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Conflict of Laws

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CONFLICT OF LAWS

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> [I]t is futile to expect the courts to develop, or even to follow consistently, a coherent choice of law theory when so much scholarly disagreement exists over fundamental questions.[1]
>
> —Herma Hill Kay

DEAN Kay's lament should give solace to the courts that decided choice of law issues during this Survey period. Again, courts struggled to merely identify the proper choice of law rules in the *Second Restatement of Conflict of Laws*.[2] Yet, choice of law issues accounted for relatively few of the conflicts cases during this Survey period (October 1, 1992 through September 30, 1993). This is not surprising, however, since conflict of laws encompasses more than just choice of law:

> "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]

Other conflicts topics covered in this Article include recognition and enforcement of foreign judgments, personal jurisdiction, and retroactivity. Much of the action occurred in personal jurisdiction, with the cases applying established Texas law without much innovation.[4] Similarly, retroactivity continued to develop consistently with prior case law.[5] Innovation, however, seemed the general rule in the area of recognition and enforcement of foreign judgements. Here, the cases struggled with the Full Faith and Credit Clause of the Federal Constitution.[6] Additionally, a court of appeals invoked the rarely used doctrine of "comity" in support of its result.[7]

I. CHOICE OF LAW

Choice of law doctrines come in many shapes and sizes. Each jurisdiction

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1. Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 586 (1983).

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT (SECOND)].

3. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 1.1, at 1 (2d ed. 1992).

4. *See infra* notes 139-67 and accompanying text.

5. *See infra* notes 75-94 and accompanying text.

6. *See infra* notes 95-127 and accompanying text.

7. *See infra* notes 128-38 and accompanying text.

is largely free to adopt the rules or approach it believes is best suited to resolving the difficult issues presented by choice of law cases.[8] With little consensus as to the best doctrine,[9] many choice of law approaches have flourished.[10] Yet, this question need not occupy the attorney arguing a choice of law issue in a Texas court. For, whether in Texas federal or state court, Texas choice of law principles apply,[11] and Texas has adopted the approach of the *Restatement (Second)*.[12]

As the immediately following discussion indicates, the *Restatement (Second)* leaves courts much room for discretion in applying its principles. Over time, one would hope that the courts of a particular jurisdiction would bring some coherence and predictability to the application of these principles. Such an assessment is beyond the scope of this Article. Instead, this Survey Article addresses the particular instances where Texas courts invoked Texas choice of law principles. For this reason, this Article asks whether courts

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8. States are loosely constrained by the due process clause of the Federal Constitution. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life liberty, or property, without due process of law."). Due process requires that the state whose law is applied in a case must have "a 'significant contact or aggregation of contacts' to the claims asserted by each . . . plaintiff." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985); *see also* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 57-67 (1986).

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

10. For an overview of the various choice of law approaches, see SCOLES & HAY, *supra* note 3, §§ 2.4 through 2.17, at 11-44. *See also* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979) (cases and commentary "reveal[] almost as many theories as there are theorists."); LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991); JAMES A. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW (1980); Kay, *supra* note 1, at 523 ("Courts willing to consider the adoption of new choice of law theory in the United States today are faced with a bewildering array of academic theories, many with loyal judicial adherents.").

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

12. *See Gutierrez*, 583 S.W.2d at 318. This Article addresses only those cases dealing with interstate choice of law. Thus, cases dealing with either federal pre-emption of state law or choices between federal and state law are not covered. Two cases, however, are noteworthy for the simplicity and clarity of their discussions. In New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195 (5th Cir. 1993), the Fifth Circuit summarized the choice of law principles for marine insurance contracts:

> A marine insurance contract is indisputably a marine contract within federal admiralty jurisdiction. In most instances, however, regulation of marine insurance is a matter properly left to the states. In determining whether federal maritime law governs an issue the court must consider three factors: (1) whether the federal maritime rule constitutes "entrenched federal precedent"; (2) whether the state has a substantial, legitimate interest in application of its law; and (3) whether the state's rule is materially different from the federal rule.

Id. at 1198 (footnotes omitted); *see* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). The *Martech* court ultimately avoided the choice of law question when it determined that both federal and state law yielded the same outcome. *Martech*, 993 F.2d at 1198-99. In 5801 Associates v. Continental Ins. Co., 983 F.2d 662 (5th Cir. 1993), the court applied state law to a marine insurance contract because it found no entrenched federal precedent. *Id.* at 664.

are considering the proper factors and focusing upon the crucial facts. In other words, 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.

The *Restatement (Second)* commands a general quest for the elusive state with the "most significant relationship" to the parties and the issues of a particular case.[13] To guide this quest, the *Restatement (Second)* provides three levels of principles of increasing specificity. First, the broadest principles are stated in section 6:

> [T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in determination of the *particular issue*, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[14]

Section 6 applies to analysis of *all* substantive areas of law.

The second level principles focus on specific substantive areas, such as torts,[15] contracts,[16] and property.[17] These general substantive provisions provide additional factors for consideration *along with* the factors in section 6. For example, section 145 lists the following factors in tort cases:

> (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.[18]

The section 145 factors are to be weighed with the section 6 factors in determining the state with the "most significant relationship to the occurrence and the parties."[19]

Lastly, the *Restatement (Second)* contains many third level principles that apply to specific issues within a substantive area.[20] For example, within

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13. *See, e.g.*, RESTATEMENT (SECOND), *supra* note 2, §§ 145(1), 187(1). Courts undertake choice of law analysis under the *Restatement (Second)* only in the absence of a *statutory* directive regarding the applicable law. *See id.* § 6(1) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."); *see, e.g.*, TEX. BUS. & COM. CODE ANN. § 4A.507 (Vernon Supp. 1994) (choice of law for certain funds transfers).

14. RESTATEMENT (SECOND), *supra* note 2, § 6(2) (emphasis added).

15. *See id.* § 145.

16. *See id.* § 188.

17. *See id.* § 222.

18. *Id.* § 145(2).

19. *Id.* § 145(1).

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

torts the *Restatement (Second)* has third level rules for the standard of care,[21] the duty owed to the plaintiff,[22] contributory negligence,[23] and assumption of the risk.[24] These third level principles erect a sort of presumption in favor of a particular state's law. This presumption determines the applicable law unless "some other state has a *more significant relationship* under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied."[25] The third level principles, then, act as rules-of-thumb for identifying the state with the most significant relationship to a particular issue. These rules-of-thumb, however, may give way to a particularized "*more* significant relationship" analysis of the first and second level principles under the facts and circumstances of a particular case.[26]

Given the differing levels of specificity of the *Restatement (Second)*'s rules, courts require an order or method to structure their application of these provisions. The Texas Supreme Court appears to have adopted such a method.[27] The court begins by identifying a specific third level provision, if any, that addresses the particular issue in question. If such a third level provision exists, a strong presumption arises in favor of the law chosen by the third level provision.[28] Next, regardless of whether a third level principle existed, the court identifies the applicable second level provision and analyzes the factors in this provision along with the factors in section 6. This analysis determines the state with the "most/more significant relationship."[29] If no third level provision applied, the second level provision and

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Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973); Christian L. Wilde, *Depecage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 329 n.3 (1968).

21. RESTATEMENT (SECOND), *supra* note 2, § 157.

22. *Id.* § 159.

23. *Id.* § 164.

24. *Id.* § 165.

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

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

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

28. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 679 (Tex. 1990) (the third level principle "[a]s a rule, . . . is conclusive in determining what state's law is to apply."), *cert. denied*, 498 U.S. 1048 (1991); *see Maxus*, 817 S.W.2d at 54. If courts did not apply a strong presumption in favor of the state selected by a third level provision, such provisions would become largely superfluous; if the general "most significant relationship" analysis always overrode the third level analysis, why not simply drop the third level analysis? The answer lies in the description of the third level principles as heuristic devices intended to identify the state with the most significant relationship. *See* text following note 25, *supra*. The drafters of the *Restatement (Second)* have distilled the first and second level factors in relation to a specific issue of law, and have determined that the factors will, on average, reduce to a single consideration reflected in the third level provision. For example, in torts, the issue of the standard of care will generally reduce to consideration of the place of injury. RESTATEMENT (SECOND), *supra* note 2, § 157. In other words, when analyzing choice of law for the standard of care, the § 145 tort factors along with the general § 6 factors generally point towards the state where the injury occurred. Section 157 embodies that shorthand rule. Yet, § 157 recognizes that particular factual situations may require a different result. Thus, flexibility is allowed by the "more significant relationship" analysis.

29. Some third level provisions, however, do not provide for consideration of the state

section 6 determine the applicable law. If, on the other hand, a third level provision and the "more significant relationship" analysis select *different* states, the court must decide whether the second level and section 6 factors overcome the third level presumption in favor of the other state's law. Unfortunately, the *Restatement (Second)* provides little guidance on this issue. Indeed, the *Restatement (Second)* does not offer fixed rules so much as an "approach" to conflicts analysis.[30] This "approach provides a basis from which courts can create a body of specific rules covering specific situations."[31] As this approach can only be developed on a case-by-case basis, a periodic examination of the cases—as is the purpose of this Survey Article—provides helpful guidance.

A. TORTS

In *Thomas v. N.A. Chase Manhattan Bank*[32] the Fifth Circuit confronted a choice of law issue in the context of a convoluted business scenario. In 1980, James Thomas, in partnership with others, purchased a Texas private banking franchise in Galveston. The partnership subsequently used this bank to provide financing for a series of ventures. N.A. Chase Manhattan Bank lent financial support to these ventures. At the same time, Thomas and Chase joined in an investment enterprise known as "Columbia Investors." Chase later withdrew from the Columbia Investors project over Thomas' objection.

Eventually, the original partnership disbanded. Chase recommended Lawrence Price to Thomas as a potential participant in a new partnership to purchase the Galveston bank. Ultimately, Thomas and Price did so.

Prior to forming a partnership with Price, Thomas received information that Price had "a banking problem" in Chicago. Thomas contacted Chase for further information regarding Price and received assurances from a Chase executive that (1) Chase had investigated the matter and (2) Chase knew of nothing to be concerned about. Relying on these assurances, Thomas formed the partnership with Price and completed the purchase of the Galveston bank.

In the ensuing years, Price proceeded to breach many of the agreements relating to the purchase of the bank. Additionally, Price used the bank to carry on a massive tax fraud which eventually drove the Galveston bank into insolvency. It was later learned that Price had engaged in a similar fraud in Chicago prior to the purchase of the Galveston bank.

In 1989, Thomas brought suit against Chase for (1) fraud, conspiracy to defraud, and negligent misrepresentation due to Chase's assurances regard-

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with a "more significant relationship" to override the choice of law rule in the third level principle. *See, e.g.*, RESTATEMENT (SECOND), *supra* note 2, §§ 223-43 (law governing transfers of interests in land taken from the situs of the property).

30. *See* Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

31. SCOLES & HAY, *supra* note 3, § 17.21, at 605.

32. 994 F.2d 236 (5th Cir. 1993). As discussed above in note 11, federal courts apply the choice of law rules of the state in which they sit.

ing Price; (2) breach of contract due to Chase's withdrawal from the Columbia Investors project; and (3) breach of fiduciary duty. The district court did not address a choice of law issue,[33] apparently applying Texas law. On appeal, Chase argued for the application of New York law.

In analyzing the choice of law issue, the Fifth Circuit first noted that Texas applies the principles of the *Restatement (Second)*.[34] The court then characterized the case as "sounding in tort."[35] Given this characterization of the case, the court cited to sections 6 and 145 (second level tort provision) of the *Restatement (Second)*.[36] The court, however, never discussed these provisions. Instead, it listed the different state contacts in the case:

> The following New York contacts are not disputed: (1) Chase is domiciled there; (2) Chase made the alleged misrepresentation there; (3) negotiations between Thomas and Price regarding the formation of the . . . partnership [to purchase the Galveston bank] occurred there; and (4) Thomas's business relationship with Chase, including the discussions regarding Columbia Investors, was based there. Although the . . . partnership [to purchase the Galveston bank] was organized under Texas law, its general partners . . . are organized under the laws of Missouri and Wyoming . . .; and Thomas is a Missouri resident. The only other apparent tie with Texas is the bank's location in Galveston.[37]

"In light of these contacts," the court held that New York law applied to Thomas' claims.[38]

Three problems exist with the court's choice of law analysis. First, the court merely assumed that the same state's law applied to the *entire* case. The court did so by characterizing the entire case as "sounding in tort."[39] This characterization seemingly conflicts with the court's prior statement that Thomas had made a claim for breach of contract. As discussed above, the issue-by-issue approach to choice of law of the *Restatement (Second)* allows for the possibility that different states' laws will apply to different substantive issues within the same case.[40] The court ignored this possibility by characterizing the entire case as sounding in tort.[41]

Second, the court ignored the Second Restatement's third level provisions relevant to Thomas' claims. For example, section 148 addresses choice of law for claims of fraud or misrepresentation. If the defendant's fraud or misrepresentation and the plaintiff's reliance occurred in the same state, section 148(1) selects that state's law.[42] If the plaintiff and the defendant's acts

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33. *Id.* at 241 n.7.
34. *Id.* at 241.
35. *Id.*
36. *Id.* at 241 n.8. For a list of the § 145 factors, see *supra* text accompanying note 18 above.
37. *Id.* at 242.
38. *Id.*
39. *Id.* at 241.
40. *See supra* note 20 and accompanying text.
41. The act of characterizing an entire case for choice of law purposes—*i.e.*, the search for a single "proper law"—is similar to the "English approach" to choice of law. *See* SCOLES & HAY, *supra* note 3, § 2.15, at 38.
42. RESTATEMENT (SECOND), *supra* note 2, § 148(1).

do not take place in the same state, section 148(2) lists several factors to be considered in determining the state with the most significant relationship to the transaction.[43] In applying these factors, the general focus is protection of the plaintiff.[44] Thus, the cases generally look to the place where the plaintiff relied on the defendant's representations.[45]

In the present case, consideration of section 148 likely would not have made a difference. As the court stated, Chase made its alleged misrepresentations from New York, and Thomas relied on these representations—by negotiating and entering into a partnership with Price—in New York. As New York was the place of both the defendant's misrepresentation and the plaintiff's reliance, section 148(1) would indicate that New York law governs the fraud claim.[46]

Third, the court failed to undertake a qualitative analysis of the sections 6 and 145 factors. The court quoted these provisions in a footnote and then merely listed the state contacts in the text of the opinion.[47] Instead of analyzing the contacts with regard to sections 6 and 145, the court seemed to rest its decision on a quantitative view of the contacts: four for New York, one for Texas. The court concluded that this contacts calculus is correct "especially because Thomas's claims arise from his dealings with Chase in New York."[48] While this statement touches upon some of the factors in sections 6 and 145, it hardly amounts to an analysis of those factors. Indeed, as noted above in the discussion of section 148 and fraud, the relevant factors are those relating to Thomas' *reliance* on Chase's representations, *not only* those relating to Thomas' dealings with Chase. The court's contact-counting method subverts the goal of the *Restatement (Second)* to foster judicial and scholarly discussions that prioritize and organize the various first and second level principles into a rubric for future decisions. *Thomas* provides no guidance for cases with a different distribution of contacts, such as two for New York and two for Texas. Such decisions exacerbate the ambiguity and uncertainty inherent in a flexible approach to choice of law.

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43. Section 148(2) provides for consideration of:

> (a) the place, or places, where the plaintiff [relied], (b) where [he] received the representations, (c) . . . where the defendant made the representations, (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, (e) the place where [the tangible involved in the transaction] was situated at the time, and (f) the place where the plaintiff [was] to render performance under [the] contract which he [was] induced to [conclude].

Id. § 148(2).

44. SCOLES & HAY, *supra* note 3, § 17.37, at 626.

45. *See id.* § 17.37, at 626-27 n.2.

46. Since the court did not acknowledge the presence of a contract issue in its choice of law analysis, this Article does not attempt such an analysis. For present purposes, it is sufficient to note that the *Restatement (Second)* contains a second level contract provision, as well as several third level provisions addressing different types of contracts, and contract issues. *See* RESTATEMENT (SECOND), *supra* note 2, §§ 188, 189-97, and 198-207 respectively.

47. *Thomas*, 994 F.2d at 241-42 & n.8.

48. *Id.* at 242.

B. THE PARTIES' CONTRACTUAL CHOICE OF LAW

The Houston Court of Appeals confronted a contractual choice of law in *Adobe Resources Corp. v. Newmont Oil Co.*[49] Adobe Resources Corp., Newmont Oil Company, and Rebel Oil Company executed a letter agreement for the purpose of acquiring and developing certain oil, gas, and mineral leases. The agreement applied to an Area of Mutual Interest (AMI) that was wholly within Louisiana. Under the agreement, if one of the parties acquired a lease to property within the AMI, the other parties could participate in the lease "by paying the acquiring party its proportionate part of all out-of-pocket acquisition costs."[50]

In 1984, Newmont acquired a sublease within the AMI. Upon acquisition, Newmont notified the other parties of the acquisition and requested payment of the acquisition costs—including the cost of a planned seismic project—if a party chose to participate in the sublease. Adobe and Rebel elected to participate in the sublease, but refused to pay the seismic costs, arguing that such costs were not "acquisition costs" within the meaning of the letter agreement. Newmont would not relent.

In 1988, Adobe filed suit against Newmont over the sublease transaction. Adobe alleged claims for breach of duty of good faith and fair dealing, breach of fiduciary duty, and breach of the operating agreement.[51] Newmont filed for summary judgment on the ground, among others, that Louisiana law governed Adobe's claims and that Louisiana law did not recognize any of Adobe's claims. The district court granted summary judgment for Newmont, and Adobe and Rebel appealed.

The court of appeals began its choice of law analysis by correctly noting that "Texas courts have adopted the principles [of section 6 of the *Restatement (Second)*] for determining the governing law where the parties have not chosen the governing law contractually."[52] The court, however, apparently believed that when the parties have "chosen the governing law contractually" Texas courts strictly enforce such a contract provision.[53] Once it had determined that one of the parties' agreements selected Louisiana law,[54] the court applied Louisiana law without further discussion.[55]

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49. 838 S.W.2d 831 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

50. *Id.* at 834.

51. Rebel later intervened in the suit. It is unclear from the court's opinion when and by whom the "operating agreement" was executed.

52. *Adobe Resources*, 838 S.W.2d at 836.

53. *Id.*

54. The court's conclusion that the parties had selected Louisiana law required some discussion. The operating agreement stated that it was governed "by the law of the state in which the Contract Area is located." *Id.* The "Contract Area" was defined as largely identical to the AMI. *Id.* Since the AMI was wholly within Louisiana, the Contract Area also lay within that state. Thus, the operating agreement effectively selected Louisiana law. *Id.* This conclusion, however, did not resolve the case at hand. Adobe and Rebel sued on the letter agreement, *not* the operating agreement. The court resolved this difficulty by arguing that the letter agreement "expressly incorporates the operating agreement as an exhibit." *Id.* Whether the court correctly construed the letter agreement is a question of contract interpretation that is outside the scope of this Article.

55. *Id.*

While identifying the general principles in section 6 of the *Restatement (Second)*, the court of appeals missed a provision essential to resolution of the case: section 187. As an important provision that the Texas Supreme Court has expressly adopted and applied,[56] as well as a provision that parties and courts seem to ignore occasionally,[57] section 187 is worth quoting in full:

> § 187. Law of the State Chosen by the Parties
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, *unless* either
> (a) the chosen state has no substantial relationship to the parties to 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 in 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.[58]

As the *Adobe* court did not even cite to this section, this Article will not linger on its application. Instead, a few observations are appropriate. First, section 187(1) would not apply in this case. Section 187(1) is intended not so much to determine the applicable law as to enable the contracting parties to define their contractual obligations by reference to existing law.[59] For example, the parties could agree that a specific word in their contract "shall have the meaning given that term in section X of the general statutes of state Y."[60] Since the parties are not selecting governing law, but rather crafting the meaning of their agreement, the state which the parties select need not have any relationship with the transaction.[61]

Since section 187(1) would not apply, the court would apply section 187(2). Under section 187(2), the court would have to determine (1) whether Louisiana has a substantial relationship to the parties and the trans-

56. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (applying § 187, the court held that unreasonably restrictive covenants not to compete violated a fundamental policy of Texas law and, thus, the contractual choice of Florida law was unenforceable), *cert. denied*, 498 U.S. 1048 (1991).

57. *See, e.g.*, Pennsylvania House, Inc. v. Juneau's Pennsylvania House, 782 F. Supp. 1195 (E.D. Tex. 1991); Paul E. McGreal, *Conflict of Laws, Annual Survey of Texas Law*, 46 SMU L. REV. 1123, 1131-32 (1993) (discussing *Pennsylvania House*).

58. RESTATEMENT (SECOND), *supra* note 2, § 187 (emphasis added).

59. *See id.* § 187 cmt. c ("The rule in [subsection (1)] is a rule providing for incorporation by reference and is not a rule of choice of law.").

60. *See id.* § 187 cmt. c, illus. 4.

61. *See* RICHMAN & REYNOLDS, *supra* note 26, § 60(a)(2), at 166.

action, and, if so, (2) whether the applicable Louisiana law violates a fundamental policy of the state with the most significant relationship to the transaction and the parties, as determined by applying sections 6 and 188. This analysis, of course, would require further facts regarding the principal place of business and place of incorporation of the parties, as well as the places of negotiating and expected performance of the letter agreement. Additionally, the court would have to determine whether Louisiana's non-recognition of claims for breach of the duty of good faith and fair dealing and fiduciary duty violate a fundamental state policy of Texas.

In future cases, the application of section 187 will be limited by an important new Texas statute, effective September 1, 1993. Section 35.51 of the Texas Business and Commerce Code sets forth the choice of law rules for contractual choices of law in transactions equal to or exceeding one million dollars.[62] Under section 35.51(b), the parties may choose a state's law to "govern[] an *issue* relating to the transaction" if the chosen state "bears a reasonable relation to that jurisdiction".[63] In an important change from section 187 of the *Restatement (Second)*, the parties' choice is valid "regardless of whether the application of that law is contrary to a fundamental or public policy of [Texas] or any other jurisdiction."[64] If, however, a portion of the parties' agreement would be invalid or unenforceable under the law of the chosen state, section 35.51(e) provides that the law of the state with the "most significant relationship to the transaction . . . governs the validity or enforceability of that term."[65] The law of the chosen state still governs the validity and enforcement of the other terms of the parties' agreement.[66] Section 35.51, then, favors the validity of agreements.

As with section 187 of the *Restatement (Second)*, section 35.51(c) accords deference to the parties' choice of law to "govern[] the interpretation or construction" of an agreement in their transaction.[67] In this case, the chosen state's law applies "regardless of whether the transaction bears a reasonable

62. TEX. BUS. & COM. CODE ANN. § 35.51(a)(2) (Vernon Supp. 1994).

63. *Id.* § 35.51(b) (emphasis added). Section 35.51(d) defines "reasonable relation" for purposes of the statute. Specifically, "reasonable relation" includes, but is not limited to, transactions where:

> (1) a party to the transaction is a resident of that jurisdiction;
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> (2) a party to the transaction has its place of business or, if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;
>
> (3) all or part of the subject matter of the transaction is located in that jurisdiction;
>
> (4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or
>
> (5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.

Id. § 35.51(d).

64. *Id.* § 35.51(b).

65. *Id.* § 35.51(e).

66. *Id.* § 35.51(e)(3)(B).

67. *Id.* § 35.51(c).

relation to that jurisdiction."[68]

Several types of transactions are excepted from the application of section 35.51.[69] These exceptions include certain issues relating to transfers of real property,[70] marriage and adoption,[71] wills,[72] or issues for which another statute provides a choice of law rule.[73] Choice of law for these transactions is presumably left to analysis under the *Restatement (Second)*.

C. CONCLUSION

In both choice of law cases, the courts did not apply relevant provisions of the *Restatement (Second)*. While neither omission would clearly have changed the outcome of the immediate case, neither case provides helpful guidance for future cases. Additionally, each case continued the habit of loose, almost impressionistic application of the *Restatement (Second)*. Only the Texas Supreme Court seems willing to engage in the extended analysis necessary to give meaning to the broad, flexible provisions of the *Restatement (Second)*.[74] In analyzing the above choice of law cases, this Article merely attempts to follow the court's example.

In the most significant choice of law development during this Survey period, the Texas legislature rewrote the choice of law rules for a significant portion of major commercial transactions. When parties to a large transaction insert a choice of law clause into an agreement, as is often the case, section 35.51 of the Texas Business and Commerce Code will govern its validity. By removing the "fundamental policy" limitation of section 187 of the *Restatement (Second)*, section 35.51 makes validity more likely.

II. RETROACTIVITY

Last year's Survey Article[75] discussed the general rules Texas courts apply in resolving questions of retroactivity of new legal rules.[76] During that Survey period, the Texas Supreme Court adopted a three-part test for retroac-

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68. *Id.*

69. *Id.* § 35.51(f).

70. *Id.* § 35.51(f)(1). Specifically, subsection (f)(1) excepts determinations:

> whether a transaction transfers or creates an interest in real property for security proposes or otherwise, the nature of an interest in real property that is transferred or created by a transaction, the method for foreclosure of a lien on real property, the nature of an interest in real property that results from foreclosure, or the manner and effect of recording or failing to record evidence of a transaction that transfers or creates an interest in real property[.]

Id.

71. *Id.* § 35.51(f)(2).

72. *Id.* § 35.51(f)(3).

73. *Id.* § 35.51(f)(4).

74. *See Maxus*, 817 S.W.2d at 53-57; *DeSantis*, 793 S.W.2d at 677-81; Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420-22 (Tex. 1984); Gutierrez v. Collins, 583 S.W.2d 312, 318-19 (Tex. 1979).

75. McGreal, *supra* note 57.

76. "Legal rule" refers to a court decision that announces a rule of common law or interprets a statutory or constitutional provision. Such a rule is "new" if the deciding court either addresses an issue of first impression, or overrules prior precedent.

tivity in a case that invalidated the state's public school finance system.[77] The three-part test provides:

> 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 . . . 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 inequity 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.[78]

The court held that its ruling would apply prospectively.[79]

As discussed at greater length in last year's Survey article, the supreme court's new test seemed to focus on its old criterion of *reasonable* or *justifiable reliance*. The third part looks towards "substantial inequitable results" or "injustice or hardship" produced when a retroactive decision thwarts the expectations of those who relied on the old legal rule. The first part asks whether that reliance was justifiable. If the new legal rule was either foreseeable or foreshadowed, reliance on the old legal rule would not be justified. The court's retroactivity doctrine, then, attempts to protect justifiable reliance on existing legal rules. This prudential policy promotes the stability necessary to foster commercial and other interaction, while allowing the flexibility required for a fair legal system. The Texas Supreme Court's two retroactivity cases decided in this Survey period follow this prudential policy.

In *Elbaor v. Smith*[80] the Texas Supreme Court held that Mary Carter agreements[81] are "void as violative of sound public policy."[82] Recognizing that its decision could upset a substantial number of concluded cases, the court carefully considered whether its decision should apply retroactively. The court found that the first and third factors of the test favored prospective application.[83] Since the issue was one of first impression, the parties could not have foreseen the court's decision.[84] Also, since many past trials were concluded with Mary Carter agreements, it was clear that many parties had relied on the prior validity of such agreements.[85] To upset this justified reliance would cause hardship to both the litigants who would have to retry

77. Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992).

78. *Id.* at 518 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)).

79. *Id.* at 521.

80. 845 S.W.2d 240 (Tex. 1992).

81. The court described Mary Carter agreements as follows: "A Mary Carter Agreement exists when the settling defendant retains a financial stake in the plaintiff's recovery *and* remains a party at the trial of the case." *Id.* at 247.

82. *Id.* at 250.

83. *Id.*

84. *Id.*

85. *Id.* at 251.

their cases and the courts who would have to squeeze these cases onto their already overcrowded dockets.[86]

Balanced against this justifiable reliance, the court noted that the purpose of its new rule prohibiting Mary Carter agreements—prevention of unfair trials—would best be served by retroactively applying the new prohibition to any potentially tainted trials.[87] Yet, this second factor ultimately yielded to the weight of justifiable reliance when the court concluded that its prohibition of Mary Carter agreements applied "only in the present case, to those cases in the judicial pipeline where error has been preserved, and to those actions tried on or after December 2, 1992."[88] Thus, yet again, the Texas Supreme Court protected justified reliance.

This deference to justified reliance continued in *Lohec v. Galveston County Commissioner's Court*.[89] *Lohec* addressed the status of the Galveston County Beach Park Board of Trustees (Board). Phil Lohec, the Galveston County Auditor, claimed that the Board was a county entity, and thus was subject to the county's authority. Specifically, Lohec sought to have the Board submit all purchase payments to his office for approval.[90] The Board, on the other hand, believed that it was an independent entity free from county oversight or supervision. In December 1989, Lohec filed for a declaratory judgment regarding the status of the Board. On March 1, 1990, the trial court entered a declaratory judgment that the Board was a county entity and enjoined further purchases or payments without county approval. The court of appeals reversed, and Lohec appealed to the Texas Supreme Court.

The supreme court held that the Board was "an entity subject to county supervision."[91] In deciding whether its decision should apply retroactively, the court stated that it "weighs, among other things, considerations of fairness, equity and policy including [1] whether the decision involves an issue of *first impression* and [2] whether retroactive application could produce *substantial inequitable results*."[92] This statement invokes only the first and third factors of its new retroactivity test. As noted above, these two factors are the core of justifiable reliance. Thus, the court seemed to narrow its inquiry solely to justifiable reliance.

The Board clearly relied on its view of the law in making payments without county approval. The question, then, was whether the Board's reliance was reasonable. The court's answer was yes and no. The court found that "the Board had been on *notice* since the trial court's judgment that its procedure of making payments without submitting them to the county auditor for

86. *Id.*
87. *Id.*
88. *Id.* (footnote omitted).
89. 841 S.W.2d 361 (Tex. 1992).
90. Under Texas law, the county auditor "has general oversight of the books and records of a county" and "shall see to the strict enforcement of the law governing county finances." TEX. LOC. GOV'T CODE ANN. §.112.006 (Vernon 1988).
91. *Lohec*, 841 S.W.2d at 366.
92. *Id.* at 366 n.4 (emphasis added).

approval was potentially invalid."[93] On this reasoning, the Board's reliance before it received notice was justified, but its reliance after receiving notice that its position potentially was invalid was not justified. Thus, the court applied its ruling retroactively to the date of the trial court's ruling.[94]

III. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Most of the cases dealing with foreign judgments during this Survey period involved the Full Faith and Credit Clause of the Federal Constitution.[95] Several cases were routine applications of the Full Faith and Credit Clause and, thus, receive only brief treatment.[96] One court of appeals case, however, invoked the rarely used doctrine of comity in reaching its result. Discussion of this case attempts to determine whether the court articulated a coherent new doctrine or merely invoked a buzzword in support of a result.[97]

A. FULL FAITH AND CREDIT

In *Bard v. Charles R. Myers Insurance Agency*[98] the Texas Supreme Court addressed a case involving the liquidation of an insolvent Vermont insurance company—the Ambassador Insurance Company. In November 1983, a Vermont receivership court had ordered that Ambassador be placed in receivership. David Bard, the Vermont Banking and Insurance Commis-

93. *Id.* (emphasis added).

94. *Id.*

95. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

96. *See, e.g.*, Trinity Capital Corp. v. Briones, 847 S.W.2d 324 (Tex. App.—El Paso 1993, no writ) (in a proceeding to enforce a foreign state's judgment, a court may only enforce the judgment or declare the judgment void for want of jurisdiction, but may not grant a new trial).

In Total Minatone Corp. v. Santa Fe Minerals, Inc., 851 S.W.2d 336 (Tex. App.—Dallas 1993, no writ), the Dallas Court of Appeals addressed the proper standard of review for an injunction against bringing suit in a foreign state. In striking down the injunction, the court stated that "a party seeking to enjoin another party from pursuing an out-of-state lawsuit must show [that] clear equity demands the Texas court's intervention to prevent manifest wrong and injustice." *Id.* at 339. Yet, the anti-suit injunction may be for naught if the sister state does not give the injunction full faith and credit. *See* SCOLES & HAY, *supra* note 3, § 24.21, at 981; *see also* Cunningham v. Cunningham, 200 A.2d 734, 736 (Conn. 1964) ("Even though an injunction may issue against a suit in another state or country . . . a court is not compelled to observe such a decree."); James v. Grand Trunk W. R.R., 152 N.E.2d 858, 867 (Ill.) ("this court need not, and will not, countenance having its right to try cases, of which it has proper jurisdiction, determined by the courts of other States, through their injunctive process."), *cert. denied*, 358 U.S. 915 (1958); RESTATEMENT (SECOND), *supra* note 2, § 103 cmt. b. *But see* Note, *Full Faith and Credit to Foreign Injunctions*, 26 U. CHI. L. REV. 633 (1959).

97. Interstate enforcement of child support orders is addressed in the *Family Law: Husband and Wife* article in this Survey. *See* Joseph W. McKnight, *Family Law: Husband and Wife, Annual Survey of Texas Law*, 47 SMU L. REV. 1161 (1994). The issue is governed by the Revised Uniform Reciprocal Enforcement of Support Act (RURESA) as adopted in Texas. *See* TEX. FAM. CODE ANN. § 21.18 (Vernon Supp. 1994); *see also* Smith v. Drake, 852 S.W.2d 82 (Tex. App.— Waco) (verification of a RURESA petition by a California official on " 'best information and belief and subject to the penalty of perjury' " satisfied Texas statute), *rev'd on other grounds sub. nom*, County of Alameda v. Smith, 867 S.W.2d 767 (Tex. 1993).

98. 839 S.W.2d 791 (Tex. 1992).

sioner, was appointed as receiver. At that time, the court also enjoined "the prosecution of any action against Ambassador that would interfere with the Commissioner's conduct of the affairs of Ambassador."[99]

Upon reviewing Ambassador's financial status, Bard concluded that the company should be liquidated and filed an application to do so in the Vermont receivership court. The court agreed and ordered that Ambassador be liquidated. On appeal, the Vermont supreme court upheld that order. The final liquidation order enjoined all suits against Ambassador or Bard.[100]

In liquidating Ambassador, Bard brought suit in Texas against Charles Myers and Charles Myers Insurance Agency (collectively, Myers). Myers wrote and sold Ambassador's insurance policies to Myers' customers. The suit alleged that Myers owed monies for insurance premiums that Myers had collected and never paid over to Ambassador. Myers answered this suit and filed a counterclaim alleging misconduct on the part of Ambassador. Specifically, Myers alleged that "Ambassador's pre-receivership management had conspired with one of his competitors to prevent Myers from placing certain insurance risks with Ambassador."[101] Bard sought summary judgment on Myers' counterclaim on the grounds that the Vermont court's anti-suit injunction was entitled to full faith and credit. The district court denied summary judgment, and the court of appeals affirmed.

The Texas Supreme Court began its analysis by setting forth generally accepted principles of the full faith and credit doctrine. First, "[a] properly proven foreign judgment must be recognized and given effect coextensive with that to which it is entitled in the rendering state."[102] Second, "[t]he full faith and credit clause requires that a valid judgment from one state be enforced in other states regardless of the laws or public policy of the other states."[103] Third, "[f]ull faith and credit is *not required* . . . when a decree is interlocutory or *subject to modification under the law of the rendering state*."[104] In the present case, the crucial question was whether the final liquidation order was "subject to modification" and, thus, not entitled to full faith and credit.

Under Vermont law, the receivership court retained jurisdiction over the liquidation of Ambassador, with continuing authority to issue further orders or modify existing ones.[105] The court of appeals held that this possibility of modification prevented the order from receiving full faith and credit.[106] In doing so, the court of appeals applied a very narrow, formalistic notion of finality. The Texas Supreme Court opted for a different approach, altering the breadth and depth of the inquiry. First, the court stated that "[t]he fact

99. *Id.* at 792.
100. *Id.* at 793.
101. *Id.*
102. *Id.* at 794 (citing Barber v. Barber, 323 U.S. 77, 79 (1944)).
103. *Id.* (citing Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 714 (1982)).
104. *Id.* (citing *Barber*, 323 U.S. at 81) (emphasis added).
105. *Id.* at 795.
106. *Id.* at 794.

that some parts of an order may be subject to modification does not affect the finality of *other parts* of the same order."[107] This statement shifted the focus of the analysis, from a general examination of the receivership court's orders, to close review of the specific provision at issue: the anti-suit injunction.

Second, the supreme court employed a functional definition of finality in analyzing the anti-suit provision. While acknowledging that the receivership court retained broad authority to modify its orders, the supreme court emphasized the purpose of this continuing authority. The continuing authority existed only to the extent "*necessary* to enable the receivership court to oversee the conduct of the liquidation."[108] Continuing authority merely gave the court the flexibility to address "unforeseen developments."[109]

The anti-suit injunction, on the other hand, formed a fixed part of the liquidation process; "claims were to be brought against the estate according to the procedures set out in the liquidation order and in no other way."[110] In other words, the Vermont court's modification power was in the nature of a reactive instrument, while the anti-suit injunction was in the nature of a fixed procedure. On this view, the anti-suit portion of the order was not a provision that the Vermont court was likely to modify in response to "unforeseen developments." Thus, the supreme court concluded that the anti-suit injunction effectively was final.

The supreme court bolstered its decision in favor of full faith and credit with two further points. First, the court appealed to the first full faith and credit maxim stated above: a foreign judgment is entitled to the same effect it would receive in the foreign state.[111] Under this principle, "[b]ecause the liquidation order was treated as a final, enforceable order in Vermont, that order, including its injunction against suits, must be given full faith and credit by the Texas courts."[112] Second, the court found support for its result in United States Supreme Court precedent.[113] Yet, the important analytical

107. *Id.* (emphasis added).

108. *Id.* at 795 (emphasis added).

109. *Id.*

110. *Id.* The court gleaned further support for this view from the fact that there was "no indication anywhere in the liquidation order that the injunction against bringing or prosecuting suits was subject to modification." *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (citing *Underwriters*, 455 U.S. at 691). United States Supreme Court support for the court's conclusion is not as clear as the court suggested. The court parenthetically described *Underwriters* as "ordering North Carolina court to grant full faith and credit to injunction against bringing or prosecuting suits entered by Indiana receivership court." *Id.* This description, however, misstates the holding in *Underwriters*. *Underwriters* involved a financially troubled Indiana insurance company. The company was rebuilding under the jurisdiction of an Indiana Rehabilitation Court. The company had done business in North Carolina and, as required by North Carolina law, had deposited a substantial bond with North Carolina officials to pay North Carolina insureds in the event that the company became insolvent. The litigation involved the rights to this deposit. The company sought and received a favorable decision from the Indiana Rehabilitation Court regarding the deposit. Subsequently, North Carolina officials sought and obtained a favorable judgment from a North Carolina court regarding the deposit. In the North Carolina action, the Indiana insurer argued for full faith and credit for the Indiana Rehabilitation Court's order. This argument failed. On appeal from the North Carolina decisions, the Supreme Court reasoned that the Indiana ruling was entitled to

move was the supreme court's rejection of a formalistic reading of "finality" in favor of a more functional approach centered on the specific provision sought to be enforced.

Knighton v. International Business Machines Corp.[114] involved a Florida court's order of alimony. In 1983, a Florida court granted Thomas Knighton and Ruth Roskelly a divorce. The court ordered Knighton to pay Roskelly permanent weekly alimony. About a year after the divorce, Knighton moved to Texas. Since the divorce, he had failed to pay alimony. In 1990, Roskelly sought and obtained a Florida court order directing IBM, Knighton's employer since before the divorce, to garnish Knighton's wages to pay for past and future alimony. Since IBM had operations in Florida, the company was subject to the jurisdiction of Florida courts. If IBM refused to garnish its Texas employee's wages, Roskelly could gain a judgment against IBM in Florida. Thus, IBM would be in a difficult position if a Texas authority interfered with the garnishment.

Of course, Knighton filed suit against Roskelly and IBM in Texas to prevent the garnishment. He sought a declaratory judgment that the Florida court's order violated Texas' constitutional prohibition of garnishment of wages. The trial court granted summary judgment for IBM and Roskelly, and Knighton appealed.

On appeal, Knighton made clear that he did not challenge the validity of the Florida judgment, but only the enforcement procedures used to execute that judgment.[115] His challenge rested solely on the following provision of the Texas constitution: "No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments."[116] The court of appeals appeared to meet this contention head on with its initial appeal to the Full Faith and Credit Clause.[117] The court invoked a central concept in full faith and credit jurisprudence: "A state cannot deny full faith and credit to another state's judgment solely on the ground that it offends the public policy of the state where it is sought to be enforced."[118] The court then seemed ready to enforce the Florida gar-

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full faith and credit unless it could be shown that the Indiana Rehabilitation Court lacked subject matter or personal jurisdiction. *Underwriters*, 455 U.S. at 704-05. The United States Supreme Court concluded that res judicata prohibited relitigation of jurisdiction in North Carolina because the North Carolina officials had had a full and fair opportunity to argue those issues in the Indiana proceeding. *Id.* at 710, 714; *see* Durfee v. Duke, 375 U.S. 106, 111 (1963) ("a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the original judgment."). Consequently, the Indiana ruling was entitled to full faith and credit. Thus, *Underwriters*, while perhaps relevant to the court's analysis in *Bard*, does not stand for the proposition advanced by the court. Other authority, however, does state the proposition. *See* Brown v. Link Belt Div. of FMC Corp., 666 F.2d 110, 115 (5th Cir. 1982); State *ex rel.* Low v. Imperial Ins. Co., 682 P.2d 431, 439 (Ariz. Ct. App. 1984); Integrity Ins. Co. v. Martin, 769 P.2d 69, 70 (Nev. 1989); Nasef v. U & I Invs. Inc., 755 P.2d 136, 138 (Or. 1988).

114. 856 S.W.2d 206 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

115. *Id.* at 208.

116. TEX. CONST. art. XVI, § 28 (1876, amended 1983).

117. *Knighton*, 856 S.W.2d at 209.

118. *Id.*

nishment order over the contrary public policy embodied in the Texas constitution. The court, however, avoided such a holding. Instead, it appealed to the procedural posture of the case. The court reasoned that the Texas Constitution only applies to Texas court-ordered garnishment of wages.[119] In the present action, on the other hand, IBM independently garnished Knighton's wages due to the threat of reprisal in Florida. Roskelly and IBM merely asked the Texas court to "not interfere." Thus, IBM's garnishment did not violate the Texas Constitution.

The court of appeals' holding, then, was based on an interpretation of the Texas Constitution, rather than an enforcement-of-judgments rationale. Whether the court of appeals was correct is an issue beyond the scope of this Survey Article.[120] An interesting issue arises, however, if one assumes that the Texas Constitution prohibited IBM's garnishment. That scenario could pose a conflict between the Full Faith and Credit Clause and the Texas Constitution. The conflict, however, is resolved easily. If the Full Faith and Credit Clause requires enforcement of a foreign garnishment order in violation of the Texas Constitution, the Texas Constitution must yield. This result is mandated by the Supremacy Clause of the Federal Constitution.[121] Thus, the question reduces to whether the Full Faith and Credit Clause in fact requires a state to recognize and implement the enforcement measures contained in a foreign court's judgment. If so, that requirement would supersede any requirement in the Texas Constitution.

The United States Supreme Court long ago answered this issue in the negative. In *McElmoyle v. Cohen*[122] the Court addressed an attempt to enforce a South Carolina judgment in Georgia. Georgia placed a five year statute of limitations on the enforcement of foreign judgments. South Carolina, on the other hand, placed no limitations period on the enforcement of judgments entered by its own courts. McElmoyle brought a suit to enforce a South Carolina judgment in a Georgia federal circuit court. The suit was filed

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119. *Id.* at 210 ("This is *not* a case wherein a party is seeking a Texas court order garnishing wages for the enforcement of a valid judgment.").

120. The issue presumably hinges upon the definition of "garnishment." In other words, does a Texas employer's withholding of wages due to a continuing threat of sanction in another state's courts constitute garnishment within the meaning of the Texas constitution. In Beggs v. Fite, 103 Tex. 46, 106 S.W.2d 1039 (Tex. 1937), the Texas Supreme Court stated that "[g]arnishment is a statutory proceeding whereby the property, money, or credits of one person in the possession of, or owing by another are applied to the payment of the debt of a debtor by means of proper statutory process issued against the debtor and the garnishee." *Id.* at 1042. This definition was subsequently explained in Orange County v. Ware, 819 S.W.2d 472 (Tex. 1991), which made clear that garnishment involved *three* parties, and, thus, an employer's offset of an employee's wages against an employee's debt owed the employer was *not* garnishment. *Id.* at 475 (employer's "withholding of [employee's] salary involves only those two parties and not a third party necessary for a garnishment.").

121. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the *Constitution* or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added).

122. 38 U.S. (13 Pet.) 312 (1839).

seven years after entry of the South Carolina judgment. Thus, the suit would have been timely in South Carolina, but was beyond the limitations period in Georgia. Of course, Cohen sought to dismiss the enforcement suit on the basis of the statute of limitations. The circuit court certified the question to the Supreme Court.

In the Supreme Court, McElmoyle argued that Georgia denied full faith and credit to the South Carolina judgment by not allowing as long a period to enforce the judgment as South Carolina allowed. The argument was based on the accepted full faith and credit doctrine that "[t]he judgment of a state Court should have the same credit, validity, and effect, in every other Court of the United States, which it had in the state where it was pronounced."[123] Under this reasoning, since the South Carolina judgment was not subject to a statute of limitations defense in South Carolina, neither should it be subject to that defense in Georgia.[124] The Supreme Court rejected this argument. The Court explained that a foreign judgment "does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and *can only be executed in the latter as its laws permit.*"[125] Under this reasoning, the question became whether the statute of limitations is a doctrine "that settles the right of a party on a contract or judgment, or one that bars the *remedy.*"[126] The Court concluded that the statute of limitations affects the remedy and, thus, could bar enforcement of the South Carolina judgment.[127]

B. COMITY

In *Keene Corp. v. Caldwell*[128] a Texas Court of Appeals invoked the concept of comity among states in reaching its decision. The appeal to comity

123. Hampton v. McConnell, 16 U.S. (3 Wheat.) 234, 235 (1818).

124. *McElmoyle*, 38 U.S. (13 Pet.) at 314.

125. *Id.* at 325 (emphasis added); *see also* Sistare v. Sistare, 218 U.S. 1, 26 (1910) ("mere modes of execution provided by the laws of a State in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another state"). This principle, however, is subject to an important caveat. The forum state cannot manipulate its jurisdictional rules to effectively eliminate enforcement of rights arising under the laws of another state. *See* Hughes v. Fetter, 341 U.S. 609, 611 (1950) (states "cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent.") (footnote omitted); Broderick v. Rosner, 294 U.S. 629, 643 (1934) (state "may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties.").

126. *McElmoyle*, 38 U.S. (13 Pet.) at 327 (emphasis added).

127. *Id.* at 328 ("the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina".). *Cf.* Cole v. Cunningham, 133 U.S. 107, 112 (1890) (Full Faith and Credit Clause "did not make the judgments of the States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other states, and they enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments.").

128. 840 S.W.2d 715 (Tex. App.—Houston [14th Dist.] 1992, no writ).

went largely unexplained. Thus, before examining the court's rationale, a brief discussion of comity is in order.

The concept of comity arose as a justification for one sovereign nation applying the law of another sovereign nation.[129] The United States Supreme Court explained this doctrine of international choice of law as follows:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested.
>
> 'Comity,' in the legal sense, is *neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will*, upon the other. But it is the recognition which one nation allows within territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[130]

Comity, then, exists somewhere in the twilight between "absolute obligation" and "courtesy and good will." Justice Joseph Story, in his *Commentaries on the Conflict of Laws*, expressed similar thoughts:

> It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests. And it has been suggested, that the doctrine rests on a deeper foundation; that it is not so much a matter of comity, or courtesy, as a matter of paramount moral duty. Now, assuming, that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded. And, certainly there can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interest of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust.[131]

Comity, then, justified the extension of one nation's law within the borders of another nation. Comity has also been invoked in support of the recognition and enforcement of a foreign nation's judgments.[132] These positions are quite sensible. In the international arena, comity is a necessary constraining force when nations have no reason or duty to apply another nation's law or

129. *See* Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

130. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (emphasis added).

131. Joseph Story, *Commentaries on the Conflict of Laws* § 33, at 40-41 (5th ed. 1857) (footnotes omitted).

132. Schibsby v. Westonhaltz, (1870), L.R. 6 Q.B. 155, 40 L.J.Q.B. 73, 24 L.T. 93, [1861-1873] All E.L. Rep. 988.

recognize its judgments.[133] This rationale transports well to American domestic choice of law, where states are largely free to ignore the law of other states, subject only to the constraint of due process. The Texas Court of Appeals, however, transported comity from choice of law to recognition of a foreign state's judgments. In the judgments context, the Full Faith and Credit Clause already provides a full measure of interstate regulation. Comity would seem to have little or no role to play.[134] The question, then, becomes whether the court of appeals elaborated a meaningful role for comity.

Keene is encouraging, but incomplete, in fleshing out comity. *Keene* involved two asbestos personal injury cases. In each case, the plaintiffs sought discovery of three depositions taken in a prior federal asbestos lawsuit against the defendant. The federal district court presiding over that prior suit had issued a protective order sealing these depositions. Nevertheless, the Texas district court ordered the defendant to produce the documents. The defendant sought a writ of mandamus.

The court of appeals reversed the district court, resting its decision largely on comity.[135] The court reasoned:

> [W]e believe a situation such as this goes to the very heart of the concept of comity. Comity is a principle in which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a *matter of obligation*, but out of *deference* and *respect*. To allow one court to intrude upon the orders of another is not in the interest of *judicial economy* and is *inappropriate without concrete public policy concerns*.[136]

The court of appeals sounded familiar themes when it described comity as a matter of "deference and respect," rather than a force of "obligation." Due to the brevity of the discussion, however, it is unclear whether "judicial economy" and "public policy" will serve as the touchstones of a new theory of comity. The rule could be stated as follows: when a foreign court's order or judgment is not entitled to full faith and credit, the order or judgment shall be enforced if it would be in the interest of judicial economy to do so, unless enforcement would contravene a concrete public policy of the state of Texas. This rule would have the significant effect of guiding the enforcement of all non-final foreign judgments which, by definition, are not entitled to full faith and credit.[137] Of course, the concepts of "judicial economy" and "concrete public policy," which go unexplained in *Keene*, will have to be elabo-

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133. *See* Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 371 (1945).

134. *Id.*

135. The court of appeals also invoked the Full Faith and Credit Clause. *Keene*, 840 S.W.2d at 720. It did no more than "invoke" the Clause, however, asserting a conclusion without reasoning. *Id.* ("A protective order, especially one that is relied on by the parties, is entitled to full faith and credit protection."). Yet, it is far from clear that a non-final, modifiable protective order is entitled to full faith and credit. *See* ACandS, Inc. v. Askew, 597 So. 2d 895, 898 (Fla. Dist. Ct. App. 1992) (no full faith and credit for federal protective order).

136. *Keene*, 840 S.W.2d at 720 (citation omitted) (emphasis added).

137. Additionally, judgments of tribal courts are not necessarily entitled to full faith and credit. *See* Brown v. Babbit Ford, Inc., 571 P.2d 689, 694-95 (Ariz. Ct. App. 1977) (enforcing the judgment of a tribal court on grounds of comity).

rated upon in future cases. Yet, they are not concepts wholly foreign to the law.[138] Thus, *Keene* may have sown the seeds of a meaningful "comity" doctrine beyond the Full Faith and Credit Clause.

IV. PERSONAL JURISDICTION

This Survey period saw several routine personal jurisdiction cases.[139] Before turning to a discussion of these cases, this section of the Article opens with a brief overview of the Texas personal jurisdiction analysis.[140]

Texas personal jurisdiction analysis asks two questions: (1) may Texas exercise jurisdiction under a state long-arm statute;[141] and (2) does the exercise of jurisdiction offend the due process guarantees of either the state[142] or the

138. *See, e.g.*, State Farm Fire & Casualty Co. v. S.S., 858 S.W.2d 374 (Tex. 1993) ("Our system of appellate review, as well as judicial economy, is better served when appellate courts only consider those summary judgment issues contemplated and ruled on by the trial court."); Bard v. Charles R. Myers Ins. Agency, Inc., 839 S.W.2d 791, 796 (Tex. 1992) (Texas compulsory counterclaim rule and Vermont receivership court's anti-suit injunction both served a "compelling interest" in judicial economy); Barr v. Resolution Trust Corp., 837 S.W.2d 627, 629 (Tex. 1992) ("The policies behind the doctrine [of claim preclusion] reflect the need to . . . promote judicial economy . . . ."); TEX. PROB. CODE ANN. § 5A(d) (Vernon Supp. 1993) ("A statutory probate court may exercise the pendant and ancillary jurisdiction necessary to promote judicial efficiency and economy.").

Recall that the concept of "concrete public policy" plays an important role in analysis of contractual choice of law provisions under § 187 of the *Restatement (Second)*. As discussed above, a party's contractual choice of law cannot override a "fundamental policy" of a state with a "materially greater interest than the chosen state in the determination of the particular issue." RESTATEMENT (SECOND), *supra* note 2, § 187(2)(b); *see* Desantis v. Wackenhut Corp. 793 S.W.2d 670, 679 (Tex. 1990) (Texas has a "fundamental policy" interest in policing covenants not to compete).

139. One court of appeals case discussed when the personal jurisdiction inquiry is *not* appropriate. In State v. Taylor, 838 S.W.2d 895 (Tex. App.—Houston [1st Dist.] 1992, no writ), a husband and wife divorced in Texas and the husband was ordered to pay monthly child support. Soon thereafter, the wife moved to Wisconsin. At some point, the husband stopped paying child support. Under Wisconsin law, failure to pay child support owed a Wisconsin resident constitutes the commission of a felony *in Wisconsin*. Thus, Wisconsin sought to have the husband extradited. In the Texas extradition proceeding, the husband argued that Wisconsin did not have personal jurisdiction over him. The court of appeals rejected this argument, stating that the " 'minimum contacts' analysis is not applicable to establish jurisdiction in criminal prosecutions." *Id.* at 897.

140. For a fuller discussion of general Texas personal jurisdiction, see McGreal, *supra* note 57, at 1146-48.

An important procedural device, the special appearance, is not covered in this Article. The special appearance is a foreign defendant's only means of raising the issue of personal jurisdiction in a Texas court. If not done properly, the defendant's actions could constitute a general appearance that waives the issue of personal jurisdiction. Rule 120a of the *Texas Rules of Civil Procedure* governs the special appearance. The cases discussing special appearance are covered in the civil procedure article of this Survey. *See* Ernest E. Figari, *et al.*, *Texas Civil Procedure, Annual Survey of Texas Law*, 47 SMU L. REV. 1677 (1994); *see, e.g.*, Whiskeman v. Lama, 847 S.W.2d 327, 330 (Tex. App.—El Paso, 1993, no writ) ("by filing . . . appeal by writ of error, defendant . . . entered a general appearance . . . thus submitting to the personal jurisdiction of the trial court."); N.H. Helicopters, Inc. v. Brown, 841 S.W.2d 424, 425 (Tex. App.—Dallas 1992, no writ) ("An order overruling a special appearance is interlocutory and not subject to immediate appeal"; appeal after final judgement is an adequate remedy at law such that mandamus does not lie).

141. *See* TEX. CIV. PRAC. & REM. CODE. ANN. §§ 17.041-17.069 (Vernon 1986 & Supp. 1994) (long-arm statute for claims on business transactions or torts).

142. TEX. CONST. art I, § 19 ("No citizen of this State shall be deprived of life, liberty,

federal[143] constitutions.[144] The first question largely collapses into the second, as the Texas Supreme Court generally reads the Texas long-arm statutes to authorize jurisdiction coextensive with the limits of due process.[145] Next, due process analysis poses two further questions: (1) has the defendant *purposefully* established "minimum contacts" with Texas; and (2) does Texas' "assertion of jurisdiction comport with fair play and substantial justice."[146] If the defendant has established minimum contacts with Texas, it is unlikely that a Texas court's exercise of jurisdiction will offend fair play and substantial justice.[147]

In applying the due process test, Texas courts have distilled two basic types of personal jurisdiction: specific and general.[148] Specific jurisdiction occurs when the plaintiff's underlying claim arises from the defendant's contacts with Texas.[149] General jurisdiction, on the other hand, occurs when the defendant maintains "substantial activities" within Texas that are "continuing and systematic," regardless of the connection between the "defend-

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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").

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

144. Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990)

145. For example, one provision of the Texas long-arm statute authorizes jurisdiction over 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 (emphasis added). Three Fifth Circuit cases decided during this Survey period also recognized this principle of Texas personal jurisdiction law. Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1205 (5th Cir. 1993) ("The Texas Long-Arm Statute reaches as far as constitutionally permitted, and the personal jurisdiction inquiry collapses into one of due process only."), *cert. denied*, 62 U.S.L.W. 3430 (U.S. Feb. 22, 1994) (No. 93-993); Asociacion Nacional Des Pescadores A Pequena Escala O Artesanales De Colombia v. Dow Quimica De Colombia S.A., 988 F.2d 559, 567 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3446 (U.S. Jan. 10, 1994) (No. 93-592); Aviles v. Kunkle, 978 F.2d 201, 204 (5th Cir. 1992) ("Because Texas' long-arm statute extends personal jurisdiction to the constitutionally permissible limits of due process, the determination of personal jurisdiction compresses into a due process assessment.") (citations omitted).

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

147. *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 80, 86 (Tex. 1992) ("Once minimum contacts 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." *Id.* at 358.

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

149. *Id.* at 357.

ant, forum, and litigation."[150] Since specific jurisdiction requires a closer nexus among "defendant, forum, and litigation," such jurisdiction requires less continuous or systematic contacts with Texas.[151]

As noted above, the Texas Supreme Court has read the Texas long-arm statutes to confer jurisdiction as broadly as due process allows.[152] In the two Texas personal jurisdiction cases addressed in this Survey, however, both courts discussed the applicability of the long-arm statute separately from due process. Both cases involved the statute authorizing personal jurisdiction over companies "doing business" in Texas.[153] The analysis in these cases suggests that the "doing business" requirement and due process tests have substantive differences.

In one of the cases, *Central Texas Cattle Co. v. McGinness*,[154] the court's choice to separately analyze the long-arm statute and due process led to further problems. The court concluded that none of the defendants were "doing business" in Texas and, thus, that "the Texas long-arm statute does not authorize the exercise of personal jurisdiction over [them]."[155] The court then compounded its error by proceeding to analyze personal jurisdiction under the due process test.[156] Personal jurisdiction, however, requires that *both* the long-arm statute and due process be satisfied. When the court concluded that the long-arm statute did not allow jurisdiction over any of the defendants, the analysis was at an end. Thus, given that the long-arm statute analysis disposed of the case, the due process analysis was dicta.[157]

In *Temperature Systems, Inc. v. Bill Pepper, Inc.*[158] the court of appeals concluded that the long-arm statute reached the defendant, and, thus, the court properly reached the question of due process. The case involved a suit by Bill Pepper, Inc. against Temperature Systems, Inc. (TSI). TSI was a distributor of heating, ventilation, and air conditioning equipment. Bill Pepper, Inc. (BPI) recruited and placed executive personnel in the heating and air conditioning industry. TSI and BPI orally agreed that BPI would find sales representative candidates for TSI, and that TSI would pay BPI a com-

150. *Id.*
151. *Id.*
152. *See supra* note 145 and accompanying text.
153. TEX. CIV. PRAC. & REM. CODE. ANN. § 17.042 (Vernon 1986).
154. 842 S.W.2d 388 (Tex. App.—San Antonio 1992, no writ).
155. *Id.* at 391.
156. *Id.* at 391-92.
157. In that dicta, the court concluded that the defendants had "affirmatively demonstrated a lack of minimum contacts with this state and that exercise of jurisdiction by Texas courts would not comport with fair play and substantial justice." *Id.* at 392. The defendants had challenged personal jurisdiction by special appearance. In that proceeding before the district court, the defendants bore the burden of disproving personal jurisdiction. *See* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 203 (Tex. 1985). The district court found that it did not have jurisdiction, but its ruling contained no findings of fact or conclusions of law. Thus, on appeal, the court of appeals was required to presume that the trial court made all necessary findings to support its decision. *See* Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989). The plaintiff did not overcome these presumed findings and, thus, the court of appeals affirmed the trial court's dismissal for lack of personal jurisdiction. *Central Texas Cattle*, 842 S.W.2d at 392.
158. 854 S.W.2d 669 (Tex. App.—Dallas 1993, writ dism'd by agr.).

mission for each BPI candidate TSI hired. BPI referred TSI a candidate named Steve Ross. TSI did not initially hire Ross, but reconsidered him five months later and eventually hired him. TSI did not pay a commission to BPI. Upon learning that TSI had hired Ross, BPI demanded a commission from TSI. When TSI refused to pay, BPI brought suit in Texas. TSI filed a special appearance that the district court overruled. At trial, the jury found for BPI. TSI appealed the overruling of the special appearance.

Before proceeding to the court of appeals' due process analysis, a brief description of TSI's Texas contacts is helpful. TSI did not sell equipment in Texas, and neither advertised nor solicited business in Texas. TSI was not licensed to do business in Texas and did not have offices, personnel, or assets in Texas. TSI maintained an "inter-distributor relationship" with other equipment distributors throughout the country. Through this relationship, distributors supplied one another with equipment that they did not have in stock at a given time. Under this arrangement, TSI had purchased about $500,000 in equipment from Texas distributors. Lastly, TSI entered into a contract with a Texas corporation, BPI, and was to make payments to BPI in Texas.

The court of appeals easily disposed of the issue of specific jurisdiction. TSI had few contacts with Texas relating to the contract forming the basis of the suit. Indeed, most of the contacts alleged by BPI were, as the court of appeals noted, the unilateral actions of BPI:

> (1) making seventeen phone calls from Texas to TSI, (2) performing a search from Texas for TSI, (3) recruiting Steve Ross, a Wisconsin resident, from Texas, (4) conducting a background check of Steve Ross from Texas, (5) checking Ross' references from Texas, (6) forwarding Ross' resume to TSI from Texas, (7) scheduling an interview for Steve Ross from Texas, and (8) forwarding numerous items of correspondence from Texas to TSI.[159]

The court noted that BPI's "unilateral actions in soliciting a contract or in carrying out the terms of a contract are irrelevant to a due process consideration."[160] This left TSI with no contacts to Texas that related to the contract action. Thus, the court held that the district court did not have specific personal jurisdiction over TSI.[161]

In addressing the question of general jurisdiction, the court was able to consider TSI's other contacts with Texas. Specifically, the court focused on TSI's inter-distributor relationship with Texas distributors. The court noted that over the period from 1987 through 1990, TSI purchased "a large amount of equipment" from Texas sources.[162] The court also noted that there was no evidence that these purchases had decreased over time. The court characterized these purchases as "continuous and systematic" contacts

159. *Id.* at 675.

160. *Id.* (citing U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978)).

161. *Id.*

162. *Id.* at 676.

with Texas, a key finding for purposes of general jurisdiction.[163] Next, the court found that these continuous dealings with Texas firms showed TSI's intent to "purposeful[ly] avail[] [itself] of the privilege of conducting business in Texas so that TSI should reasonably anticipate being called into court in Texas."[164] Concluding its due process analysis, the court found that it would not violate "fair play and substantial justice" to subject TSI to suit in Texas.[165] It based this conclusion on two findings: (1) TSI's contacts with Texas implied that it would not unduly burden TSI to defend the suit in Texas; and (2) Texas has a significant interest in litigating the rights of a Texas plaintiff — BPI.[166] On this analysis, the court held that the district court may properly exercise personal jurisdiction over TSI.[167]

V. CONCLUSION

Once again, choice of law proved troublesome for Texas courts. The courts did not consistently locate or apply the *Restatement (Second)*'s myriad rules. Perhaps that is the price for an "approach" to choice of law that often encourages little more than gestalt jurisprudence. Yet, as the Texas Supreme Court has shown, a disciplined application of the *Restatement (Second)* can give structure to the analysis. In retroactivity, the Texas Supreme Court has continued its development of the justifiable reliance test. And, in personal jurisdiction, application of the due process test continued in unsurprising fashion. Lastly, enforcement of foreign judgments offered a grab bag of interesting issues. Most unusual was the emergence of comity as an independent basis for enforcement of foreign judgments not otherwise entitled to full faith and credit. An assessment of the significance of this development must await future treatment in the case law.

163. *Id.*
164. *Id.*
165. *Id.* Texas courts consider several factors in considering whether personal jurisdiction will offend notions of fair play and substantial justice. *See supra* note 147.
166. *Temperature Systems*, 854 S.W.2d at 676.
167. *Id.*