the court had followed its implied rule, it would have applied Minnesota law to Lutheran Brotherhood's claims. Otherwise, the court's choice of law holdings are inconsistent.

Why did the court of appeals skip the choice of law question? Perhaps it did so because the choice of law and due process tests appear quite similar. The Second Restatement applies the law of the state with the more or most "significant connection" and due process asks if a state has a "significant connection" with the case. Once it had decided that New York had a significant connection with the case, the court of appeals may have missed that Minnesota had a *more* significant connection with Lutheran Brotherhood than New York. By confusing the exact scope of the choice of law and due process tests, the court of appeals may have thought it was deciding both questions at once.

C. CONTRACTS

In *Hefner v. Republic Indemnity Co. of America*[47] the United States District Court for the Southern District of Texas applied Texas choice of law principles.[48] Hefner, a Texas resident, was attacked and injured by security guards at the Paseo Apartments in Houston, Texas. Hefner received a personal injury judgment in Texas state court against the owners and managers of the apartment complex. Hefner then filed suit in federal district court to recover his judgment from the apartment owner's insurance companies.

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44. RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6, 145 (1971); *see* SCOLES & HAY, *supra* note 3, at 626. "When the defendant's fraud or misrepresentation and the defendant's reliance occur in the same state, no problem arises. When they do not, the principal concern is the protection of the plaintiff and this will therefore normally lead to the *place where he acted in reliance*." *Id.* (emphasis added).

45. *See supra* note 44.

46. *Lutheran Brotherhood*, 829 S.W.2d at 310.

47. 773 F. Supp. 11 (S.D. Tex. 1991).

48. The United States Supreme Court's decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), requires a federal district court exercising its diversity jurisdiction to apply the substantive law of the state in which it sits. *Id.* at 68. The *Erie* doctrine also requires federal district courts to apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

Hefner argued that he was a third-party beneficiary of the owner's insurance contracts.

The district court correctly noted that Texas applies the most significant relationship test of the Second Restatement.[49] The court, however, used a truncated version of the Second Restatement, applying only the five factors of section 188(2).[50] Applying these factors, the court concluded that California law governed interpretation of the insurance contract.[51] The court emphasized that the parties negotiated and signed the insurance contract in California; the insurer was a California insurance company that had its principal place of business and was to perform under the insurance contract in California; the insured was a resident of California; and the insurance premiums were paid in California.[52] On these facts, four of the five section 188(2) factors favored California law: place of negotiation; place of signing; place of performance; and residence of parties. In the face of these California contacts, the court minimized the three Texas contacts: place of the subject matter of the insurance contract (the apartment complex); Hefner's status as a Texas resident; and that Hefner's personal injury claim arose in Texas. The court then concluded that California law applies.[53]

The district court's application of section 188(2) ignored two other relevant provisions of the Second Restatement: (1) the general factors of section 6; and (2) the specific rule in section 193 governing choice of law for insurance contracts.[54] Section 6 likely would not alter the district court's analysis, as the section 6 factors are applied in light of the factors in section 188(2). Section 193, however, might make a difference. The section 188(2) factors are applied in light of more specific provisions of the Second Restatement. Section 193 is just such a provision.

Section 193 states a preference for the law of the place where the insured risk is located.[55] The reason for this preference is that the insured risk's "location has an intimate bearing upon the risk's nature and extent and is a factor upon which the terms and conditions of the policy will frequently depend."[56] In *Hefner*, since the insured risk was located in Texas, section 193 would establish a preference for Texas law. This preference could be overcome if another state has a "more significant relationship" with the

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49. *Hefner*, 773 F.Supp. at 13.

50. *Id.* For the five factors of § 188(2), see text accompanying note 22.

51. *Id.*

52. *Id.*

53. *Id.*

54. RESTATEMENT (SECOND) CONFLICT OF LAW § 193 (1971).

55. *Id.* Section 193 states:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties.

Id.

56. *Id.* § 193 cmt. c.

transaction considering the factors in section 6.[57] Thus, a proper resolution of *Hefner* would evaluate the section 193 preference of Texas law under the section 6 factors.[58]

D. THE PARTIES' CONTRACTUAL CHOICE OF LAW

In *Pennsylvania House, Inc. v. Juneau's Pennsylvania House*[59] a federal district court applied the wrong choice of law rules to the parties' contractual choice of law. *Pennsylvania House* involved a dispute between a furniture manufacturer and one of its dealers. Agreements between the parties selected Pennsylvania law to govern the parties' relationship. Specifically, the manufacturer and the dealer entered into two promissory notes. The notes created a security interest in the dealer's inventory in favor of the manufacturer. When the dealer went out of business, the manufacturer gained the dealer's consent to a private sale of the inventory to satisfy the manufacturer's security interest. The proceeds of the private sale were not sufficient to cover the entire debt and the manufacturer brought an action for the deficiency. The dealer defended on the basis that the private sale was not commercially reasonable and, therefore, the dealer was entitled to extinguishment of the debt. The manufacturer countered that the dealer had waived any such defense by consenting to the sale. The question facing the district court was whether a debtor can waive the reasonableness requirement for a private sale.[60]

The district court decided the choice of law issue in a brief paragraph. The court merely noted that the parties had chosen Pennsylvania law and stated that Texas law "enforces the manifest intent of the parties to be bound by the law of another state."[61] The district court cited a 1968 Texas Supreme Court case in support of this proposition, *Austin Building Co. v. National Union Fire Insurance Co.*.[62] *Austin Building*, however, was decided before Texas adopted the Second Restatement. *Austin Building* applied the *lex loci contractus* (place of contracting) rule of the First Restatement in deciding the governing law for a contract issue.[63] The *Austin Building* court had merely noted that the underlying purpose of the *lex loci* rule is to capture the parties' intent absent an express manifestation. Thus, the passage from *Austin Building* cited in *Pennsylvania House* applied the contract choice of law rules of the First Restatement.

As noted above, Texas has discarded the First Restatement rules in favor

57. *Id.* § 193.

58. Note that the structure of this analysis is similar to the approach used by the Texas Supreme Court in *Maxus*: (1) determine whether the Second Restatement erects a presumption or preference for a state's law; and, if so, (2) consider whether the section 6 factors displace the preference or presumption. *See supra* notes 19-23 and accompanying text.

59. 782 F. Supp. 1195 (E.D. Tex. 1991).

60. Article 9 of the Uniform Commercial Code governed the security arrangement between the parties. The debtor invoked the requirement of § 9-504(1)(c) that a sale of collateral be commercially reasonable. U.C.C. § 9-504(1)(c) (1971).

61. *Pennsylvania House*, 782 F. Supp. at 1196.

62. 432 S.W.2d 697 (Tex. 1968).

63. *Id.* at 701.

of the Second Restatement.[64] Indeed, three years ago, in *DeSantis v. Wackenhut Corp.*,[65] the Texas Supreme Court revamped Texas law regarding parties' contractual choice of law. *DeSantis* adopted section 187 of the Second Restatement which expresses a preference for the law chosen by the parties.[66] That section, however, also places two significant limitations on the parties' ability to choose. First, the chosen state must bear some "substantial relationship" to the parties or their transaction.[67] Second, the law of the chosen state must not violate "a fundamental policy of a state which has a materially greater interest than the chosen state . . . and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties."[68] The district court mentioned neither of these restrictions, merely enforcing the parties' choice of law based on a "parties' intent" principle derived from the First Restatement.[69]

The Fifth Circuit has been more faithful to Texas' adoption of the Second Restatement in this area. That court recognized the principles of section 187 in *Resolution Trust Corp. v. Northpark Joint Venture*.[70] *Northpark* involved a deficiency action brought against the guarantors of a promissory note. The creditor foreclosed on the property securing the note, but the proceeds did not cover the entire debt. The creditor then filed a deficiency action against the guarantors. The debtors, guarantors, and the creditor were all located in Texas. The property securing the note was located in Mississippi. Under Texas law, the creditors were entitled to summary judgment on the guaranties.[71] Conversely, under Mississippi law, summary judgment would not be appropriate.[72]

The *Northpark* court noted that both the note and the security agreement

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64. *See supra* note 12.

65. 793 S.W.2d 670 (Tex.), *cert. denied*, 111 S. Ct. 755 (1990).

66. *Id.* at 677; RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971). Section 187 provides in part that:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971).

67. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2)(a) (1971).

68. *Id.* § 187(2)(b).

69. *Pennsylvania House*, 782 F. Supp. at 1196.

70. 958 F.2d 1313 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 963 (1993).

71. *Id.* at 1318.

72. *Id.*

regarding the Mississippi property contained choice of law clauses. Thus, under Texas choice of law rules — the law of the forum of the federal district court — *DeSantis* and Restatement Second section 187 applied.[73] The Fifth Circuit decided that it did not need to address the section 187(2)(b) limitation on the parties' choice of law.[74] This decision is quite reasonable considering that only the Mississippi property, which had been disposed of in a prior foreclosure, and one of the defendants were located outside of Texas. The Fifth Circuit, however, still faced an important question: since the note chose Texas law and the security agreement chose Mississippi law, which choice of law clause governs? The court's answer hinged upon which agreement gave rise to the creditors' right to a deficiency judgment.[75] Analyzing Texas law, the court held that the note and guaranty agreements, not the security agreement, created the right to a deficiency judgment.[76] Thus, the law chosen by the parties in the note — Texas law — governed the dispute.[77]

E. ADOPTION AND INTESTATE SUCCESSION

The Fort Worth court of appeals discussed the proper choice of law rules for adoption status and intestate succession when it decided *Northwestern National Casualty Co. v. Doucette*.[78] *Doucette* addressed the ability of an adopted child to inherit under intestate succession from his natural father. Russell Doucette was the natural son of the decedent Johnny Pannell. Russell was adopted by an Arizona couple in 1959. Johnny died intestate in 1984, leaving real and personal property located in Texas. When Russell learned that his natural father had died intestate, he filed a declaration of heirship with the probate court.

The court of appeals framed two issues for resolution: (1) was there a valid adoption; and (2) can Russell inherit from his natural father?[79] The court decided that Texas law, in the form of the 1933 case *Martinez v. Gutierrez*,[80] provided a different choice of law rule for each issue: "[f]irst, the questions affecting the existence of an adoption and the method of its creation are controlled by the law of the state . . . that creates it. . . . Second, . . . ques-

73. *Id.*
74. *Id.* at 1318 n.6.
75. *Id.* at 1318.
76. *Id.* at 1319.
77. *Id.* at 1318. Perhaps to remove all doubt that Texas law applied, the Fifth Circuit analyzed the choice of law issue assuming that no valid choice of law clause existed. *Id.* at 1319. Applying Restatement Second § 187, the court concluded that:

> The state that has the most significant relationship to the transaction and the parties in this case is Texas. First, Texas has greater contacts with the transaction and the parties: (1) the parties negotiated and executed the note and guaranties in Texas; (2) [the creditors] are Texas residents; (3) all of the defendants, except one, were Texas residents or domiciliaries at the time that the note and guaranties were executed; and (4) the note and guaranties, by their express terms, are wholly performable in Texas.

Id.
78. 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied).
79. *Id.* at 399.
80. 66 S.W.2d 678 (Tex. Comm'n App. 1933, holding approved).

tions of descent and distribution are controlled by the state where the realty of the estate is located."[81] A straightforward application of these rules dictated that Arizona law (place of the adoption) governed the validity of the adoption and Texas law (place of the realty) governed the intestate succession.[82]

II. FORUM SELECTION CLAUSES

The United States Supreme Court has strictly enforced forum selection clauses.[83] The most recent case, *Carnival Cruise Lines, Inc. v. Shute*,[84] took this attitude to a new extreme. The Shutes had purchased two tickets for a cruise with Carnival Cruise Lines (Carnival). Printed on the back of the Shutes' tickets was the standard fine print that is of interest to almost no one except lawyers. Among this fine print was a forum selection clause that provided "all disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated . . . in the State of Florida."[85] For a reason not explained in the Court's opinion, the Shutes' admitted that they knew of the forum selection clause before they boarded the cruise ship.[86] Mr. Shute was injured when he slipped and fell on a deck mat while on a tour of the ship. He then brought suit in federal court in the state of Washington. Carnival sought summary judgment, claiming that the forum selection clause required Mr. Shute to file suit in Florida. On these facts, in a seven to two decision, the Court held that it must enforce the forum selection clause.[87]

Shute illustrates how unyielding courts can be in enforcing forum selection clauses. *Shute* seems to leave a safety valve for litigants who claim that they did not know of the forum selection clause.[88] Although no consensus exists,[89] state courts, not bound by *Shute* on state law matters,[90] strive to allow some escape hatch for unsuspecting individuals bitten by a forum selection clause.

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81. *Doucette*, 817 S.W.2d at 399 (citations omitted).

82. *Id.*

83. *See* Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

84. 111 S. Ct. 1522 (1991).

85. *Id.* at 1524.

86. *Id.* at 1525 ("Respondents essentially have conceded that they had notice of the forum-selection provision.").

87. *Id.* at 1528.

88. Indeed, a California appellate court, applying *Shute*, relieved a cruise passenger from a forum selection clause because the passengers did not have sufficient notice of the clause prior to contracting for passage. Carnival Cruise Lines, Inc. v. Superior Court, 286 Cal. Rptr. 323 (Cal. Ct. App. 1991).

89. *See* SCOLES & HAY, *supra* note 3, at 366 ("The practice of state courts is less well developed, presumably because forum-selection clauses are found in situations in which there is diversity of citizenship so that the parties usually resort to the federal courts.").

90. State courts do, however, look to Supreme Court cases for guidance. *See* Societe Jean Nicolas et Fils v. Mousseux, 597 P.2d 541 (Ariz. 1979); Smith, Valentino & Smith, Inc. v. Superior Court, 551 P.2d 1206 (Cal. 1976); United States Trust Co. v. Bohart, 495 A.2d 1034 (Conn. 1985).

Barnette v. United Research Co.[91] addressed the forum selection clauses in two employment agreements between W.H. Barnette and United Research Company (URC). Both agreements required that URC and Barnette litigate any disputes under the agreements in the federal or state courts of New Jersey. After URC terminated Barnette, Barnette sued URC in a Texas state district court. URC moved to dismiss the suit based on the forum selection clause. The district court dismissed the case and Barnette appealed.

The court of appeals held that the forum selection clause was enforceable and thus affirmed the district court.[92] In so holding, the court reasoned that: (1) forum selection clauses are *not per se* void as against public policy;[93] (2) the validity of a forum selection clause depends upon whether the chosen forum, in this case New Jersey, would enforce the particular clause;[94] and (3) New Jersey courts would enforce the forum selection clause, thus the district court correctly dismissed the suit.[95]

III. RETROACTIVITY

Retroactivity issues loom ominously on the legal horizon whenever a court overrules past precedent, announces a new rule of common law, or announces a new interpretation of its statutes or constitution.[96] In cases arising *before* these new legal rules are announced, the issue is which legal rule — new or old — applies? Thus, though not strictly a conflict of laws topic, retroactivity can be seen as actually presenting a choice of law: the old or new legal rule.[97] This Part begins with a discussion of Texas retroactivity doctrine as it existed at the outset of the last Survey period. Next, this Part discusses the court of appeals cases that applied the existing retroactivity doctrine. Lastly, this Part discusses two Texas Supreme Court cases that, on first reading, appear to alter the Texas retroactivity analysis.

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91. 823 S.W.2d 368 (Tex. App.—Dallas 1991, writ denied); *see also* W. Wendell Hall & Philip J. Pfeiffer, *Employment and Labor Law, Annual Survey of Texas Law*, 46 SMU L. Rev. 1393, 1446-47 (1993).

92. *Barnette*, 823 S.W.2d at 370.

93. *Id.* The court also distinguished three Texas cases raised by Barnette: *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535 (Tex. 1972), *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S.W. 630 (Tex. 1912), and *Dowling v. NADW Marketing, Inc.*, 578 S.W.2d 475 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.). *Evans*, *Branum*, and *Dowling* each refused to enforce a forum selection clause in a case covered by a *specific venue statute* under Texas law. *Evans*, 477 S.W.2d at 537; *Branum*, 212 S.W. at 631-32; *Dowling*, 578 S.W.2d at 475. No such statute applied in *Barnette*.

94. *Barnette*, 823 S.W.2d at 370.

95. *Id.*

96. For convenience, I refer to all of these judicial pronouncements as "new legal rules" or the "new law."

97. Indeed, Justice David Souter, in an opinion joined by Justice John Paul Stevens, characterized retroactivity as a question of choice of law. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443 (1991). Justice Souter stated that "[s]ince the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law." *Id.* (Opinion of Souter, J.).

A. EXISTING TEXAS RETROACTIVITY PRINCIPLES

Texas retroactivity doctrine has been discussed in many Texas Supreme Court cases.[98] These cases apply a two factor test: "[(1)] the extent of public reliance on the former rule and [(2)] the ability to foresee a coming change in the law."[99] Ultimately, one can think of the central retroactivity test as *reasonable* or *justifiable* reliance.[100] For, if a change in the law was foreseeable, any reliance on the continued vitality of an old rule must be considered unreasonable or justified.

Emphasizing reliance has support in both law and logic. In terms of precedent, the United States Supreme Court has employed a form of the "reliance" test in its retroactivity doctrine.[101] In terms of logic, reliance is essential to functioning in the real world. Legal rules are background considerations against which much of commerce and life are played out. Economic transactions and individual choices are made in *reliance* upon existing legal norms. A shift or change in legal norms, then, naturally undermines some of these transactions and choices. If the stability of legal norms could not be assumed to a certain extent, the costs of individual and entity choices would drastically increase. Thus, the public's justifiable reliance provides a strong incentive against retroactivity of new legal rules.

B. COURT OF APPEALS DECISIONS

Not all new legal rules, however, implicate the reliance concern. The Dallas court of appeals claimed to be dealing with such a new rule in *Commonwealth Lloyd's Insurance Co. v. Thomas*.[102] *Thomas* addressed the retroactivity of the Texas Supreme Court's 1987 decision in *Arnold v. National County Mutual Fire Insurance Co.*,[103] which recognized a cause of action against insurers for breach of their duty of good faith and fair dealing.[104] The insurer's alleged wrongful conduct occurred in 1981, six years before *Arnold*. The *Thomas* court found no reasonable reliance for two reasons. First, since the Texas Supreme Court had never addressed the issue before, there was no "old" law for insurer's to rely upon.[105] This argument, however, fails to recognize that people rely upon the absence of a legal rule just as they rely upon the existence of a legal rule. Knowledge that particular conduct will *not* subject a party to liability or sanction will shape a person's desire or willingness to engage in that conduct.

Second, harmful conduct, such as actions taken in bad faith, will likely fail

98. *See* Reagan v. Vaughn, 804 S.W.2d 463, 467-68 (Tex. 1991); Street v. Honorable Second Court of Appeals, 756 S.W.2d 299, 301 (Tex. 1988); Sanchez v. Schindler, 651 S.W.2d 249, 254 (Tex. 1983).

99. *Sanchez*, 651 S.W.2d at 254.

100. Texas courts speak of *justifiable* reliance. *See Reagan*, 804 S.W.2d at 468; Bowen v. Aetna Casualty & Surety Co., 837 S.W.2d 99, 99 (Tex. 1992).

101. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

102. 825 S.W.2d 135 (Tex. App.—Dallas 1992), *vacated*, 843 S.W.2d 135 (Tex. 1993) ("judgments . . . . set aside without reference to the merits").

103. 725 S.W.2d 165 (Tex. 1987).

104. *Id.* at 167.

105. *Thomas*, 825 S.W.2d at 142.

the foreseeability prong of the Texas retroactivity test. The law may not address the wrongdoer's conduct simply because the question of her particular form of wrongdoing has yet to wind its way through the legal system. Reliance on the absence of a legal rule in this situation is more akin to taking advantage of a momentary legal vacuum than to justified reliance upon an existing legal rule. Such wrongdoers likely engage in their harmful conduct all the while waiting for the other shoe to drop. Unless liability for the particular wrongdoing is a reasonably contested legal point, reliance is unreasonable. Indeed, the *Thomas* court noted that many jurisdictions had previously allowed bad faith actions against insurers.[106] Since "[i]nsurers surely were aware of" this authority,[107] the Texas Supreme Court's decision in *Arnold* was a foreseeable change in the law, making the insurer's reliance, if any, unreasonable.

In *Tarango v. Liberty Mutual Fire Insurance Co.*[108] the El Paso court of appeals discussed a mix of retroactivity and stare decisis principles. *Tarango* addressed when the statute of limitations period begins to run for an action on a bad faith denial of an insurance claim.[109] In the 1987 case of *Arnold v. National County Mutual Fire Insurance Co.*[110] the Texas Supreme Court held that the statute of limitations begins running when the underlying contract claim is resolved.[111] Three years later, in *Murray v. San Jacinto Agency, Inc.*,[112] the supreme court overruled *Arnold*, holding instead that the statute of limitations begins running when the facts forming the basis of recovery come into existence, i.e., when the insurance claim is denied in bad faith.[113] Under *Arnold*, Tarango's claim would be timely; under *Murray* his claim would be barred by the statute of limitations.

The *Tarango* court began its analysis by stating the Texas retroactivity rule of reasonable reliance.[114] Instead of applying this rule, however, the court of appeals looked to a sister court's opinion on the same issue: *Liberty Mutual Fire Insurance Co. v. Richards*.[115] The *Richards* court held that a court of appeals is bound to apply Texas Supreme Court precedent as it exists at the time the court of appeals decides the case.[116] This approach amounts to a rule of full retroactivity for all Texas Supreme Court decisions, which, as discussed above, is clearly *not* the rule in Texas. The *Tarango* court correctly questioned the dangerously broad language of *Richards*:

> With due respect, we disagree with the language of the Houston Court. They were not bound by the general rule of applying the later decision by the Supreme Court to facts created under a former decision. The

106. *Id.* at 142 & n.2.
107. *Id.* at 142.
108. 823 S.W.2d 717 (Tex. App.—El Paso 1992, n.w.h.).
109. *Id.* at 718.
110. 725 S.W.2d 165 (Tex. 1987).
111. *Id.* at 168.
112. 800 S.W.2d 826 (Tex. 1990).
113. *Id.* at 829.
114. *Tarango*, 823 S.W.2d at 718.
115. 810 S.W.2d 232 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
116. *Id.* at 234.

> Court could have considered the fairness and policy exceptions as the Supreme Court had not addressed the point.[117]

The reasoning in *Richards* was clearly in error. Yet, the *Tarango* court felt compelled to follow the *result* in that case. This peculiar outcome resulted from the various notations the Texas Supreme Court uses to refuse writs of error. The supreme court uses the notation "writ denied" when it

> is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the state as to require correction.[118]

In denying review in *Richards*, the supreme court entered the notation "writ denied."[119] The court of appeals concluded that retroactivity of a statute of limitations certainly poses a question of "importance to the jurisprudence of the state".[120] Thus, the supreme court must have concluded that although the *Richards* court had not "correctly declared the law," the court's *result* did not require reversal.[121] The *Tarango* court, then, read "writ denied" as an implicit affirmance of the *result*, but not the *reasoning*, in *Richards*. Under this interpretation, the *Tarango* court also felt bound to reach the same result — apply *Murray* retroactively.[122]

C. TEXAS SUPREME COURT DECISIONS

During this Survey period, the Texas Supreme Court may have cast doubt upon the continued viability of the two factor retroactivity test discussed above. In *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*[123] the supreme court reformulated the retroactivity inquiry into a three factor test. Yet, in *Bowen v. Aetna Casualty & Surety Co.*[124] the supreme court included *Edgewood* in a string citation to the past retroactivity decisions as if *Edgewood* had worked no intervening change in the law. As the discussion below shows, these two cases largely leave the substance of Texas retroactivity doctrine as they found it.

In *Edgewood* the Texas Supreme Court engaged in what has become a Texas judicial tradition — periodic constitutional review of the state public school financing system.[125] In doing so the supreme court disproved the old adage that "the third time is the charm."[126] For the third time in four years the supreme court ruled that the public school funding system violated a

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117. *Tarango*, 823 S.W.2d at 718.
118. TEX. R. APP. P. 133(a).
119. *Tarango*, 823 S.W.2d at 718.
120. *Id.*
121. *Id.*
122. *Id.*
123. 826 S.W.2d 489 (Tex. 1992).
124. 837 S.W.2d 99 (Tex. 1992).
125. *See also* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).
126. For those challenging the public school funding system, however, one might say "good things come in three's."

provision of the state constitution.[127] The majority concluded, however, that its decision would not take effect until the summer of 1993.[128] In doing so, the court applied what Justice Lloyd Doggett's dissent referred to as "prospectiv[ity]-plus."[129]

The majority in *Edgewood* began its retroactivity discussion by establishing a proposition that underlies every prior Texas retroactivity decision: "whether a state court's rulings of state law are to be given prospective or retroactive application is a matter for the state court to decide."[130] This legal principle has never been questioned by the United States Supreme Court,[131] nor has it been in doubt among the state courts.[132] Indeed, in formulating the two part retroactivity test the Texas Supreme Court never paused to consider whether it was bound by federal authority on the issue. Thus, it is curious that the majority spent a great deal of time establishing this accepted proposition.[133] Perhaps even more curious, after the lengthy discussion establishing its authority to formulate a unique retroactivity analysis for state law matters, the court ultimately adopted a version of the federal retroactivity test in its entirety.[134]

The supreme court's adoption of the federal retroactivity test presents an additional curiosity. The court adopted the federal test because Texas case law had not "clearly articulated the factors which bear upon" the retroactivity decision.[135] Yet, as discussed above, Texas courts have quite clearly focused on justified reliance on the old legal rule.[136] The *Edgewood* court gave no indication why the existing retroactivity test was insufficient.

The Texas Supreme Court applied the retroactivity test from the United States Supreme Court case *Chevron Oil Co. v. Huson*.[137] The *Chevron* test, as adopted in *Edgewood*, states:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . [the court] must

127. *Edgewood*, 826 S.W.2d at 514.

128. *Id.* at 523.

129. *Id.* at 558 (Doggett, J., dissenting).

130. *Id.* at 516.

131. *See, e.g.*, American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 177 (1990) ("When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.").

132. *See Edgewood*, 826 S.W.2d at 516 n.31 (collecting cases where state courts applied their own retroactivity analysis).

133. *Id.* at 516-19.

134. *Id.* at 518. The text refers to a "version" of the federal retroactivity test because the United States Supreme Court's decision in James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991), has been read to discard the Court's previous test in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). *See, e.g.*, Bank of Denver v. Southeastern Capital Group, Inc., 770 F. Supp. 595, 596 (D. Colo. 1991); Berning v. A.G. Edwards & Sons, Inc., 774 F. Supp. 480, 483 (N.D. Ill. 1991). The majority and the dissent in *Edgewood* spar on this issue. *Edgewood*, 826 S.W.2d at 518-19 n.34; *id.* at 566-67 & n.71 (Doggett, J., dissenting).

135. *Edgewood*, 826 S.W.2d at 518.

136. *See supra* notes 98-101 and accompanying text.

137. 404 U.S. 97 (1971).

> . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, [the court must] weig[h] the equity imposed by retroactive application, for where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.[138]

The first and third *Chevron* factors embody the foreseeability and reliance prongs of the former Texas retroactivity test. The second *Chevron* factor, if rigorously applied, would add a new ingredient to the retroactivity mix: the "purpose and effect" of the new legal rule.

Federal courts have applied the *Chevron* test in two different ways. First, some courts apply a new legal rule retroactively unless *each* of the *Chevron* factors weighs in favor of prospectivity.[139] Second, some courts treat the *Chevron* factors as considerations that inform a single balancing test.[140] The *Edgewood* majority adopted the latter approach.[141]

Having established its new retroactivity doctrine, the majority analyzed the *Chevron* factors. First, the court concluded that its decision "involves issues of first impression whose determination was not clearly foreshadowed."[142] Second, the court reasoned that a major purpose of the state constitutional provisions at issue was "to provide for the creation and funding of school districts."[143] Thus, retroactive invalidation of the school funding system "would be so damaging to the school system it could not further any purpose of the Constitution."[144] Third, since school districts had relied on the school funding system to collect their revenues, "a retroactive holding would severely disrupt school finances during the current school year."[145] Based on these three findings, the *Edgewood* majority concluded that its decision would apply prospectively.[146]

The dissent attempted to put a cynical spin on the majority's reasoning. Justice Doggett dismissed the court's analysis of the *Chevron* factors, instead explaining: "Unwilling to live with the legal consequences of its own improper action, the majority weaves a more tangled web by adopting a new rule: convenience dictates that taxpayers *must* pay the tax which this court has just declared unconstitutional."[147] This criticism, however, is flawed. The reliance factor gives due consideration to *others* who must live with the court's ruling. Instead of mounting a principled attack upon use of the reliance factor, as Justice Souter has done,[148] the dissent ascribes an ulterior

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138. *Edgewood*, 826 S.W.2d at 518 (quoting *Chevron*, 404 U.S. at 106-07).
139. *See* Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422, 427 (6th Cir. 1990).
140. *See* Silverman v. Barry, 845 F.2d 1072, 1085-86 (D.C. Cir. 1988); Stretton v. Penrod Drilling Co., 701 F.2d 441, 445-46 (5th Cir. 1983).
141. *Edgewood*, 826 S.W.2d at 519-20 n.36.
142. *Id.* at 520.
143. *Id.*
144. *Id.* at 520-21.
145. *Id.* at 521.
146. *Id.*
147. *Id.* at 557 (Doggett, J., dissenting).
148. *Beam*, 111 S. Ct. at 2447-48 (Opinion of Souter, J.). Justice Souter argued that:

motive and criticizes the majority's application of the *Chevron* factors.[149]

Additionally, the dissent seems to slur together two separate issues: (1) whether the new rule should be applied prospectively; and, if so, (2) from what date should the decision be applied prospectively? In answering the first question the court considers reliance on the old law, *i.e.*, the willingness to live with the consequences of a decision. Prospectivity in *Edgewood* would not necessarily force an unconstitutional tax on Texas taxpayers. Texas taxpayers only pay a tax that the "court has just declared unconstitutional" if the answer to the second question moves the date of prospective application to after the date of the decision. In setting the prospective date of its decision in *Edgewood*, the court chose the June 1, 1993, about a year and a half after the date of its decision.[150] As the dissent points out, tolling the effect of its decision until a considerable time after the date of the decision is inconsistent with prior federal[151] and Texas[152] practice, and could present constitutional difficulties.[153]

Will the Texas Supreme Court's adoption of the *Chevron* test significantly alter the substance of retroactivity in Texas? The *Edgewood* opinion itself contains two indications that the answer is "no." First, in adopting the balancing approach to the *Chevron* factors, the court stated that:

> We share the view of the First Circuit, that "[t]he [*Chevron*] factors are not discrete, disembodied tests, but rather offer three perspectives on the central question of retroactivity: was *reliance* on a contrary rule so *justified* and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity."[154]

As this quotation indicates, *justified reliance* is still the touchstone of prospectivity.

Second, the *Edgewood* court concluded its balancing of the *Chevron* factors as follows:

> The Legislature should not be permitted to impose an illegal tax on the citizens of this State. As onerous as this burden is—and it is very onerous, indeed—we believe that equitable considerations favor avoiding a

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> Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. . . . The applicability of rules of law are not to be switched on and off according to individual hardship . . . .

Id. (Opinion of Souter, J.).

149. *Edgewood*, 826 S.W.2d at 557-65 (Doggett, J., dissenting).

150. *Id.* at 522-23.

151. *Smith*, 496 U.S. at 187 (plurality opinion) ("It is, of course, a fundamental tenet of our retroactivity doctrine that the prospective application of a new principle of law begins on the date of the decision announcing the principle.").

152. *See* Crow v. City of Corpus Christi, 146 Tex. 558, 209 S.W.2d 922, 925 (Tex. 1948); National Biscuit Co. v. State, 134 Tex. 293, 135 S.W.2d 687, 695 (1940).

153. *Edgewood*, 826 S.W.2d at 567-69 ("Due process of law is implicated because 'exaction of a tax constitutes deprivation of property.' ") (Doggett, J., dissenting).

154. *Id.* at 519-20 n.36 (quoting Simpson v. Office of Workers' Compensation, 681 F.2d 85, 89 (1st Cir. 1982)) (emphasis added).

> very serious disruption in the education of Texas' children. Although the considerations on both sides of this factor are significant, we believe that the balance clearly favors a prospective application of our decision.[155]

The school districts' reliance interests swayed the court in favor of prospectivity. Government officials had relied on the school financing scheme in operating their school districts, and retroactive invalidation of that scheme would have induced chaos as those officials scrambled to keep schools open.[156] In the end, then, *Edgewood*'s three factor test may prove merely to be an elaboration on the meaning of justified reliance.

In *Bowen v. Aetna Casualty & Surety Co.*[157] the Texas Supreme Court addressed the retroactivity of its decision in *Stracener v. United Services Automobile Ass'n*.[158] *Stracener* "prohibit[ed] the insurer from taking a deduction from its underinsured coverage of an amount paid under a separate policy."[159] Occasionally a tortfeasor's insurance covers only a portion of the victim's damages and the victim must seek the remaining damages from the victim's underinsured insurance policy. In these cases, the victim's insurer will seek an offset of the amount already recovered from the tortfeasor. Insurers would like to reduce the policy limit by the recovered amount. The victim, on the other hand, would rather offset the recovered amount against the victim's total damages. *Stracener* decided that the Texas Insurance Code forbids insurers from offsetting the recovered amount against policy limits.[160]

Bowen suffered $125,000 in damages in an automobile accident. The tortfeasor's insurance only covered $25,000 of these damages. Bowen then sought the remaining $100,000 from his underinsured motorist policy which had a policy limit of that amount. The insurer sought to offset the $25,000 against the policy limit, reducing Bowen's coverage under the policy to $75,000. Under *Stracener*, Bowen would be entitled to the entire $100,000. The court of appeals held that *Stracener* should not be applied retroactively and the supreme court reversed.[161] An examination of both the court of appeals and supreme court opinions illustrates how *justifiable* reliance remains the key to retroactivity.

In deciding the retroactivity of *Stracener*, the court of appeals first noted that insurers had relied upon the pre-*Stracener* rule "in determining benefits and it would be unfair to change" the rule.[162] Second, the court of appeals concluded that there "was no foreshadowing" of the rule announced in

155. *Edgewood*, 826 S.W.2d at 521.

156. *Id.*

157. 837 S.W.2d 99 (Tex. 1992).

158. 777 S.W.2d 378 (Tex. 1989).

159. Bowen v. Aetna Casualty & Surety Co., 827 S.W.2d 97, 98 (Tex. App.—San Antonio 1992), *rev'd*, 837 S.W.2d 99 (Tex. 1992).

160. *Stracener*, 777 S.W.2d at 384 (construing TEX. INS. CODE ANN. § 5.06-1(2)(b) & (5) (Vernon 1981 & Supp. 1992)).

161. Bowen v. Aetna Casualty & Surety Co., 837 S.W.2d 99, 100 (Tex. 1992).

162. *Bowen*, 827 S.W.2d at 99.

Stracener.[163] Since insurers could not foresee the outcome of *Stracener*, they acted reasonably in relying on the pre-*Stracener* state of the law. From this, the court concluded that reasonable reliance on the old law foreclosed retroactive application of *Stracener*.[164]

The Texas Supreme Court did not appear to question the court of appeals' conclusion that some insurers had relied on the pre-*Stracener* law.[165] Instead, the supreme court focused on whether the result in *Stracener* was "foreshadowed." The supreme court answered this question in the negative, reasoning that *Stracener* merely corrected a line of court of appeals cases that employed an obviously incorrect interpretation of the Insurance Code.[166] The supreme court held that *Stracener* should be applied retroactively.[167] Implicit in this holding is a belief that reliance on an unreasonable or otherwise obviously flawed court of appeals' decision (in this case, an erroneous statutory interpretation) is *not* justifiable reliance deserving protection from retroactivity.

IV. ENFORCEMENT OF FOREIGN JUDGMENTS

Three relatively minor cases were decided regarding foreign judgments during the Survey period. This Part briefly discusses the holdings of each case.

The Texas Supreme Court interpreted the Texas version of the Uniform Enforcement of Foreign Judgments Act (UEFJA)[168] in *State First National Bank v. Mollenhour*.[169] The UEFJA provides that a foreign judgment properly filed with the clerk of a Texas court shall have "the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which it is filed."[170] Under Texas case law, the UEFJA only requires such similar treatment for *valid final judgments* of another jurisdiction.[171] In *Mollenhour*, the supreme court addressed whether the foreign judgment was "final" for purposes of the UEFJA.

State First National Bank filed an action against two defendants, one of whom was Mollenhour, in an Arkansas trial court. The trial court entered a judgment against Mollenhour and stayed the action against the other defendant who was later discharged in bankruptcy. Mollenhour appealed to the Arkansas court of appeals which affirmed the judgment against him. At this point, State First National Bank filed suit in Texas to enforce the Arkansas judgment. The district court entered judgment for the bank but the

163. *Id.*
164. *Id.*
165. *Bowen*, 837 S.W.2d at 100.
166. *Id.* ("*Stracener* corrects a 'misinterpretation of the statute by some courts of appeal' which had 'add[ed] words not found in the statute' and failed to construe the insurance law in accordance with its policy statement.").
167. *Id.*
168. TEX. CIV. PRAC. & REM. CODE ANN. § 35.001 to 35.008 (Vernon 1986).
169. 817 S.W.2d 59 (Tex. 1991).
170. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003(c) (Vernon 1986).
171. Myers v. Ribble, 796 S.W.2d 222 (Tex. App.—Dallas 1990, no writ).

court of appeals reversed on the ground that the Arkansas judgment was not final. The supreme court reversed in a per curiam opinion that summarily concluded that "[u]nder Arkansas law the decision was final."[172] The court cited Arkansas precedent in support of this conclusion.[173] Only two points arise from this case. First, the finality of a foreign judgment for UEFJA purposes is to be determined under the law of the jurisdiction that entered the judgment. Second, and less helpful, under these exact facts an Arkansas judgment is final for UEFJA purposes.

In *Harbison-Fischer Manufacturing Co. v. Mohawk Data Sciences Corp.*[174] the Fort Worth court of appeals addressed several challenges to the enforcement of a New York judgment. Mohawk had obtained a New York trial court default judgment that confirmed a New York arbitration award it received against Harbison-Fischer. Mohawk then filed the New York judgment in Texas seeking enforcement under the UEFJA. Harbison-Fischer made several challenges to enforcement of the New York judgment.

First, Harbison-Fischer argued that the New York judgment was not entitled to full faith and credit because the New York court lacked personal jurisdiction.[175] The court of appeals overruled this point of error, reasoning that Harbison-Fischer's participation in the arbitration proceeding submitted it to jurisdiction in New York.[176] Second, Harbison-Fischer quibbled over whether the New York judgment had been properly authenticated for enforcement under the UEFJA.[177] The court held that once an authenticated copy of a judgment is filed, the opponent bears the burden of proving a defect in authentication.[178] Since Harbison-Fischer put on no evidence to rebut authentication, the court overruled that point of error.[179]

Harbison-Fischer's final two attacks on the New York judgment raised two principles worthy of note. Harbison-Fischer argued that enforcement of the New York judgment was improper because: (1) the New York judgment was subject to appeal in New York and, therefore, not final; and (2) New York would not enforce a Texas judgment entered under the same circumstances. The court responded by stating two rules worth quoting in full:

> Even if a judgment is subject to appeal or if the time has not expired in which to file motion [sic] to vacate or for a new trial, the judgment has a finality that entitles it to full faith and credit under the Federal Consti-

172. *Mollenhour*, 817 S.W.2d at 59.

173. Wilburn v. Keenan Cos., Inc., 759 S.W.2d 554 (Ark. 1988).

174. 823 S.W.2d 679 (Tex. App.—Fort Worth 1991), *vacated*, 840 S.W.2d 383 (Tex. 1992) ("judgments . . . set aside without reference to the merits").

175. *Id.* at 683. A federal statute, 28 U.S.C. § 1738 (1988), implements the Full Faith and Credit Clause of the federal constitution, U.S. CONST. art. IV, § 1, by providing for enforcement of foreign judgments that have been properly authenticated.

176. *Harbison-Fischer*, 823 S.W.2d at 684.

177. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 35.003(a) (Vernon 1986). Under Texas law, the foreign judgment must be accompanied by a certification of a judge from the foreign jurisdiction. *Id.* Harbison-Fischer argued that Mohawk had not proved that the signature purporting to be that of a New York judge *actually was* a judge's signature. *Harbison-Fischer*, 823 S.W.2d 684-85.

178. *Harbison-Fischer*, 823 S.W.2d at 685.

179. *Id.* at 682.

> tution. Even though New York law might not allow the registration of a Texas default judgment, we are required to follow . . . TEX. CIV. PRAC. & REM. CODE ANN. sec. 35.003 by permitting the filing of a New York default judgment because our statute does not have a similar provision excluding default judgments from its application.[180]

Based upon these two rules, the court overruled these last two objections to enforcement of the New York judgment.[181]

Royal Insurance Co. of America v. Quinn-L Capital Corp.[182] applied the Fifth Circuit rule on attacking a foreign judgment based on the subject matter jurisdiction of the rendering foreign court.[183] The rule, quoted from a United States Supreme Court case, is as simple as it is absolute:

> A party that has had an *opportunity to litigate the question of subject-matter jurisdiction* may not . . . reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.[184]

In *Royal Insurance* the party attacking the subject matter jurisdiction of the foreign court had not appealed the foreign judgment within the foreign system. With a right of appeal in the foreign system, the party clearly had an *opportunity* to attack the foreign court's subject matter jurisdiction. By not seizing that *opportunity*, the foreign judgment became "final and the court's subject matter jurisdiction [was] insulated from collateral attack."[185]

V. PERSONAL JURISDICTION

Perhaps the most interesting and contentious conflicts cases during the Survey period arose in the area of personal jurisdiction. In recent years, the Texas Supreme Court has explicated its due process, personal jurisdiction formula in *Schlobohm v. Schapiro*[186] and *Guardian Royal Exchange Assurance, Ltd. v. English China Clays.*[187] The supreme court twice revisited the area during this Survey period in *In re S.A.V.*[188] and *Malaysia British Assurance v. El Paso Reyco, Inc.*[189] And, of course, many court of appeals' decisions addressed the subject.[190] This Part begins with a brief overview of the guiding principles of Texas personal jurisdiction doctrine.[191] The discussion

180. *Id.* at 685-86.
181. *Id.* at 686.
182. 960 F.2d 1286 (5th Cir. 1992).
183. *Id.* at 1292.
184. *Id.* at 1293 (quoting Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982)) (emphasis added).
185. *Id.*
186. 784 S.W.2d 355 (Tex. 1990).
187. 815 S.W.2d 223 (Tex. 1991).
188. 837 S.W.2d 80 (Tex. 1992).
189. 830 S.W.2d 919 (Tex. 1992).
190. *See infra* notes 253-263 and accompanying text.
191. These principles generally derive from *Schlobohm* and *Guardian Royal*. This Article, however, does not discuss the specific holdings or reasoning in either case. These matters are discussed in prior survey articles. *See* Freytag & McCoy, *supra* note 6, at 150 (discussing *Schlobohm*); McCormick & Martinez, *supra* note 17, at 1472-76 (discussing *Guardian Royal*).

then examines the supreme court's two most recent entries on the subject. This Part then concludes with a brief survey of court of appeals decisions.[192]

A. TEXAS PERSONAL JURISDICTION DOCTRINE

As in other states, the Texas personal jurisdiction inquiry initially proceeds on two levels: (1) may Texas exercise jurisdiction under a state long-arm statute;[193] and (2) does the exercise of jurisdiction offend the due process guarantees of either the state[194] or federal[195] constitutions.[196] The statutory analysis is quite straightforward, with long-arm jurisdiction largely extending as far as the constitution allows.[197] The constitutional due process analysis, in turn, poses a two step analysis: (1) has the defendant *purposefully* established "minimum contacts" with Texas; and (2) does Texas' "assertion of jurisdiction comport with fair play and substantial justice."[198] This two step analysis, in most cases, hinges on the first question: whether the defendant *purposefully* directed some minimum quantum of actions toward Texas. As both the Texas and United States Supreme Courts have stated, if the defendant has established minimum contacts with the forum state, it is unlikely that jurisdiction would offend fair play and substantial justice.[199] The emphasis in Texas' application of the minimum contacts test

192. An important procedural device, the special appearance, is not covered in this Article. The special appearance is a defendant's only means of raising the issue of personal jurisdiction in the foreign forum and, if done improperly, could result in waiver of the entire issue. Rule 120a of the Texas Rules of Civil Procedure governs the special appearance. The cases discussing special appearances are covered in the civil procedure article of this Survey. *See* Ernest E. Figari, et al., *Texas Civil Procedure, Annual Survey of Texas Law*, 46 SMU L. REV. 1055, 1060-62 (1993); *see, e.g.*, *In re* S.A.V., 837 S.W.2d 80 (Tex. 1992) (father raising subject matter jurisdiction in custody and support modification proceeding did *not* enter general appearance waiving issue of personal jurisdiction); Clements v. Barnes, 822 S.W.2d 658 (Tex. App.—Corpus Christi 1991) (by raising other matters during special appearance litigant failed to strictly comply with rule 120a, waiving any objection to personal jurisdiction), *rev'd on other grounds*, 834 S.W.2d 45 (Tex. 1992); Letersky v. Letersky, 820 S.W.2d 12 (Tex. App.—Eastland 1991, no writ) ("use of discovery process does not constitute a waiver of a special appearance").

193. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-17.069 (Vernon 1986 & Supp. 1993) (long-arm statute for claims on business transactions or torts).

194. TEX. CONST. art. 1, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."); *see id.* Interp. Commentary (Vernon 1984) ("Section 19 of the Texas Bill of Rights is a due process of law provision").

195. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

196. *Schlobohm*, 784 S.W.2d at 357.

197. For example, § 17.042 of the Texas long-arm statute extends jurisdiction to all companies "doing business" in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986). The Texas Supreme Court has stated that "the broad language of the long-arm statute's doing business requirement allows the statute to reach as far as the federal constitution permits." *Schlobohm*, 784 S.W.2d at 357.

198. *Schlobohm*, 784 S.W.2d at 357.

199. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1986) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."); *id.* at 116 (Brennan, J., concurring in part and concurring in the judgment) (describing as "rare cases" those situations where fair play and substantial justice are not met despite the existence of minimum contacts); *In re* S.A.V., 837 S.W.2d at 86 ("Once minimum contacts

has been whether the defendant intentionally and willfully directed contacts toward Texas.[200]

In grappling with the minimum contacts test, the Texas Supreme Court has identified two types of personal jurisdiction based on the quantum and type of contacts a defendant may have with Texas.[201] The two types are special and general jurisdiction.[202] Special jurisdiction occurs when the plaintiff's underlying claim arises from the defendant's contacts with Texas.[203] For example, consider a defendant that manufactures and sells a product in Texas. The product subsequently injures a consumer and the consumer sues the manufacturer on the theory of strict products liability in a Texas court. Jurisdiction is *specific* because the plaintiff's claim — products liability — arises from the defendant's activities in Texas — manufacture and sale of the product. Because of the close nexus among the "defendant, forum, and litigation," less aggregate contacts between the defendant and Texas can support personal jurisdiction.[204] Indeed, the defendant's contacts with Texas can be "isolated and disjointed" and still support specific jurisdiction.[205]

Under general jurisdiction, on the other hand, the plaintiff's claim need not arise out of the defendant's contacts with Texas. Consider the products liability example discussed above. This time, however, assume that the manufacturer produces and sells product X in Texas and product Y in New York. Assume also that the plaintiff purchased product Y in New York and brought it to Texas where product Y injured the plaintiff. In this situation, the manufacturer's production and sale of product X should constitute sufficient "minimum contacts" with Texas to support personal jurisdiction. The plaintiff's claim — products liability for *product Y* — did not arise out of the defendant's activities in Texas — manufacture of *product X*. Since the nexus among "defendant, forum, and litigation" is not as tight as with specific jurisdiction, general jurisdiction requires greater aggregate contacts between the forum and the defendant.[206] The Texas Supreme Court has said that

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have been established, however, the exercise of jurisdiction will rarely fail to comport with fair play and substantial justice."); *Schlobohm*, 784 S.W.2d at 357-58 ("Because the minimum contacts analysis now encompasses so many considerations of fairness, it has become less likely that the exercise of jurisdiction will fail a fair play analysis."). The Texas Supreme Court, however, has listed several factors to be considered in determining whether jurisdiction comports with fair play and substantial justice: "the quality, nature, and extent of [the defendant's] activity in the forum state, the relative convenience of the parties, the benefits and protections of the laws of the forum state afforded the respective parties, and the basic equities of the situation." *Schlobohm*, 784 S.W.2d at 358.

200. *Schlobohm*, 784 S.W.2d at 358.

201. *Id.*

202. *See, e.g.*, Project Eng'g USA Corp. v. Gator Hawk, Inc., 833 S.W.2d 716 (Tex. App.—Houston [1st Dist.] 1992, no writ) (applying *general* versus *specific* personal jurisdiction).

203. *Schlobohm*, 784 S.W.2d at 357.

204. *Id.*

205. *Id.*

206. *Id.* For example, consider Scott v. Huey L. Cheramie, Inc., 833 S.W.2d 240 (Tex. App.—Houston [14th Dist.] 1992, no writ), where the court of appeals considered both specific and general jurisdiction. In *Scott*, the defendant had very few contacts with Texas. Thus, the defendant did not have the continuous and systematic contacts needed to support general per-

general jurisdiction must be based upon "substantial activities" within Texas that are "continuing and systematic."[207]

One final issue that remains unresolved before the United States Supreme Court, but not the Texas Supreme Court, is whether the two steps of the due process personal jurisdiction test should be read as stating (1) a two part test under which *each* part must be separately considered and satisfied in order to find personal jurisdiction; or (2) a balancing test under which the two factors should be considered together in determining whether personal jurisdiction exists.[208] The Texas Supreme Court states its test in the conjunctive which suggests that *both* prongs must be met for personal jurisdiction to satisfy due process.[209]

In the United States Supreme Court, the answer is not so clear. Justice Sandra Day O'Connor's opinion for the court in *Asahi Metal Industry Co. v. Superior Court*[210] concluded that the defendant did *not* have minimum contacts with the forum state.[211] If the due process analysis was a two part test, this finding would end the analysis. Justice O'Connor, however, continued to consider the factor of substantial justice and fair play.[212] Indeed, in concluding her analysis, Justice O'Connor stated that "the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice."[213] This formulation links "minimum contacts" and "fairness" as two factors to be balanced in analyzing personal jurisdiction.

Justice O'Connor, however, only received three other votes for her application of a balancing test. Indeed, Justice John Paul Stevens' concurring opinion concluded that failure to fulfill either of the two due process tests defeats personal jurisdiction.[214] He criticized Justice O'Connor for elaborating upon both prongs of the test when a negative answer under one prong was sufficient to dispose of the case.[215]

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sonal jurisdiction. *Id.* at 242. Specific personal jurisdiction, on the other hand, may have swept the defendant within its reach. The plaintiff's claim, however, did not arise from the defendant's contacts with Texas and, thus, specific personal jurisdiction was not appropriate. *Id.*

207. *Schlobohm*, 784 S.W.2d at 357.

208. The United States Supreme Court is also sharply divided upon whether merely placing a product in the stream of commerce with the awareness that the product could be swept into the forum state constitutes sufficient minimum contacts to support personal jurisdiction. *See* Asahi Metal Ind. Co. v. Superior Court, 480 U.S. 102, 109-12 (1987) (need stream of commerce plus some other action by the defendant) (opinion of O'Connor, J.); *id.* at 116-17 (stream of commerce alone is sufficient) (Brennan, J., concurring in part and concurring in the judgment).

209. *Schlobohm*, 784 S.W.2d at 358 (linking the parts of the due process test with conjunction "and").

210. 480 U.S. 102 (1987).

211. *Id.* at 113.

212. *Id.* at 113-16 (Opinion of O'Connor, J.).

213. *Id.* at 116 (Opinion of O'Connor, J.).

214. *Id.* at 121-22 (Stevens, J., concurring in part and concurring in the judgment).

215. *Id.*

B. TEXAS SUPREME COURT PERSONAL JURISDICTION CASES

In *Malaysia British Assurance v. El Paso Reyco, Inc.*[216] the Texas Supreme Court addressed a conflict over a reinsurance contract issued by Malaysia British Assurance (MBA), a Malaysian corporation, to Pioneer Insurance Company Limited (PICL), a Pakistani corporation. Under the contract of reinsurance in this case, the reinsurance company promised to pay any liability the insurance company may incur to its insureds. Thus, the reinsurance relationship flowed directly between the reinsurance company (MBA) and the insurance company (PICL); the insurance company's insureds were not parties to the agreement. As the *Malaysia* court explained, "[i]f . . . the reinsurance contract allows only the reinsured company to bring a claim against the reinsurer, the original insureds have no basis for a claim against the reinsurer."[217]

As just discussed, MBA reinsured PICL. PICL, in turn, had many insureds, including El Paso Reyco, a Texas corporation which operated a water park in Texas. Reyco became liable to one of the patrons of its water park. In the course of litigation, the Texas district court assigned Reyco and the patron any rights PICL had against MBA under the reinsurance contract.[218] Reyco and the patron then brought suit against MBA in a Texas district court and MBA challenged the court's personal jurisdiction.

The nature of the reinsurance relationship between MBA and PICL was critical to the Texas Supreme Court's analysis of personal jurisdiction. As noted above, the reinsurance contract created a two-way relationship between MBA and PICL. Under the contract, MBA answered directly to PICL and *not* to PICL's insureds. From these facts, the court concluded that MBA "did not *purposefully* establish minimum contacts with Texas."[219] The most that could be said was that MBA purposefully contracted with a Pakistani corporation that, quite fortuitously, happened to have insureds in Texas. If MBA's reinsurance contact created a relationship between MBA and the Texas insureds, then, perhaps, one could find that MBA had directed its conduct toward Texas. The reinsurance agreement, however, never contemplated a relationship beyond MBA and PICL and, thus, MBA directed no actions beyond PICL and Pakistan.[220] Therefore, the court concluded that MBA's "twice-removed contact with Texas is not sufficient for *in personam* jurisdiction."[221]

After concluding that MBA had not established minimum contacts with Texas, the *Malaysia* court ended its analysis and concluded that personal

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216. 830 S.W.2d 919 (Tex. 1992).

217. *Id.* at 921.

218. *Id.* at 920.

219. *Id.* at 921 (emphasis added).

220. Indeed, MBA became subject to liability to Texas insureds through an assignment by the district court and not by any purposeful actions of its own. *Id.* (citation omitted) ("The assignment did not involve any purposeful conduct on the part of Malaysia British; rather, it was a 'unilateral activity of another party or third person' that cannot support jurisdiction.")

221. *Id.*

jurisdiction did not exist.[222] Note, once again, that this illustrates how Texas treats the due process test as two distinct elements, each of which *must* be met to find personal jurisdiction. This analysis stands in sharp contrast to Justice O'Connor's opinion in *Asahi*, which continued to the fairness and justice analysis despite its finding of no minimum contacts.[223]

In re S.A.V.[224] involved a Texas action to modify a Minnesota divorce decree. The two parents were married and divorced in Minnesota. At the time of the divorce, the couple had two children. In 1986, the Minnesota court entered a divorce decree settling the matters of child custody and support.[225] In 1987, the mother moved to Amarillo while the father remained in Minnesota. During this period, the father visited the children in Texas and made several casual job inquiries while on these visits. In 1989, each parent filed an action to modify child custody and support in their respective home state. The father entered a special appearance under rule 120a of the Texas Rules of Civil Procedure to challenge the Texas court's subject matter[226] and personal jurisdiction. The district court found personal jurisdiction and the court of appeals affirmed that portion of the district court's ruling.[227]

The Texas Supreme Court began its analysis by examining the different due process requirements for custody determinations as opposed to support determinations. First, as for support determinations, the court reasoned that claims for support "are like claims for debt in that they seek a personal judgment establishing a direct obligation to pay money."[228] As such, support determinations require personal jurisdiction.[229] Second, custody determinations, on the other hand, "are status adjudications *not* dependent upon personal jurisdiction over the parents."[230]

The *S.A.V.* court's first conclusion reflects the general rule of personal jurisdiction, but the second conclusion is more troublesome. For some time, courts and commentators have operated under the assumption that custody

222. *Id.*

223. *See supra* notes 210-215 and accompanying text.

224. 837 S.W.2d 80 (Tex. 1992).

225. *Id.* at 82.

226. The exercise of subject matter jurisdiction in an interstate custody dispute is governed by the Texas codification of the Uniform Child Custody Jurisdiction Act, TEX. FAM. CODE ANN. §§ 11.51 to 11.75 (Vernon 1986), and the Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. § 1738A (West Supp. 1992).

227. *In re* S.A.V., 798 S.W.2d 293, 300 (Tex. App.—Amarillo 1990), *rev'd on other grounds*, 837 S.W.2d 80 (Tex. 1992).

228. *S.A.V.*, 837 S.W.2d at 83.

229. *Id.*

230. *Id.* at 84 (emphasis added) (citing Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977)). A court of appeals during this Survey period misapplied these rules. In Hoffman v. Hoffman, 821 S.W.2d 3 (Tex. App.—Fort Worth 1992, n.w.h.), the Fort Worth court of appeals wrote that "[w]here the trial court in a divorce proceeding has no personal jurisdiction over the respondent, the trial court has the jurisdiction to grant the divorce, but *not* to determine the managing conservatorship of children or divide property outside the State of Texas." *Id.* at 5 (emphasis added). As the *S.A.V.* court held, child custody is a status determination for which personal jurisdiction is not required. *S.A.V.*, 837 S.W.2d at 84. Thus, the *Hoffman* court incorrectly stated the current Texas rule of personal jurisdiction for child custody matters.

determinations do not require personal jurisdiction.[231] This assumption, however, was undermined by Justice Antonin Scalia's opinion in *Burnham v. Superior Court*.[232] *Burnham* only addressed the property disposition portion of a divorce action.[233] Yet, Justice Scalia examined personal jurisdiction over both property disposition and custody issues.[234] This language has caused one commentator to question the prior rule.[235] It suffices for this discussion to point out that the Texas Supreme Court's rule with regard to custody determinations may now be open to question.

Since support determinations require personal jurisdiction, the *S.A.V.* court analyzed that issue under the due process test.[236] As noted above, personal jurisdiction initially has two inquiries: long-arm statute and due process. In *S.A.V.* the applicable long-arm statute allowed jurisdiction coextensive with the reach of the state and federal due process clauses.[237] Personal jurisdiction, then, is bounded only by the two step due process formula. And, as one might expect, the minimum contacts prong of the due process test received the most discussion.

The Texas Supreme Court relied heavily upon two types of contacts in finding that Texas courts had personal jurisdiction over the father. First, the court found that the father had made "repeated visits" to his children in Texas.[238] Although unclear as to the number of these visits, the court was confident that the number was significant because the frequency of the father's visits was such that his travel expenses offset his child support obligation.[239] Second, the court pointed to two occasions on which the father made job inquiries while visiting his children in Texas.[240] The court found these two job inquiries, which yielded no apparent follow-up or results, constituted a "continuing job search."[241] From these two sets of contacts, the court held that the father had purposefully established minimum contacts

231. *See* Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 371 (1991).

232. 495 U.S. 604 (1990).

233. More specifically, *Burnham* addressed whether transient jurisdiction (serving the defendant with process while the defendant is temporarily within the forum state) satisfies the federal due process test for personal jurisdiction answering the question in the affirmative. *Id.* at 609.

234. *Id.* at 623-24 (Opinion of Scalia, J.).

235. Atwood, *supra* note 231, at 372. For an excellent, comprehensive discussion of *Burnham* in this context, as well as the need or desirability of personal jurisdiction for custody determinations, see *id.* ("Justice Scalia, under the misperception that the petitioner was challenging California's authority to determine the custody of his children, clearly assumed that personal jurisdiction over the husband was a prerequisite to, and a sufficient basis for, custody jurisdiction.").

236. *S.A.V.*, 837 S.W.2d at 85-87.

237. TEX. FAM. CODE ANN. § 11.051(4) (Vernon 1986) (providing for personal jurisdiction on "any basis consistent with the constitutions of this state and the United States").

238. *S.A.V.*, 837 S.W.2d at 86.

239. *Id.* The Minnesota court had modified its original divorce decree to allow the father and mother to offset visitation expenses against their respective child support obligations. *Id.* at 80.

240. *Id.* at 86.

241. *Id.*

with Texas.[242]

In assessing fair play and substantial justice, the court returned to the father's "repeated trips" to visit his children in Texas.[243] The court reasoned that these repeated trips, as well as the state of "modern transportation and communication," showed that litigation in Texas did not place an undue burden on the father.[244] At this point, the court's heavy reliance on the father's visits to Texas becomes strained. The court finds personal jurisdiction in the face of its own doctrine. Texas personal jurisdiction depends upon *purposeful* contacts with the forum state. The Texas Supreme Court discusses the aggregate number of contacts the father had with Texas.[245] The court, however, never addressed the quality — purposeful or unilaterally induced — of those contacts. Can one truly characterize the father's actions as purposeful? To do so would be to place a parent in a cruel dilemma when their ex-spouse leaves the state with their children: either do not visit the children or do so and submit to personal jurisdiction.

Justices Nathan Hecht and Raul Gonzalez recognized this problem with the court's personal jurisdiction holding.[246] Justice Gonzalez made the point most thoroughly and elegantly:

> The act of visiting children pursuant to a child visitation agreement should not subject a parent to the jurisdiction of the state in which the custodial parent decides to reside. To find personal jurisdiction in a State merely because the custodial parent was residing there, would discourage parents from entering into reasonable visitation agreements. This result "would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside. . . . The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[247]

Under this rationale, Justices Hecht and Gonzalez concluded that Texas courts could not exercise personal jurisdiction over the father.[248]

A negative answer to the minimum contacts question, as suggested by Justices Hecht and Gonzalez, need not defeat personal jurisdiction in *S.A.V.* Remember that Justice O'Connor seems to apply the two due process factors as a balancing test.[249] Although the Texas Supreme Court does not appear to treat the due process test this way,[250] it is worth examining whether a

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242. *Id.* Apparently neither type of contacts alone was dispositive. The court expressly reserved the question whether "visits to the children alone can establish minimum contacts." *Id.* at 86 n.2.

243. *Id.* at 87.

244. *Id.*

245. *Id.* at 86.

246. *Id.* at 89 (Hecht, J., concurring and dissenting); *id.* at 91 (Gonzalez, J., dissenting). Four justices in all — Hecht, Gonzalez, Phillips, and Cornyn — voted against the court's personal jurisdiction holding. Thus, the *S.A.V.* personal jurisdiction holding survives by the slim reed of a 5-4 vote.

247. *Id.* at 93-94 (Gonzalez, J., dissenting) (citations omitted) (footnotes omitted).

248. *Id.* at 94.

249. *See supra* notes 212-13 and accompanying text.

250. *See supra* note 222-23 and accompanying text.

balancing test could make a difference. Under the fair play and substantial justice prong of the due process analysis, the *S.A.V.* court found that Texas had two interests in the litigation: (1) "Texas has asserted its particularized interest in adjudicating child support by enacting a special jurisdictional statute;"[251] and (2) "Texas has a vital interest in protecting the rights of children within its borders and providing for their support."[252] Under a balancing test, a state's strong interests in a particular controversy could compensate for a lack of significant contacts between the defendant and the forum state. On that analysis, the *S.A.V.* court could acknowledge the lack of purposeful contacts between the father and Texas, but still find personal jurisdiction on the basis of Texas' strong interests in the controversy.

C. TEXAS COURT OF APPEALS PERSONAL JURISDICTION CASES

This section discusses two significant Texas court of appeals cases adjudicating personal jurisdiction. This discussion omits cases that contain a merely straightforward application of the personal jurisdiction test.[253] Instead, this section discusses how various courts of appeals characterized and weighed a defendant's different contacts with Texas. The minimum contacts analysis, after all, holds the key to personal jurisdiction.

In *Phillips v. Phillips*[254] the court of appeals addressed a variation on the divorce scenario in *S.A.V.* The father was originally from Mississippi. He and his wife married in Virginia, and, over the years, he worked in Washington, D.C., Liberia, and Kenya. At the time of the litigation, the father worked in Kenya and listed Mississippi as his United States residence. The mother was originally from Texas. The father's only contacts with Texas were eight visits over a two year period. These trips, made during the marriage, were to court his wife, to be with his wife for the birth of their child, and to visit his wife's family.

The court of appeals found that the father was subject to personal jurisdic-

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251. *S.A.V.*, 837 S.W.2d at 87. The special jurisdiction statute referred to is Texas' version of the UCCJA. TEX. FAM. CODE ANN. §§ 11.51 to 11.75 (Vernon 1986). Since virtually every state has adopted some version of the UCCJA, every state, under this reasoning, "has asserted its particularized interest in adjudicating child support." *S.A.V.*, 837 S.W.2d at 87.

252. *S.A.V.*, 837 S.W.2d at 87. The court listed five factors under fair play and substantial justice:

> (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Id. at 86.

253. For example, in Project Eng'g USA Corp. v. Gator Hawk, Inc., 833 S.W.2d 716 (Tex. App.—Houston [1st Dist.] 1992, no writ), the court of appeals determined that a California corporation with significant contacts with Texas was subject to personal jurisdiction in Texas. *Id.* at 722. Similarly, in Franklin v. Geotechnical Servs., Inc., 819 S.W.2d 219 (Tex. App.—Fort Worth 1991, writ denied), the court of appeals highlighted the paucity of contacts between the defendant and Texas by comparing its case to cases where courts had found sufficient minimum contacts. *Id.* at 221-22.

254. 826 S.W.2d 746 (Tex. App.—Houston [14th Dist.] 1992, no writ).

tion in Texas.[255] At first glance, one might assume that *Phillips* represents even less contacts than in *S.A.V.* Indeed, the father in *Phillips* did not search for a job while in Texas. This comparison misses a crucial difference between the two cases. In *Phillips* one can feel more comfortable with the conclusion that the father *purposefully* established contacts with Texas. The father was still in the marriage relationship and, presumably, by *mutual* arrangement of the couple the mother remained with her family in Texas and the father visited the family there. In this way, *Phillips* is unlike *S.A.V.* where the mother's post-marriage change of residence was a *unilateral* act that forced personal jurisdiction on the father. For this reason, the minimum contacts holding seems less troublesome than in *S.A.V.*

The court of appeals also concluded that fair play and substantial justice did not defeat personal jurisdiction.[256] The court cited two compelling reasons in support of this conclusion. First, since the father remained in Kenya, litigation in Texas posed no more, and possibly less, of a burden upon him than litigation in his United States residence of Mississippi.[257] Second, the couple had lived sporadically in many places during their marriage.[258] Under these circumstances, the couple had practically as many contacts with Texas as with any other state during their marriage. Thus, looking at the facts of the case as a whole, what may at first seem like rather meager contacts with Texas are actually much more significant relative to other relevant states.[259] From this, the court of appeals concluded that exercise of jurisdiction over the father did not contravene fair play and substantial justice.[260]

The outcome in *Laykin v. McFall*[261] largely hinged on the purposefulness requirement of the minimum contacts test. A Texas resident had contacted a California resident for the purpose of selling a ring. The California resident agreed to sell the ring for a commission from the sale. Soon thereafter, the Texas resident found a buyer in Texas and demanded the ring back. The California resident refused to return the ring, and the Texas resident brought an action in Texas for conversion and fraud. The California resident had never done or solicited business in Texas. Indeed, the California resident's only contact with Texas was with regard to the sale of the ring.

The court focused its analysis quite closely upon the actions of the California resident. In doing so, the court stated that "the activities of others cannot support a determination of the requisite conclusion that defendant purposefully directed his activities into Texas."[262] The Texas resident had drawn the California resident into the relationship with Texas. Thus, the

255. *Id.* at 750 (explaining that although the father's "contacts with Texas are few, . . . these visits were in furtherance of the family or parent-child relationship").

256. *Id.*

257. *Id.*

258. *Id.* at 748-49.

259. *Id.* at 750.

260. *Id.*

261. 830 S.W.2d 266 (Tex. App.—Amarillo 1992, no writ).

262. *Id.* at 269.

court of appeals concluded that the California resident had not engaged in any activities that would "amount to the required *purposeful* invocation of the benefits and protections of Texas law."[263]

CONCLUSION

Texas law continues to be a muddle in the choice of law area as courts struggle to, first, discern the correct choice of law rule under the Second Restatement and, second, apply the almost invariably amorphous test to complex factual situations. Very little certainty or predictability can be achieved under such a regime. Personal jurisdiction, however, has seen a constant honing and clarifying of the due process test. The critical factor of purposeful minimum contacts is readily identified and applied by the courts. The remainder of Texas conflict of laws has seen little significant movement.

263. *Id.* (emphasis added). In dissent, Justice Poff argued that the United States Supreme Court's decision in Calder v. Jones, 465 U.S. 783 (1984), supported personal jurisdiction in this case. *Id.* at 275-77 (Poff, J., dissenting). Yet, *Calder* faithfully applied the purposefulness requirement for minimum contacts. *Calder*, 465 U.S. at 788-90. Indeed, the defendant in *Calder* was a newspaper that had *targeted* the California market and, thus, purposefully established contacts with that forum. *Id.* at 789-90 (noting that the newspaper's "intentional, and allegedly tortious, actions were expressly aimed at California"). Thus, *Calder* seems consonant with the *Laykin* majority's focus on the actions the California resident purposefully directed toward Texas.