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Conflict of Laws

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CONFLICT OF LAWS

by

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Conflict of laws involves problems conveniently grouped under the headings of jurisdiction, choice of law, and judgments. During the previous survey period major developments occurred nationally in all three areas. This year, however, the major developments involved Texas jurisdiction cases and national and Texas developments in the area of judgments.

I. JURISDICTION

A. Long-Arm Jurisdiction in Texas: Article 2031b

Under article 2031b,[1] Texas' long-arm jurisdiction statute, a court must answer a defendant's contest of jurisdiction by examining two distinct issues: first, whether the statutory requirements have been met and secondly, whether assertion of jurisdiction exceeds constitutional limits. This approach was discussed by the Court of Appeals for the Fifth Circuit in *Prejean v. Sonatrach, Inc.*[2]

Plaintiffs' husbands were employees of a Dallas engineering firm which entered into a contract with defendant Sonatrach, Inc. to provide technical assistance for projects conducted in Algeria. While performing contractual duties in Algeria, the husbands were killed in the crash of an airplane that

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1. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1982). Article 2031b provides:

> Any foreign corporation, association, joint stock company, partnership, or nonresident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

Id. § 3. Article 2031b is only one of a number of devices a plaintiff may use to obtain jurisdiction over a nonresident defendant. *See, e.g., id.* art. 2039a (Vernon 1964) (long-arm motorist statute). *See also* TEX. R. CIV. P. 108, which provides for service of notice of pending litigation on defendants not present within the state.

2. 652 F.2d 1260 (5th Cir. 1981). *See also* Jim Fox Enterprises, Inc. v. Air France, 664 F.2d 63 (5th Cir. 1981).

was manufactured by defendant Beech Aircraft Corporation, owned by defendant Air Algeria, and chartered by Sonatrach. All three defendants were nonresidents of Texas. The plaintiffs filed wrongful death actions in a federal district court in Texas, alleging personal jurisdiction over the nonresident defendants by virtue of article 2031b. The district court dismissed the action against all three defendants for lack of personal jurisdiction.[3]

The precise issue facing the court was whether article 2031b definitionally authorizes exercise of jurisdiction to constitutional limits. The court noted that the literal language of the long-arm statute suggests that a nexus must exist between a cause of action and a defendant's contacts with Texas.[4] Thus, the court rejected plaintiff's contention that the Texas Supreme Court, in *U-Anchor Advertising v. Burt*,[5] interpreted article 2031b broadly, so as to reach all claims compatible with the limits of due process, regardless of their relationship to a defendant's activities within the state.[6] The court, noting that Texas courts have recognized this nexus requirement,[7] concluded that until such time as article 2031b is amended by the Texas Legislature, suits relying on 2031b must involve designated causes of action that arise out of the defendant's contacts with Texas.[8]

The *Prejean* court then decided whether the three defendants were amenable to process under the long-arm statute. The court held that Air Algeria was not amenable to jurisdiction because the economic effect of an alleged tortious act in Algeria with only fortuitous impacts on Texas survivors was simply an insufficient basis on which to establish jurisdiction.[9] Beech could not be sued in Texas because the cause of action did not arise from Beech's activities in Texas and, therefore, did not meet the requirements of the Texas statute.[10] Since the record as developed by the lower court was inconclusive, the court reversed and remanded for further dis-

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3. *Id.* at 1264.

4. *Id.* at 1265. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 2031b, § 2 (Vernon 1964), which restricts amenability to process to "any action . . . *arising out of* . . . business" in Texas. (emphasis added)

5. 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). The defendant in *U-Anchor* was doing business in Texas as defined in article 2031b. Amenability to suit was denied, however, on constitutional grounds. The Texas Supreme Court noted that courts need to "focus on the constitutional limitations of due process" in construing the reach of article 2031b. 553 S.W.2d at 762.

6. 652 F.2d at 1265-66. In so holding, the court expressly disapproved the language in Navarro v. Sedco, Inc., 449 F. Supp. 1355 (S.D. Tex. 1978), that indicated that a nexus was not required. 652 F.2d at 1267.

7. 652 F.2d at 1266 n.8. The court noted that in some Texas cases the nexus requirement is recognized as having a purely statutory origin. *Id. See, e.g.*, Diversified Resources Corp. v. Geodynamics Oil & Gas, Inc., 558 S.W.2d 97 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). Other cases could be interpreted as supporting a constitutional basis for the nexus requirement. *See, e.g.*, Computer Synergy Corp. v. Business Sys. Prods., Inc., 582 S.W.2d 573, 576 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). The vast majority of Texas cases, however, simply require a nexus. *See Prejean*, 652 F.2d at 1266 n.8.

8. 652 F.2d at 1267.

9. *Id.* at 1269-70.

10. *Id.* at 1270.

covery with regard to Sonatrach.[11]

It is not surprising that the Fifth Circuit concluded that article 2031b authorizes exercise of jurisdiction over nonresident defendants only when the suit involves a cause of action that arises out of a specific designated contact with Texas. Constitutional developments at the time article 2031b was promulgated clearly supported exercises of jurisdiction only in such cases.[12] Accordingly, the question that arose most frequently in the early years of the operation of the statute was whether exercises of jurisdiction under the statute were constitutional. More recently the Supreme Court of the United States has modified the substantive due process constraints on exercise of jurisdiction.[13] Now the question is less likely to be whether a clearly authorized exercise of jurisdiction is constitutional, but whether a constitutional exercise of jurisdiction is authorized.

Several approaches might be followed in seeking a solution to this difficulty. The obvious solution is to amend article 2031b to make it clear that it authorizes exercise of jurisdiction to the extent of constitutional limits.[14] This has not been done.[15] Alternatively the problem could be addressed in the rules of procedure as issued by the Supreme Court of Texas. This has been done,[16] but the validity of this approach under terms of the Texas Constitution has been sharply questioned.[17] Finally, article 2031b itself could be interpreted as expansively as possible. This is the approach followed by the Supreme Court of Texas in the recent case of *Hall v. Helicopters Nationales De Colombia, S.A. ("Helicol").*[18]

In the *Hall* case the plaintiffs were survivors of Americans who were killed in a helicopter crash in Peru. The facts of the case revolve around a contract between the Peruvian state owned oil company and an American joint venture. The American joint venture agreed to construct a pipeline from the jungles of Peru to the Pacific Ocean. The joint venture was composed of three American corporations who had joined for the sole purpose

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11. *Id.* at 1270-71.

12. *See generally* Wilson, *In Personam Jurisdiction Over Non-Residents: An Invitation and a Proposal*, 9 BAYLOR L. REV. 363 (1957).

13. *See generally* Rush v. Savchuk, 444 U.S. 320 (1980), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), Kulko v. Superior Court, 436 U.S. 84 (1978), Shaffer v. Heitner, 403 U.S. 186 (1977).

14. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1982).

15. While the general statute has not been so amended, some specific statutes have. For instance, section 3.26 of the Family Code provides:

> If the petitioner is a resident or domiciliary of this state at the commencement of a suit for divorce, annulment, or to declare a marriage void, the court may exercise personal jurisdiction over the respondent. . .although the respondent is not a resident or a domiciliary of this state if. . .there is any basis consistent with the constitution of this state or the United States for the exercise of the personal jurisdiction.

TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1982).

16. *See* TEX. R. CIV. P. 108 (Vernon 1982).

17. *See* Newton, *Conflict of Laws, Annual Survey of Texas Law*, 33 SW. L.J. 425, 435 (1979). *See also* Placid Investments, Ltd. v. Girard Trust Bank, 663 F.2d 1176 (5th Cir. 1981).

18. 25 Tex. S. Ct. J. 190 (1982).

of performing the contract in Peru. Two of the three corporations were Texas corporations. The third corporation had extensive contacts with Texas, but these corporations, individually or in their joint venture status, were not being sued. Rather it was another corporation, Helicol, which had contracted with the joint venture to provide helicopter service in Peru. Plaintiff Hall relied upon the following contacts: (1) a pre-contract visit of a Helicol officer to Texas to discuss capacity to supply helicopter service, (2) a purchase by Helicol over a period of six years of most of its equipment and supplies from Bell Helicopter in Fort Worth, (3) payment to Helicol by the joint venture with checks drawn on a Houston bank, (4) training of Helicol's pilots and personnel in Texas and (5) Helicol's agreement to carry insurance measured in United States dollars.[19]

Two questions arise: whether these facts satisfy article 2031b and whether jurisdiction, if authorized, is consistent with the due process requirements of the constitution.

The Court of Civil Appeals interpreted article 2031b as requiring a showing that the defendant had either committed a tort in Texas or entered into a contract to be performed in whole or in part in Texas.[20] The Supreme Court of Texas disagreed and held that such an interpretation improperly restricts the reach of the statute. Article 2031b provides:

> For the purpose of this Act, and without including other acts that may constitute doing business, any (foreign defendant) shall be deemed doing business in this State by entering into a contract . . . to be performed in whole or in part . . . in this State, or the committing of any tort in whole or in part in this State.[21]

The phrase "and without including other acts that may constitute doing business" was labeled "catchall language" to be used to expand the scope of article 2031b "to the full extent of jurisdiction over a nonresident defendant whenever doing so is consistent with due process."[22] As pointed out by the court, this permits courts to avoid difficulties inherent in defining "doing business" and proceed to the important question of whether a given exercise of jurisdiction is consistent with due process. Clearly the court is correct in its description of the effect of this expansive use of the catchall language and therefore this authoritative statement is welcome indeed. The statute as a whole, however, read in its historical context, was at best ambiguous—it is certainly plausible to read it as requiring satisfaction of the "tort" or "contract" elements. Indeed, in 1979 the Texas Legislature amended article 2031b to add "The Act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside

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19. *Id.* at 191.

20. Helicopteros Nacionales De Colombia, S.A. v. Hall, 616 S.W.2d 247 (Tex. Civ. App. —Houston [1st Dist.] 1981, *aff'd*, 25 Tex. S. Ct. J. 190 (Feb. 24, 1982)).

21. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1982).

22. 25 Tex. Sup. Ct. J. at 191 (citing U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.-Austin 1973, writ ref'd n.r.e.); Thode, *In Personam Jurisdiction; Article 2031b, The Texas 'Long-Arm' Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 307-08 (1964)).

or outside of Texas shall be deemed doing business in this State."[23] To the extent that the 1959 catchall language extends jurisdiction to constitutional limits, this amendment was unnecessary. Such a state of affairs raises interesting questions of statutory interpretation.[24]

Those questions of statutory interpretation are of historical interest only. But two other questions raised by the *Hall* case are of great prospective interest. First, is the catchall language broad enough to extend jurisdiction to the constitutional limits in every case? And second, can article 2031b, as interpreted, be used directly with Texas Rules of Civil Procedure?

The catchall language is "and without including other acts that may constitute doing business."[25] This language is broader than the language of either the "tort" or "contract" provisions. In any instance where ordinary language usage would apply, statutory authorization exists. Rare occasions may arise, however, where the specific "tort" or "contract" provisions cannot be invoked and where the basis of the assertion of jurisdiction does not come within the ordinary meaning of doing business. For instance, in the case of *Taylor v. Texas Department of Public Welfare*,[26] a paternity and child support case, the Court of Appeals concluded that the fathering of an illegitimate child was not a tortious act. No contract was involved in that case. And no normal interpretation of "doing business" would encompass the acts upon which jurisdiction was predicated. Because this type of case could arise, a statutory enactment clearly extending the jurisdiction of Texas courts to the limits permitted by due process is still necessary.

As written, article 2031b provides that nonresidents who do business in Texas must designate an agent for service of process. If no agent is designated then by law there is a conclusive presumption of designation of the Secretary of State as agent for service of process. Service under 2031b involves application of statutory provisions for service on the Secretary who in turn "notifies" the defendant.[27] Where the statute authorizing jurisdiction does not include any specific method for service of citation[28] it is clear that the Texas Rules of Civil Procedure may be used. But may a plaintiff rely on the catchall language of 2031b and turn to the Texas Rules of Civil Procedure instead of 2031b for service of citation authorization? While the Texas Supreme Court ultimately may authorize such a procedure, a cautious attorney will be sure to use the service method of 2031b when using its statutory authorization. A statutory authorization extending the jurisdiction of Texas courts to constitutional limits but not in-

23. TEX. REV. CIV. STAT. ANN. art 2031b, § 4 (Vernon Supp. 1982).

24. If the 1959 language goes to constitutional limits then the unnecessary 1979 amendment must mean either that the legislators did not understand their own law or they knew it and nonetheless chose to add an unnecessary amendment to the statute. Normal rules of interpretation are, of course, the reverse. When normal rules are applied, however, the catchall language cannot be read to extend jurisdiction to constitutional limits.

25. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

26. 549 S.W.2d 422 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

27. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

28. *See, e.g.*, TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1982).

cluding a specific method of service of citation would permit use of the Texas rules of procedure.

After determining that there was statutory authorization for exercise of jurisdiction, the court in *Hall* turned its attention to a consideration of due process mandates. After an altogether excellent discussion of due process and the recent United States Supreme Court cases on the subject, the majority concluded that jurisdiction could not be constitutionally exercised in this case.[29]

Other cases raised the central question of the constitutionality of jurisdictional exercises during the survey period.[30] Several of these cases involved agency questions. In a per curiam opinion in *Applied Polymers of America v. Wright Waterproofing Co.*[31] the Texas Supreme Court addressed agency in the context of the exercise of personal jurisdiction over nonresidents. Long-arm jurisdiction had been successfully exercised by virtue of petitioner, a foreign corporation, having a sales representative in Texas.[32] The court refused petitioner's application of writ of error[33] but noted that the refusal was not "to be interpreted as approving the court of civil appeals language (implying) that a sales representative is in every instance the agent of an out-of-state defendant."[34] Rather, where the evidence so indicates, a sales representative may be an independent contractor.[35] In *La Quinta Motor Inns, Inc. v. Schmelig Construction Co.*[36] the question that arose was whether guaranteeing the construction contract of a subsidiary subjected the parent corporation to jurisdiction in a Texas court. The subsidiary corporation entered into contracts with La Quinta Motor Inns to build motels in Tennessee, Nevada, Alabama, Texas, and Florida. Schmelig, the parent corporation, guaranteed the performance of the subsidiary only on the Florida project. The court held that the facts that the parent had guaranteed the subsidiary's performance through the mails and that payments would be made at the Texas domicile of the payor were sufficient contacts with the forum for the proper exercise of jurisdiction.[37] Agency responsibility in the case of corporations exists when management and operations are assimilated to the extent that one is simply a name or conduit through which the other conducts its business.[38]

29. 25 Tex. Sup. Ct. J. at 194.

30. *See* Read v. Cary, 615 S.W.2d 296, 299 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (due process not violated when defendant's contacts are neither minimal nor fortuitous and designed to result in personal ecnomic benefit). *See also* Castanho v. Jackson Marine, Inc., 650 F.2d 546 (5th Cir. 1981); *In re* McDonnell-Douglas Corp., 647 F.2d 515 (5th Cir. 1981).

31. 608 S.W.2d 164 (Tex. 1980).

32. Applied Polymers of America v. Wright Waterproofing Co., 602 S.W.2d 67 (Tex. Civ. App—Dallas 1980, writ ref'd n.r.e.).

33. 608 S.W.2d at 165.

34. *Id.*

35. *Id.*

36. 617 S.W.2d 827 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

37. *Id.* at 828.

38. *See* Gentry v. Credit Plan Corp., 528 S.W.2d 571 (Tex. 1975). For another case involving a guaranty agreement, see Marathon Metallic Bldg. Co. v. Mountain Empire Constr. Co., 653 F.2d 921 (5th Cir. 1981).

It is not clear whether the court in the *La Quinta* case was applying the agency test or simply holding that Schmelig itself conducted business in Texas.

B. Special Appearance in Texas: Rule 120a Cases

In any case where the defendant asserts a lack of personal jurisdiction the procedure for this assertion is critical. This is so because lack of personal jurisdiction is cured, and the right to claim lack of personal jurisdiction is waived, by a "general" personal appearance under traditional law. Of course this rule puts a nonresident defendant to a Hobson's choice: he can participate in the trial and defend on the merits but waive lack of personal jurisdiction or he can allow the suit to proceed to a default judgment waiving any defense on the merits but perserving the question of lack of jurisdiction.[39] The defendant in the 1890 Texas case of *York v. State*[40] argued that this Hobson's choice was constitutionally unfair, but the Surpeme Court disagreed.

Even though the constitution did not prohibit defendants being forced to concede personal jurisdiction as a price of being heard on the merits, Texas, like its sister states, chose not to force nonresident defendants to elect between a defense on the merits and an assertion of lack of jurisdiction. Texas adopted Rule 120a[41] which permits a non-resident to make a "special" appearance "for the purpose of objecting to the jurisdiction of the court over the person . . . of the defendant, on the ground that such party . . . is not amenable to process issued by the courts of this state."[42] Under the rule and influence of *York*, only if a defendant carefully followed Rule 120a could he avoid conferring jurisdiction since every appearance, prior to judgment, not in strict compliance, is a general appearance. Further defendants are required to plead and prove that they are not "amenable" to process. Special appearances cannot be used to complain about defective service or defective process. Any defendant who specially appears by definition has notice of the suit and is before the court. Only if a bar to the exercise of jurisdiction exists—a violation of the federal or state constitution or a state statute—can a special appearance succeed.

Given these well-known rules, surely consent to jurisdiction, if proved in the trial court, would defeat any 120a assertion by a defendant. Not so said the Dallas Court of Civil Appeals in the case of *TM Productions, Inc. v. Blue Mountain Broadcasting Co.*[43] Plaintiff, a Texas corporation, con-

39. Of course the lack of jurisdiction is raised in defense to a claim that the default judgment is entitled to full faith and credit in a court clearly having jurisdiction over the defendant.

40. 137 U.S. 15 (1890).

41. *See* Counts, *More on Rule 120a* 28 TEXAS B.J. (1965); Thode, *supra* note 22.

42. TEX. R. CIV. P. 120a (Vernon Supp. 1982).

43. 623 S.W.2d 427 (Tex. Civ. App.—Dallas 1981, writ granted). The writ of error was granted with the notation "Granted on Point 1." Point of error one reads "The court of appeals erred in holding that the failure of the plaintiff to allege defendant's consent to jurisdiction in plaintiff's original petition relieved defendant of the burden under Rule

tracted to make musical commercials for defendant, Blue Mountain Broadcasting Company, an Idaho corporation with its principal place of business in Oregon. The owner and general manager of Blue Mountain, John H. Runkle, Jr., received TM promotional brochures, and called TM's office in Dallas. Several months later, a TM sales representative visited the Oregon office of Blue Mountain. Runkle and the sales representative signed two written contracts licensing the use of TM's products for three years. Pursuant to the contracts TM mailed products to Blue Mountain and Blue Mountain made one payment by mail to Dallas on each contract. Because problems developed in the execution of the contracts, TM sued Blue Mountain asserting jurisdiction under article 2031b. During the 120a hearing, Blue Mountain placed in evidence John Runkle's deposition with the two contracts attached as exhibits. Apparently the trial court considered contacts between Blue Mountain and Texas and did not consider the contracts, although they were in evidence. Clearly, TM pled only contacts and not the contractual agreement. The trial court judge dismissed the suit.[44] According to the court of appeals, "[o]n this appeal, plaintiff [TM] contends that defendant [Blue Mountain] failed to establish its lack of amenability to process because one of the contracts in question contains an express consent to suit in Texas courts. Defendant replies that plaintiff cannot now assert jurisdiction of defendant's person on the basis of such consent because it did not plead consent as a ground of jurisdiction and did not otherwise raise the ground in the trial court. We agree."[45]

Any understanding of the conclusion of the majority in this case must start with the Texas Supreme Court case of *McKanna v. Edgar*.[46] In *McKanna* the supreme court held that in a *direct* appeal from a *default* judgment a lack of jurisdiction apparent on the face of the record will vitiate the trial court's judgment. Cited as support for this rule are the cases of *Flynt v. City of Kingsville*,[47] *Texaco Inc. v. McEwen*,[48] and *Doak v. Biggs*.[49] These cases, and the cases upon which they rely,[50] recognize that a judgment rendered against a defendant without citation or service and without any appearance is a nullity. Nonetheless in a case where a judgment is rendered without citation and service in fact, but recites that service was had, no collateral attack on the judgment or its verity is permitted. Adoption of this rule is premised on the sanctity and finality of court degrees, a matter of general public policy. All attacks on such final judgments must be made by some type of direct action (bill of review or appeal) challenging the judgment's validity. No presumption of validity, though, attaches

120(a) to demonstrate that it was not amenable to the process of Texas courts." 25 Tex. S. Ct. J. 272 (Apr. 21, 1982).

44. *See* 623 S.W.2d at 428.

45. *Id.* at 429.

46. 388 S.W.2d 927 (Tex. 1965).

47. 125 Tex. 510, 82 S.W.2d 934 (1935).

48. 356 S.W.2d 809 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

49. 235 S.W. 957 (Tex. Civ. App.—El Paso 1921, no writ).

50. Particularly important is the case of State Mortgage v. Traylor, 120 Tex. 148, 36 S.W.2d 440 (Tex. 1931).

in cases where (1) there is a direct attack (no final judgment) and (2) where there was a default judgment whose own recitations disclose a lack of jurisdiction. No explanation of these cases, their rationale or any other rationale for the rule of *McKanna* is set forth in *McKanna*. The opinion did add, however, that "it is imperative and essential that the record affirmatively show a strict compliance with the provided mode of service,"[51] that no presumptions in favor of jurisdictions apply in *direct* appeals,[52] that a failure of sufficient *allegations* cannot be overcome by a return not showing facts which should have been alleged,[53] and that the defendant "is presumed to have entered [an] appearance to the term of the court at which the mandate shall be filed."[54]

Crystalization of the rule to be applied in direct attacks on default judgments came in the case of *Whitney v. L & L Realty Corporation*,[55] a 1973 supreme court decision.[56] That case held that the record must affirmatively meet two major requirements "(1) [t]he pleadings must allege facts which, if true, would make the defendant responsible to answer,—or in the language of Rule 120a, contain allegations making the defendant 'amenable to process' by the use of the long-arm statute; and (2) there must be proof in the record that the defendant was, in fact, served in the manner required by statute."[57] The requirement that proof be in the record that the defendant in fact be served as required is based on the court's commendable and constitutionally required concern for satisfaction of procedural due process: a "defendant ought not to be cast in personal judgment without notice."[58] Because of the constitutional nature of the procedural due process notice requirement, a judgment which fails to meet the standard is subject to collateral attack. This is not a completely acceptable remedy, however. As the opinion points out, collateral attack by bill of review in Texas does not allow a defendant to present his defenses unless he can first show that he had a good defense and that he was free from fault in failing to appear.[59] Therefore, requiring a plaintiff to obtain a

51. 388 S.W.2d at 929 (citing Roberts v. Stockslager, 4 Tex. 307 (1849); Texaco v. McEwen 356 S.W.2d 809 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.) and Parker v. Scobee, 36 S.W.2d 303 (Tex. Civ. App.—Waco 1931 no writ)).

52. 388 S.W.2d at 929. The court cited Flynt v. City of Kingsville, 125 Tex. 510, 82 S.W.2d 934 (1935) and rejected the implications in Sgitcovich v. Sgitcovich, 150 Tex. 398, 241 S.W.2d 142 (1951); Steele v. Caldwell, 158 S.W.2d 867 (Tex. Civ. App.—Eastland 1942, no writ); Walker v. Koger, 99 S.W.2d 1034 (Tex. Civ. App.—Eastland 1936, writ dism'd); Parker v. Scobee, 36 S.W.2d 303 (Tex. Civ. App.—Waco 1931, no writ); National Cereal Co. v. Earnest, 87 S.W.2d 734, 734 (Tex. Civ. App.—San Antonio 1905, no writ).

53. 388 S.W.2d at 930 (distinguishing Employer's Reinsurance Corp. v. Brock, 74 S.W.2d 435 (Tex. Civ. App.—Eastland 1934, writ dism'd.)).

54. 388 S.W.2d at 930 (citing TEX. R. CIV. P. 123 (Vernon Supp. 1982).

55. 500 S.W.2d 94 (Tex. 1973).

56. The opinions in *McKanna* and *Whitney* were both written by Chief Justice Greenhill.

57. 500 S.W.2d at 95-96.

58. *Id.* at 97 (citing Roberts v. Stockslager, 4 Tex. 307 (1849) and McDonald v. Mabee, 243 U.S. 90 (1917)).

59. 500 S.W.2d at 96 (citing Hanks v. Rosser, 378 S.W.2d 31 (Tex. 1964) and Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950)).

certificate from the office of the Secretary of State, available for a trivial fee, is a reasonable requirement.

While the supreme court cases of *McKanna* and *Whitney* do not belabor the basis for their conclusions, it is uncontestable that the rule announced in those cases applies to *direct* attacks from *default* judgments. Examination of the rationale set forth in those two cases, and the cases cited, discloses a sound approach. When the issue of jurisdiction is not litigated (default judgment), then the record ought to at least disclose jurisdiction. That requires that the plaintiff plead facts which, if proved, would establish jurisdiction under appropriate statutory and constitutional restraints. Further, proof on the record that a proper means was used to notify the defendant is a guarantee against unnecessary and improper default judgments. Only where defendants have notice can they be expected to come forward to contest jurisdiction in the proper case.

As the Dallas court of appeals noted in *TM Productions*, though, decisions by the court of civil appeals applying *McKanna* and *Whitney* have ignored the triggering requirements of those cases and applied their rule in ways which do not serve the rule's underlying rationale. Starting with the case of *Castle v. Berg*[60] in 1967, at least five of our courts of civil appeals have applied the rule to non-default cases.[61] This application does not simply go beyond the holdings of the supreme court, it contradicts them. One of the bases for the *McKanna* and *Whitney* rule is that the issue of jurisdiction had not been litigated and therefore a failure to properly invoke jurisdiction by pleading could require reversal. Application of the *McKanna* and *Whitney* exception to a case where jurisdiction was actually litigated amounts to a negation of the very general rule to which *McKanna* and *Whitney* form an exception. *McKanna* and *Whitney* start with a recognition that res judicata applies to jurisdictional issues; the decisions of the court of civil appeals functionally reject that recognition by misapplying the rule. The only basis offered is that the plaintiff did not properly plead jurisdictional facts. Such a narrow holding is inconsistent with general rules of notice pleading. Indeed if the approach of the courts of appeals were applied to pleading generally we would return to the thoroughly discounted English writ approach where a failure to dot an "i" or cross a "t" was fatal. Not even the legacy of *York v. State*[62] can justify this result because in 1976 rule 120a was changed to allow defendants to

60. 415 S.W. 2d 523 (Tex. Civ. App.—Dallas 1967, no writ). The case of *TM Productions* first appeared at 620 S.W.2d 886. However, on the court's motion that opinion was withdrawn and the opinion at 623 S.W.2d 427 was substituted. The only change was that the new opinion omits any citation to *Castle* and substitutes in its place the case of Gathers v. Walpace, 544 S.W.2d 169 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

61. Menchaca v. Chrysler Life Insurance Co., 604 S.W.2d 287 (Tex. Civ. App.—San Antonio 1980, no writ; Mills v. Stinger Boats, Inc., 580 S.W.2d 106 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); Gathers v. Walpace Co., Inc., 544 S.W.2d 169 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); Burges v. Ancillary Acceptance Corp., 543 S.W.2d 738 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

62. 137 U.S. 15 (1890).

amend a special appearance "to cure defects."[63] Further, *McKanna* and *Whitney* are cases where failure of notice to the defendant was a major factor. This cannot be a factor in non-default cases since the defendant appeared and participated. Finally, under *McKanna* and *Whitney* the remedy was a reversal, not a dismissal. In the *Castle* case the court held that the defendant was entitled to a dismissal for lack of jurisdiction.[64] Not only are these decisions by the courts of civil appeals unjustified, where a dismissal occurs a plaintiff may lose a cause of action due to the statute of limitations. In such a case the error would be more than simple inconvenience and cost.

In *TM Productions* the Dallas court of appeals recognized the gap between the supreme court holdings and the decisions of the courts of appeals. There is no indication, however, of any recognition of the propensity of these decisions to actually undercut the supreme court cases. The majority, therefore, decided to side with the "uniform interpretation of rule 120a by the courts of civil appeals"[65] so as not to introduce uncertainty and confusion into an area where they are important considerations. Judge Akin is correct in his dissent; the choice is between supreme court authority and that of courts of civil appeals.[66] If that fact alone is not enough, then certainly the fact that the courts of appeals decisions are wrong ought to count for something.[67]

The real problem, however, goes beyond the misinterpretation of Rule 120a. It is that Rule 120a responds to *York v. State* and that case is of doubtful current validity. The main teaching of *Shaffer v. Heitner*[68] is that the territoriality doctrine of *Pennoyer v. Neff*[69] no longer applies. *York* dealt with the fairness of forcing someone to appear (automatically granting territorial jurisdiction) and fight on the merits, or stay away (denying territorial jurisdiction) and lose on the merits but preserve the jurisdictional question. A good argument can be made that this was "unfair" even if one accepts the territoriality concept of jurisdiction. Under the *Shaffer* test, though, surely a defendant cannot "fairly" be forced to submit to ju-

63. TEX. R. CIV. P. 120a.
64. 415 S.W.2d at 526.
65. 623 S.W.2d at 432.
66. *Id.* at 435. In the following additional cases handed down during the *Survey* period, courts of appeals have applied *McKanna* and *Whitney* properly in direct appeals of default judgments: Devine v. Duree, 616 S.W.2d 439 (Tex. Civ. App.—Fort Worth 1981, writ granted); Helfman Motors, Inc. v. Stockman, 616 S.W.2d 394 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); Zaragoza v. De La Paz Morales, 616 S.W.2d 295 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.); Texas Inspection Services, Inc. v. Melville, 616 S.W.2d 253 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ), Waldron v. Waldron, 614 S.W.2d 648 (Tex. Civ. App.—Amarillo 1981, no writ); Stylemark Constr., Inc. v. Spies, 612 S.W.2d 654 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Gerland's Food Fair, Inc. v. Hare, 611 S.W.2d 113 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); Thomas Petroleum Prod., Inc. v. Rulon Elec. Co., 609 S.W.2d 890 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); Grasz v. Grasz, 608 S.W.2d 356 (Tex. Civ. App.—Dallas 1980, no writ); Mega v. Anglo Iron & Metal Co., 601 S.W.2d 501 (Tex. Civ. App.—Corpus Christi 1980, no writ).
67. 623 S.W.2d at 434.
68. 433 U.S. 186 (1977).
69. 95 U.S. 714 (1878).

risdiction to defend on the merits. Clearly, once the issue of jurisdiction is joined the defendant ought to proceed by direct attack. Use of Rule 123, as in *McKanna*, raises serious constitutional problems. What if McKanna had not been sent notice and knew nothing of the suit? Then let us assume that McKanna heard of the default judgment in time to directly appeal. Can a direct appeal cost McKanna the right to contest constitutional amenability? If so plaintiffs would all be able to obtain jurisdiction in all cases where defendants appealed from default judgments by simply *not* serving notice. Such a result is not in keeping with *Shaffer*. Our rules of appearance to contest personal jurisdiction should be re-examined in the light of recent developments.[70]

II. CHOICE OF LAW

A. Tort Cases

In diversity cases a federal court must apply the laws of the state in which it sits,[71] including statutes of limitations[72] and choice of law rules.[73] Thus, although federal rules govern the manner in which process is served,[74] state rules determine when a suit is commenced for purposes of tolling state statutes of limitations.[75] These rules usually cause no difficulty in ordinary cases, but are difficult to apply in transfer cases.

Transfers in federal courts are governed by two statutes: 28 U.S.C. § 1404(a) provides that a transfer may be made for the convenience of the parties or in the interest of justice;[76] 28 U.S.C. § 1406(a) authorizes transfer when venue initially is improper.[77] In *Goldlawr, Inc. v. Heiman* the United States Supreme Court held that section 1406(a) transfers are not limited to cases in which the transferor court has personal jurisdiction over the defendant.[78] Additionally, the Fifth Circuit permits transfer to a district court when personal jurisdiction can be obtained under both sections 1404(a) and 1406(a).[79]

A transferee court initially must consider which state's choice of law rules should be applied to the case. Under the Supreme Court's holding in *Van Dusen v. Barrack*, when a suit is properly filed in one district court but is then transferred on the motion of the defendant to another court in a different state, the transferee court is bound to apply the law of the state of

70. For an interesting case involving discovery of jurisdictional facts and the applicability of *McKanna* in a federal diversity case, see Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980).

71. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

72. Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945).

73. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

74. Hanna v. Plumer, 380 U.S. 460, 464-65 (1965).

75. Walker v. Armco Steel Corp., 446 U.S. 740, 746 (1980).

76. 28 U.S.C. § 1404(a) (1976).

77. *Id.* § 1406(a).

78. 369 U.S. 463, 465-66 (1962).

79. Agucate Consol. Mines, Inc. v. Deeprock, Inc., 566 F.2d 523 (5th Cir. 1978); *see* Dubin v. United States, 380 F.2d 813, 816 (5th Cir. 1967) (transfer authorized under § 1406(a) when venue incorrect, personal jurisdiction is lacking, or both).

the transferor court.[80] No such clear guidance is available, however, when (1) transfers are effected under section 1406(a), (2) under section 1404(a) when the transferor court lacks personal jurisdiction over the defendant, or (3) under section 1404(a) on the motion of the plaintiff. The choice of law issues presented by these three situations were addressed by the Fifth Circuit in *Ellis v. Great Southwestern Corp.*[81]

The plaintiff's wife in *Ellis* suffered a fall while disembarking from a ride in an amusement park located in Texas. The fall caused a brain injury which ultimately led to her death. Plaintiff, an Arkansas resident, filed a suit in survival and wrongful death in a United States district court in Arkansas in 1978, one day before the passage of two years from the date of the accident. In 1979, in response to the defendants' motion to dismiss for lack of personal jurisdiction, the plaintiff moved that the case be transferred to the United States District Court for the Northern District of Texas, Fort Worth Division, where venue lay. The trial court granted the plaintiff's transfer motion, although the motion did not specify whether the transfer was to be under section 1404(a) or section 1406(a), nor did the motion allege that venue was improper in Arkansas or that the convenience of the parties or the interests of justice would be served by a transfer to Texas.[82] After transfer was completed, and process served, the defendants moved for summary judgment, alleging that because they had not been served at the time the suit was pending in the Arkansas court, the suit was barred under either the Texas two-year statute of limitations for actions in tort or under the comparable three-year limitations statute in Arkansas.[83] Summary judgment was granted and the plaintiff appealed.[84]

Because no grounds were given for the transfer motion, the court of appeals considered the effect upon choice of law principles of transfers under both sections. The court reasoned that if the transfer had been under section 1406(a), the law of the state of the transferee court should apply.[85] Otherwise, plaintiff could benefit from having brought the original action in an impermissible forum.[86] In contrast, under section 1404(a) transfers from a district in which personal jurisdiction cannot be obtained, the transferee court must apply the choice of law rules of the state in which it sits.[87] The court cited Professor Moore as explaining the policy behind its decision: " 'In such a situation plaintiff could not maintain his action in the district in which he filed. . . . Therefore he should not be permitted to file his action there for the purpose of capturing the law of that jurisdiction for

80. 376 U.S. 612, 639 (1964); *see* cases cited in Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1108 n.9 (5th Cir. 1981).

81. 646 F.2d 1099 (5th Cir. 1981).

82. The parties and transferee court characterized the transfer as having been pursuant to § 1406(a). *Id.* at 1102.

83. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982); ARK. STAT. ANN. § 27-907 (Supp. 1981).

84. 646 F.2d at 1102.

85. *Id.* at 1109-10 (citing Martin v. Stokes, 623 F.2d 449 (6th Cir. 1980)).

86. 646 F.2d at 1109.

87. *Id.* at 1109-10.

transportation to the jurisdiction in which service can be obtained.' "[88] The court concluded that whether the transfer in *Ellis* was under section 1406(a) or section 1404(a), the law of Texas must be applied, since it was undisputed that Arkansas, the transferor court, was unable to obtain personal jurisdiction over any of the defendants.[89]

The Fifth Circuit predicted that courts sitting in Texas would apply Texas law to determine the relative rights of the parties.[90] Recognizing that Texas has explicitly adopted the "most significant relationship test" of the *Restatement (Second) of Conflict of Laws*,[91] the court considered such factors as where the conduct that give rise to the injury occurred, where the business relationship of the parties was centered, the place of defendants' business, and the contrasting lack of contacts with Arkansas.[92] The court then proceeded to examine Texas statutes and decisions to determine whether the plaintiff's claim was barred under the Texas statute of limitations for actions in tort.[93] The court noted that under Texas law, the filing of a suit will toll the running of the statute only when diligence is used in procuring the issuance and service of citation.[94] In the absence of specific state law involving transferred actions under federal law, however, the court remanded the action for determination of whether diligence had been exercised in this case.[95]

National Bank of Commerce v. Shaklee[96] is a more traditional federal diversity case involving choice of law in tort. The original plaintiff was Heloise Bowles, the author of a nationally syndicated column. She sued Shaklee in a federal district court in Texas, alleging invasion of privacy, misappropriation of her name and likeness, copyright infringement, trademark violation, and unfair competition, all stemming from the alleged illegal publication of her book. Although plaintiff lived in Texas, negotiations for publication and distribution of the book, which were never completed, took place primarily in California. Plaintiff died after the suit was filed and the executor of her estate, National Bank of Commerce, was substituted as a party plaintiff.

Because the defendant was a California corporation and much of the contact between Shaklee and Bowles took place there, the defendant argued that California law should apply. The plaintiff argued that Texas law

88. *Id.* at 1108 (quoting 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.145[4.—5], at 1608-09 (2d ed. 1982). The court noted that a contrary rule may be constitutionally proscribed. 646 F.2d at 1110. The possibility of a change of law, however, may not defeat a transfer under a claim of forum non conveniens.

89. 646 F.2d at 1111.

90. *Id.* at 1112.

91. *Id.* at 1111. The Texas Supreme Court adopted the most significant relationship test in Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) and reaffirmed the adoption in Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) [hereinafter cited as RESTATEMENT].

92. 646 F.2d at 1112.

93. *Id.* at 1112-15.

94. *Id.* at 1112.

95. *Id.* at 1114-15.

96. 503 F. Supp. 533 (W.D. Tex. 1980).

should apply because Bowles was domiciled in Texas at her death. The choice of law issue was significant because under California law, the plaintiff's claim for damages for pain and suffering, and possibly those claims for damages stemming from invasion of privacy and misappropriation, would abate upon Bowles's death, whereas Texas law specifically provides for the survival of pain and suffering claims upon death of the plaintiff.[97]

The court noted that section 167 of the *Restatement* controls the survivability of tort actions and utilizes the "most significant relationship" test under section 145 in making this determination. Under section 145, one of the contacts to be considered is the domicile of the parties.[98] The comments dealing with domicile stress the use of domicile when the cause of action is a personal one, as opposed to a business related claim;[99] the use of domicile is especially important when the injury occurs in two or more states through multistate publication.[100] The *Restatement* further provides, in section 153, titled "multistate invasion of privacy," that the plaintiff's rights for invasion of privacy arise from local law of the state with the most significant relation, usually the plaintiff's domicile, if the material was published in that state.[101]

Under the *Restatement* guidelines, the court held that Texas law should govern.[102] Plaintiff was both domiciled and doing business in Texas at the time of the alleged wrongful acts. Moreover, defendant was a California corporation selling products in every state in the United States. Their unauthorized distribution of the plaintiff's book was nationwide, damaging plaintiff in every state. The court, therefore, held that when a multistate invasion of privacy occurs and the plaintiff files in the state of domicile, then absent unusual factors not present in this case the law of the domicile is the law of the state with the "most significant relationship."[103]

One result of the adoption by the Texas Supreme Court of the most significant relationship test of the *Restatement* in *Gutierrez v. Collins*[104] was that any case not decided prior to July 11, 1979, the date of that decision, was immediately controlled by the *Restatement* guidelines.[105] The new rule would not be controlling, however, in wrongful death actions, because choice of law in those actions is determined by statute.[106] Causes in wrongful death arising before the effective date of the 1975 version of article 4678,[107] the Texas "Death in a Foreign State" statute, are still con-

97. *Id.* at 538. *See* TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958). Texas law was unclear whether the invasion of privacy and misappropriation claims would survive. 503 F. Supp. at 539.

98. 503 F. Supp at 539; *see* RESTATEMENT, *supra* note 91, § 167.

99. RESTATEMENT, *supra* note 91, § 145.

100. *Id.* comment e.

101. *Id.* § 153.

102. 646 F.2d at 539.

103. *Id.*

104. 583 S.W.2d 312 (Tex. 1979). *See* note 91 *supra*.

105. *See* Newton, *Conflict of Laws, Annual Survey of Texas Law*, 34 SW. L.J. 385, 397-407 (1980).

106. *See id.*

107. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1982) (providing that cause of

trolled by the old statutory terms.[108] Because article 4678 is a substantive rule, any change in its terms will not be given retroactive effect.[109]

Under the unamended version of article 4678, lex loci delecti was applicable for the determination of choice of law.[110] Traditional formulations of lex loci hold that tort questions are governed by the law of the place of harmful impact, the "place" of the tort. Indeed, the legislative adoption of lex loci in wrongful death cases prevented judicial adoption of the *Restatement* guidelines.[111] The holding in *Cox v. McDonnell-Douglas Corp.*,[112] therefore, is somewhat of a surprise.

Mrs. Sharon Cox, the widow of Air Force Captain John T. Cox, brought suit in wrongful death on her own behalf and on behalf of her minor children. Captain Cox died in January of 1970 when his RF-4C aircraft crashed near Mountain Home, Idaho. Suit was filed in 1978 in the United States District Court in Austin charging McDonnell-Douglas with defects in the design and manufacture of both the angle of attack system and the ejection system. The allegedly defective airplane was manufactured in Missouri. McDonnell-Douglas moved for summary judgment on the ground that any cause of action was barred by the applicable statute of limitation.[113] The question of whether the suit was barred by limitations required an identification of the state whose choice of law rules would govern.[114] Unamended article 4678 addressed this issue and provided that the applicable law was that of the state where the "wrongful act, neglect or default" occurred.[115] The court stated that apparently "no Texas Court has faced choosing between the place of the negligent act and the place of the injury in a wrongful death case."[116] To help determine the legislative intent underlying article 4678, the court turned to the decision of the United States Supreme Court in *Richards v. United States*.[117]

In *Richards* the Supreme Court was called on to interpret section

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action of death or injury of Texas resident occurring in a foreign state or country may be brought in Texas courts under Texas substantive (including limitations) law).

108. *Id.* (Vernon 1952) (amended 1975) (providing that the law of the forum in which death or injury occurred will control cause of action).

109. A retrospective application would be in violation of the Texas Constitution. *See* TEX. CONST. art. 1, § 6. *See also* Penry v. Wm. Barr, Inc., 415 F. Supp. 126, 128 (E.D. Tex. 1976); Gutierrez v. Collins, 583 S.W.2d 312, 317 n.3 (Tex. 1979).

110. *See* note 108 *supra* and accompanying text.

111. *See* Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972).

112. 503 F. Supp. 202 (W.D. Tex. 1980).

113. *Id.* at 203.

114. *Id.*

115. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon 1952) (amended 1975).

116. 503 F. Supp. at 203. The court distinguished several Texas Supreme Court cases holding to the contrary on the ground that in each, the negligent act and injury occurred in the same state. *Id*; *see* Click v. Thuron Indus., Inc. 475 S.W.2d 715 (Tex. 1972); Francis v. Herrin Transp. Co., 432 S.W.2d 710 (Tex. 1968); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968). Additionally, the court cited, but did not follow, Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (conflict of law rules determined by law of forum in diversity cases). 503 F. Supp. at 203.

117. 369 U.S. 1 (1962).

1346(b) of the Federal Tort Claims Act.[118] The Act codifies the traditional lex loci rule by providing that jurisdiction lay where a private person "would be liable to the claimant in accordance with the law of the place were the act or omission occurred."[119] The Court interpreted this section to mean that appropriate law is chosen by considering the "whole law," including choice of law rules, of the state where the act or omission occurred.[120] One commentator has stated that the Court adopted a strained construction of the Act to avoid the harsh result created by the drafting of the choice of law rule.[121]

Assuming that the *Cox* court's conclusion that *Richards* is valid evidence of the Texas legislature's intent, the application of the *Richards* interpretation was improper. The court looked to the law of Missouri, the site of the alleged negligent acts, without looking at the "whole law."[122] Apparently, the court did not consider Missouri's choice of law rules. *Richards* is supportable only as a device to avoid harsh results under the traditional lex loci rule. In this instance, though, the harsh result was not avoided because Missouri law also adheres to the lex loci doctrine.[123]

B. Contracts

Traditional choice of law principles, applicable to agreements not to compete, provide that "one law is applied to what is regarded as the initiation of a contract and another to what is regarded as its final performance."[124] In Texas this rule has been followed since its adoption in 1885.[125] Thus, when choice of law questions arose in the enforcement in Texas of a "non-compete contract" signed in Illinois in *Matlock v. Data Processing Security, Inc.* the answer was predictable: Texas law applied to determine performance.[126] Data Processing sought and obtained temporary injunctive relief against Matlock and other former employees, pursuant to provisions in non-compete contracts signed by the defendants. Two of the three former employees signed their contracts in Illinois, the former domicile of Data Processing. Proof was offered that under Illinois law the broad contract provisions against competition in the entire United States rendered the contracts wholly void.[127] The Fort Worth court of appeals held that even if that were the law of Illinois, where the contract was exe-

118. The Federal Tort Claims Act is codified in scattered sections of title 28 of the United States Code. *See, e.g.*, 28 U.S.C. §§ 1346, 2674 (1976 & Supp. IV 1980).

119. 28 U.S.C. § 1346(b) (1976).

120. 369 U.S. at 11.

121. R. LEFLAR, AMERICAN CONFLICTS LAW § 101 (3d ed. 1977).

122. 503 F. Supp. at 204-05.

123. *Id.* at 205.

124. RESTATEMENT OF CONFLICT OF LAWS, § 332 (1934). The rule was not changed when the *Restatement* was reformulated, *See* RESTATEMENT, *supra* note 91, § 196.

125. *See* W.A. Ryan & Co. v. M.K. & T. Ry. Co., 65 Tex. 13 (1885); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex. Civ. App.—Dallas 1973, no writ).

126. 607 S.W.2d 946, 948 (Tex. Civ. App.—Fort Worth 1980), *modified*, 618 S.W.2d 327 (Tex. 1981).

127. 607 S.W.2d at 948.

cuted, it would not necessarily control.[128] The court reached this conclusion based on the fact that if the place of performance was Texas then the intention of the parties must have been to choose the law of the forum which would uphold the contract.[129] Under Texas law such a contractual provision was not void but merely unenforceable to the extent found unnecessary for the protection of the former employer.[130] The law of Texas, therefore, was applied,[131] demonstrating once again the flexibility of choice of law rules in contract.

A more unusual choice of law question was confronted in the case of *First Commerce Realty Investors v. K-F Land Co.*[132] K-F Land Company secured a loan from plaintiff First Commerce, and offered land situated in Houston as collateral for the loan. The loan note provided that it "shall be governed by, interpreted and construed in accordance with the laws of the State of Louisiana."[133] Payment was to be made in New Orleans or such other place in Louisiana as the holder might designate. A deed of trust on the Texas land provided that the loan secured thereby was a Louisiana transaction. The deed of trust, the note, and the related loan documents were executed and delivered in the State of Louisiana and were to be governed in accordance with the laws of the State of Louisiana. A guaranty, also securing the note, contained a similar provision. K-F subsequently defaulted on the note. First Commerce foreclosed on the land in Texas and, after the sale, a $572,761.85 deficiency remained. First Commerce sought a deficiency judgment, but K-F argued that such a suit was barred by the Louisiana Deficiency Judgment Act.[134] Somewhat surprisingly, the court agreed with K-F.

Real property questions are almost always determined by the law of the forum in which the land is situated.[135] In contrast, legal questions arising from a contract are controlled by the parties' choice of law when the chosen law bears a reasonable relationship to the contract and no other forum's public policy demands otherwise.[136] The question in *First Commerce* was whether the claim for a deficiency judgment arose out of a Texas real estate foreclosure and was controlled by Texas law or whether it arose out of enforcement of the underlying debt and was controlled contractually by Louisiana law.[137] After conceding the closeness of the question, the court adopted the latter view because the parties clearly bargained

128. *Id.*
129. *Id.* at 948-49.
130. *Id.* at 950.
131. *Id.* at 948.
132. 617 S.W.2d 806 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).
133. *Id.* at 807.
134. See LA. CODE CIV. PROC. ANN. arts. 2771-2772 (West 1961); LA REV. STAT. ANN. §§ 13:4106-4107 (West 1968).
135. 617 S.W.2d at 808 (citing RESTATEMENT, *supra* note 91, § 229).
136. TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon Supp. 1982). *See also* Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958); Austin Bldg. Co. v. National Fire Union Ins. Co., 432 S.W.2d 697 (Tex. 1968); RESTATEMENT, *supra* note 91, §§ 186-188.
137. 617 S.W.2d at 809.

for application of Louisiana law.[138] The court saw "no reason to frustrate an intention so clearly expressed."[139]

If the court's formulation of the issue is correct, then there certainly are strong arguments for control by Texas law. As First Commerce indicated, the deed of trust provisions are peculiar to Texas law and track the language of the Texas statute for procedures for sale. Authorities in Texas, Louisiana, and elsewhere uniformly agree that the methods of foreclosure on land and the resulting interest determinations are governed by the law of the situs state.[140] The clear purpose, and therefore the application, of the Louisiana Deficiency Judgment Act, relates to methods of foreclosure on Louisiana land.[141] If the suit on the underlying debt had first been brought in Louisiana, as it clearly could have been, the court would then have granted a deficiency judgment because the foreclosure had been on Texas land.[142] That judgment would have been entitled to full faith and credit in Texas. Because the suit was first brought in Texas, therefore, Louisiana law should not dictate a different result.

Further, the court's argument, if examined closely, reveals the fallacy of its conclusion. The court noted that because the parties had bargained for the application of Louisiana law, it was reluctant to frustrate their intention by applying Texas law.[143] If the documents are read in the light of the realities of the business world, however, the only clear intention of the parties is that Louisiana law was to apply to the note and non-land guarantees and that transactions dealing with the land itself should be controlled by Texas law. Any other interpretation not only ignores business reality but would have the drafting party, First Commerce, contract away its own right to a deficiency judgment. This result occurs because the terms of the Louisiana Deficiency Judgment Act can never be satisfied in a foreclosure of Texas real estate.[144]

A Texas statute authorizes a penalty against individuals who collect a real estate commission for the sale of land in Texas but who do not have a Texas real estate broker's license.[145] In *Smith v. Bidwell*[146] the court considered whether this statute should be applied to a private dispute involving the sale of Texas land brokered by a Missouri resident. The defendant had falsely represented to the plaintiff that he and an associate were licensed to sell Texas real estate. The negotiations and contract to sell the land to a California couple were executed in Texas at the direction of the defendant. The Corpus Christi court of civil appeals held that because the

138. *Id.*
139. *Id.*
140. *See* RESTATEMENT, *supra* note 91, § 229; G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS §§ 348-349 (3d ed. 1963).
141. *See* Gelpi v. Burke, 364 So. 2d 1064 (La. Ct. App. 1978).
142. Louisiana and most states with anti-deficiency statutes do not give them extraterritorial application. *See* Annot., 136 A.L.R. 1057 (1942).
143. 617 S.W.2d at 809.
144. The court recognized this argument but did not address it. *See id.*
145. TEX. REV. CIV. STAT. ANN. art. 6573a, § 19(b) (Vernon Supp. 1982).
146. 619 S.W.2d 445 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

critical elements of the transaction occurred in Texas, the laws of Texas should apply.[147]

C. *Proof of Law*

Professor Thomas has described Texas law pertaining to proof of foreign law as being "confused, incomplete, and in some instances behind the times."[148] His entreaties to both the judiciary and the bar have not always borne fruit. Consequently, proof of foreign law continues to be the morass it was described as being a decade ago.

One of the cases in this "confusing" area is *Franklin v. Smallridge*.[149] *Franklin* involved an action by a putative wife to set aside a deed to community property from the plaintiff's deceased "husband" to Smallridge on the grounds that she had not joined in the transaction.[150] In order to prevail, the plaintiff had to prove that she was married to the grantor, her purported husband. In an attempt to prove her legal capacity to marry, the plaintiff, on oral motion, requested the court to take judicial notice of the laws of Mexico. The motion was supported only by the deposition of a Mexican attorney. The trial court held that the plaintiff did not have the requisite capacity to enter into a common law marriage. On appeal, the court held that the deposition was insufficient to prove foreign law and, consequently, affirmed the judgment of the trial court.[151] The court reasoned that failing a proper showing of Mexican law, the Texas rule that a foreign law is presumed to be the same as the law of the forum should be followed.[152]

In *N.K. Parrish, Inc. v. Southwest Beef Industries Corp.*[153] a dispute arose over an agency agreement for the purchase of grain. The agreement in question provided that it was "to be deemed executed under and to be construed and governed by the laws of the State of Arizona."[154] Since this was a diversity case, the federal court applied Texas law, which recognizes the right of parties to choose governing law so long as the choice is reasonable.[155] Although it appeared that the choice of Arizona law was not unreasonable, Arizona law was rejected because neither party raised or briefed this issue on appeal.[156] Thus, proof of law, whether previously agreed to or not, cannot be ignored in the trial of Texas cases.

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147. *Id.* at 449.
148. Thomas, *Proof of Foreign Law in Texas*, 25 Sw. L.J. 554, 570 (1971).
149. 616 S.W.2d 655 (Tex. Civ. App.—Corpus Christi 1981, no writ).
150. The suit was originally filed as a divorce action and included the claim against Smallridge. When the husband died, the divorce claim was dismissed, and the court proceeded to try the title claim alone.
151. *Id.* at 657-58.
152. *Id.*
153. 638 F.2d 1366 (5th Cir. 1981).
154. *Id.* at 1370 n.3.
155. *Id.*; *see* Dowling v. NADW Marketing, Inc., 578 S.W.2d 475 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); Securities Inv. Co. v. Finance Acceptance Corp., 474 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).
156. 638 F.2d at 1370 n.3.

III. JUDGMENTS

Recently there has been a significant increase in the amount and complexity of personal contact and trade between states in the United States and between the United States and other nations. This phenomenon has been accompanied by an increase in litigation. Largely due to these developments, the general question of the meaning and effect of judgments has become increasingly important. After the first suit is over may the losing party sue the winning party again on a related matter? What is a related matter as opposed to a judicially determined matter? These and many related questions are arising frequently both because the litigation is more complex and because a litigious society is often willing to at least try another suit. Two decisions by the Supreme Court and the adoption of the *Restatement (Second) of Judgments* signal the current direction of development as to the meaning of judgments.[157]

Once a determination is made on what a judgment means the problem of actual enforcement still remains. Enforcement of a Texas judgment in another state or in a foreign country, or the enforcement of sister state or foreign country judgments in Texas, present special problems. Two uniform acts adopted by the 67th Texas Legislature address these special problems.

A. Res Judicata and Collateral Estoppel[158]

Supreme Court Cases. Willie McCurry was charged by Missouri authorities with possession of heroin and assault with intent to kill. Prior to his criminal trial, McCurry invoked the fourth and fourteenth amendments in an unsuccessful attempt to suppress evidence that had been seized by the police. His subsequent conviction was affirmed by a state appellate court.[159] He then sought redress for the alleged constitutional violation in a federal court in a civil rights suit brought under 42 U.S.C. § 1983.[160] The Supreme Court granted certiorari to determine whether "the unavailability of federal habeas corpus [under *Stone v. Powell*[161]] prevented the police officers from raising the state courts' partial rejection of McCurry's constitutional claim as a collateral estoppel defense to the section 1983 suit

157. For other recent developments, see Newton, *Conflict of Laws, Annual Survey of Texas Law*, 35 SW. L.J. 333, 353-57 (1981); Newton, *supra* note 105, at 411-13.

158. The term res judicata in its broadest sense is sometimes said to include the doctrine of collateral estoppel, but the two terms carry two distinct although related meanings. Under res judicata, a judgment on the merits in a prior action precludes a suit between the same parties or their privies on the same claim. Collateral estoppel precludes relitigation in a subsequent action upon a different claim of issues actually and necessarily determined in the prior action. For a discussion of this general area in light of the adoption of the RESTATEMENT (SECOND) OF JUDGMENTS (1979), see Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981).

159. State v. McCurry, 587 S.W.2d 337 (Mo. Ct. Ap. 1979).

160. 28 U.S.C. § 1983 (Supp. III 1979). Section 1983 authorizes a civil cause of action against any person for the deprivation of any constitutional or statutory right, privilege, or immunity.

161. 428 U.S. 465 (1976).

against them for damages."[162]

The majority opinion in *Allen v. McCurry* noted that federal courts traditionally adhere to the related doctrines of res judicata and collateral estoppel because they serve to "relieve the parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."[163] The Court, however, has staunchly limited preclusion under these doctrines to cases involving a "full and fair opportunity" to litigate in the earlier case. Thus, the Court stated that in applying the doctrine of collateral estoppel to state court decisions, federal courts must give effect to the underlying rationale and "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."[164]

Since the specific question before the Court was whether or not a section 1983 action may be precluded by the doctrine of collateral estoppel, the issue was primarily one of statutory interpretation. Because of the paucity of direct legislative history of the statute, however, with respect to this issue, the arguments and conclusions set forth by the Court are clearly expressions of how compatible the Court found the underlying rationales of collateral estoppel and section 1983 actions.[165] The majority found that the underlying rationales were compatible, and held that collateral estoppel could preclude a section 1983 suit.[166] In so doing, the Court considered a number of factors: the views of other courts; the effect of the demise of the doctrine of mutuality; the legislative history of section 1983 in context and in practice; and, finally, the effect of the Court's holding in *Stone v. Powell*.[167]

A significant case discussed in *Allen* is *Preiser v. Rodriquez*, in which the Supreme Court implicitly approved the application by lower federal courts of the preclusion doctrine to statutory civil rights suits.[168] The lack of authority other than *Preiser*, however, weakens the basis for the *Allen* holding. Because the requirement of mutuality of estoppel was accepted at the time of passage of section 1983, the drafters of the legislation may have assumed that preclusion, especially of the sort contemplated in *Preiser*, would not apply. Nevertheless, the Court concluded that there is no bar to reaching a result which would not have been possible under the act when passed.[169] Such a conclusion clearly is unsupportable unless the legislative

162. Allen v. McCurry, 449 U.S. 90, 91 (1980).

163. *Id.* at 94.

164. *Id.* at 95-96 (citing Younger v. Harris, 401 U.S. 37, 43-45 (1970)). The Court further noted that 28 U.S.C. § 1738 (1976) mandates preclusive effect for state court judgments whenever that effect would apply within the state. 449 U.S. at 96.

165. It is unclear whether under the facts collateral estoppel is completely preclusive. According to the majority, that issue was not before the Court. 449 U.S. at 93 n.2.

166. *Id.* at 104, 105.

167. *Id.* at 96-105.

168. 411 U.S. 475 (1973). The Court noted that since *Preiser*, "the virtually unanimous view of the Courts of Appeals . . . has been that § 1983 presents no categorical bar to the application of res judicata and collarteral estoppel concepts." 449 U.S. at 97.

169. 449 U.S. at 97-98.

history of section 1983 definitely leads to the same result.

The Court conceded that congressional debates showed that a major motive behind the enactment of section 1983 was a concern that state courts had been deficient in protecting federal rights.[170] The Court stated, however, that federal jurisdiction is supplementary and thus available only when "state substantive law [is] facially unconstitutional, where state procedural law [is] inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, [is] inadequate in practice."[171] In short, because collateral estoppel applies only when there is a full and fair opportunity to litigate, there is no reason to believe that "Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous."[172]

Finally, the Court turned to the question of whether its holding in *Stone v. Powell*[173] might justify a refusal to apply the rule of preclusion to cases which were originally brought as criminal cases in state courts. In *Stone* the Court held that federal habeas corpus relief is not available under an allegation of a fourth amendment violation when a party has had a full and fair opportunity to litigate the constitutional claim in a state court.[174] According to the Court, *Stone* did not concern section 1983 actions or the preclusive effect of state court judgments; rather, the *Stone* opinion merely considered the "prudent exercise" of federal court jurisdiction under the habeas corpus statute.[175] Thus, the Court rejected the argument that every person asserting a federal right is entitled to an unencumbered opportunity to litigate in a federal district court, regardless of whether the federal claim first arose in a state court.[176]

This last argument, that section 1983 guarantees an unencumbered opportunity to litigate a civil rights action in a federal court even if it first arose in a state criminal court, is precisely the one which the dissent in *Allen* found to be a proper interpretation of Congressional intent.[177] The dissent cited both legislative history and subsequent judicial interpretation of that history in the cases of *Monroe v. Pape*[178] and *Mitchum v. Foster*[179] for support.[180] Furthermore, even though it argued mainly that legislative intent ought to control, the dissent concluded by asserting that a "criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed. To force him to a choice between forgoing either a potential defense or a federal forum for hearing his con-

170. *Id.* at 98.
171. *Id.* (citing Monroe v. Pape, 365 U.S. 167 (1961)).
172. *Id.* at 101.
173. 428 U.S. 465 (1976).
174. *Id.* at 494.
175. 449 U.S. at 103. *See* 28 U.S.C. § 2254 (1976 & Supp. III 1979).
176. 449 U.S. at 103-04.
177. Mr. Justice Blackmun dissented, joined by Justices Brennan and Marshall.
178. 365 U.S. 167 (1961).
179. 407 U.S. 225 (1972).
180. 449 U.S. at 110-12.

stitutional civil claim is fundamentally unfair."[181]

What is the likely impact of the *Allen* decision? Obviously the application of rules of preclusion limits the availability of section 1983 actions. In addition, it may be difficult in practice to convince the Supreme Court or any other federal court that a criminal defendant did not have a full and fair opportunity to litigate a claim. Nevertheless, upon a showing of facially unconstitutional state substantive law, state procedural law inadequate to allow full litigation of a constitutional claim, or state procedural law inadequate in practice, preclusion will not be invoked.

An expanded use of rules of preclusion was also at issue in the case of *Federated Department Stores, Inc. v. Moitie*.[182] Certiorari was granted to decide whether the Ninth Circuit had validly created an exception to the doctrine of res judicata.[183] The United States initially filed an antitrust suit against Federated Department Stores, alleging that they had agreed to fix the retail price of women's clothing sold in northern California in violation of section 1 of the Sherman Act.[184] Thereafter, private plaintiffs filed seven parallel civil actions seeking treble damages on behalf of classes of retail purchasers under state law. These suits were filed in both a state court and a federal court. The state court action subsequently was removed to federal court.[185] All of the actions were then dismissed for failure to allege an injury to plaintiff's business or property under the Clayton Act.[186] Five of the plaintiffs appealed directly from that judgment to the court of appeals. Two of the plaintiffs, however, Moitie (who had originally filed in state court) and Brown (who had originally filed in federal court) refiled in state court instead of appealing. Federated removed these new suits to federal court, where the district court dismissed the actions as being precluded by the judgments in the first suit.[187] Plaintiffs appealed this decision to the Ninth Circuit. While this appeal and the direct appeal from the original dismissal instituted by the other five of the original plaintiffs were pending, the Supreme Court decided *Reiter v. Sonotone Corp.*[188] In *Reiter* the Court held that retail purchasers can suffer an injury to their property under the Clayton Act.[189] In light of that holding, the Ninth Circuit reversed and remanded the five original plaintiff's cases which had been directly appealed.[190] Additionally, the Ninth Circuit reversed the res judicata holding in the new Moitie and Brown suits.[191] The court of appeals reasoned that the doctrine of res judicata should yield to "overriding

181. *Id.* at 116.
182. 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981).
183. *Id.* at 2426, 69 L. Ed. at 107.
184. 15 U.S.C. § 1 (1976).
185. The state court case by Marilyn Moitie was removed on the basis of diversity of citizenship and federal question jurisdiction.
186. Weinburg v. Federated Dep't Stores, 426 F. Supp. 880 (N.D. Cal. 1977).
187. 101 S. Ct. at 2426, 69 L. Ed. 2d at 108.
188. 442 U.S. 330 (1979).
189. *Id.* at 342.
190. Moitie v. Federated Dep't Stores, 611 F.2d 1267, 1268 (9th Cir. 1980).
191. *Id.* at 1269-70.

concerns of public policy and simple justice."[192] Thus, where an underlying case is successfully appealed, the issues are kept alive; where the original dismissal was based on a case that had been overruled, then "justice requires that the dismissal of the non-appealing parties' suits be reversed."[193] The defendant appealed the reversal to the Supreme Court.

The majority opinion in *Moitie* is characterized by its emphasis on the finality rationale for res judicata.[194] In affirming the trial court's decision to dismiss, the Court stated that once a final judgment on the merits is rendered, it precludes relitigation of any issues that were raised or that could have been raised, whether or not the judgment was based on an erroneous conclusion or an erroneous determination of fact or law.[195] Because collateral attack on an erroneous decision is precluded, reversal of a legal principle offers no basis for an equitable exception to finality.[196] Nor did the majority consider that there was any basis for an exception based on "simple justice." The Court reasoned that simple justice is to be viewed from the standpoint of the system as a whole, not from the standpoint of a particular case because, by definition, the doctrine of res judicata serves vital public interests that outweigh determinations of the equities in an individual suit.[197] The Court stated: "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.' "[198] The Court continued that public policy must likewise be considered from the vantage point of the system as a whole: that policy favors an end to litigation, and must not be treated as one of practice or procedure, but rather as a rule of fundamental and substantial justice which is "even more compelling in view of today's crowded dockets."[199]

Mr. Justice Blackmun, joined by Mr. Justice Marshall, concurred in the judgment but felt that it was improper to "close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to what the Court of Appeals referred to as 'overriding concerns of public policy and simple justice.' "[200] One case cited with approval in the concur-

192. Id at 1269.

193. Id. at 1270.

194. The Court noted: Two important policies conflict in this area. On the one hand it is important that court decisions be "correct" in law. On the other hand it is important that there be a termination point to litigation. 101 S. Ct. at 2429, 69 L. Ed. 2d at 110.

195. *Id.* at 2427, 69 L. Ed. 2d at 108.

196. *Id.* at 2428 n.4, 69 L. Ed. 2d at 109. The Court found that the decision of the Ninth Circuit was contrary to its prior decisions. *Id.* at 2429, 69 L. Ed. 2d at 109. Of particular importance is the case of Reed v. Allen, 286 U.S. 191 (1932), which rigorously applied the res judicata doctrine. The Court stated that *Reed* negated the existence of any general equitable doctrine supporting exceptions to the finality basis for res judicata. 101 S. Ct. at 2428-29, 69 L. Ed. 2d at 109-10. Moreover, the majority viewed the facts in *Moitie* as presenting compelling reasons to apply the doctrine of res judicata because the respondents deliberately chose not to pursue an appeal and then sought to gain from the "reversal procured by other independent parties." *Id.* at 2429, 69 L. Ed. 2d at 110.

197. 101 S. Ct. at 2429, 69 L. Ed. 2d at 110.

198. *Id.* (quoting Heiser v. Woodruff, 327 U.S. 726, 733 (1946)).

199. *Id.*, 69 L. Ed. 2d at 111.

200. *Id.* at 2430, 69 L. Ed. 2d at 111.

ring opinion is *Ford Motor Credit Co. v. Uresti*,[201] a decision by the Waco court of civil appeals. In that case Ford Motor Credit Company sued Uresti and Hernandez, alleging that Uresti had purchased a tractor on credit and had fallen into arrears on his installment contract and also alleging that Uresti had then transferred the tractor to Hernandez. Ford sought foreclosure of the lien on the tractor and judgment for possession of the tractor. Uresti answered by charging that the retail installment contract violated the Federal Truth in Lending Act[202] and the Texas Consumer Credit Code.[203] Hernandez also asserted violations of the federal and state acts, and in addition, cross-claimed for the money which he paid Uresti for the tractor. Judgment was rendered for Ford against Uresti, but was offset by a judgment for Uresti for $1,000 for violation of the Truth in Lending Act.[204] Hernandez was awarded the tractor outright.[205] Ford appealed the judgment as to Hernandez, but not as to Uresti. The Waco court of civil appeals in reversing the judgment as to both defendants, noted that a decision to reverse would require a reversal as to Uresti as well as to Hernandez, because otherwise Hernandez would have no right to assert his cross-claim against Uresti.[206] In this case an equitable exception to res judicata would be permitted.

The main issue in the *Moitie* case concerned the desire to provide litigants with a fair determination and to provide finality. The majority might agree to certain exceptions under what it labeled in *Allen v. McCurry* as the existing general limitations on rules of preclusion. The general rules do not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue. Yet the language of the majority seems clear—finality is such an important consideration that the starting point is always the system as a whole and not the individual litigant. Under this approach the finality consideration is almost always decisive. Ironically, a possible result of this rule will be to increase the number of appeals since a failure to appeal will clearly subject the losing party to rules of preclusion.

Texas Cases. A clear understanding of the relative importance of the policy of finality has become extremely important in divorce cases where one party is entitled to federal retirement benefits. In *Hisquierdo v. Hisquierdo*,[207] the United States Supreme Court held that Railroad Retirement Act benefits are not divisible as community property in a state court. This rule was made applicable to military retirement benefits in *McCarty v.*

201. 581 S.W.2d 298 (Tex. Civ. App.—Waco 1979, no writ).
202. 15 U.S.C. §§ 1601-1691f (1976 & Supp. IV 1980).
203. TEX. REV. CIV. STAT. ANN. art. 5069, §§ 1.01-3.21 (Vernon Pam. Supp. 1971-1981).
204. 581 S.W.2d at 299.
205. *Id.*
206. *Id.* at 300. In support of this general proposition the court cited Lockhart v. A.W. Snyder & Co., 163 S.W.2d 385 (Tex. 1942) and Bates v. First Nat'l Bank, 502 S.W.2d 181 (Tex. Civ. App.—Waco 1973, no writ).
207. 439 U.S. 572 (1979); *see* Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979).

McCarty.[208] Texas courts hearing disputes over federal benefits are now forced to examine two important and conflicting policies: the policy of finality (enforcing termination of litigation after an opportunity for full and fair litigation) and the policy of validity (insuring that judgments are rendered only by courts having the power to do so).[209] *Hisquierdo* and *McCarty* may well be wrong and may cause great hardship in Texas.[210] To the extent this is true, the question becomes one of relief. Can the courts grant relief? Will the courts grant relief? Must there be legislative action? It may be that there is ". . . no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution,"[211] but courts are also tempted to repeal "obnoxious" rules.

Two problems that have arisen regarding division of military benefits are the effect to be given to *McCarty* in the attempted partition of military benefits not awarded in a past final divorce decree and the effect to be given to an attempted partition of military benefits awarded in a past final divorce decree. *Trahan v. Trahan*,[212] decided by the Texas Supreme Court on November 18, 1981, addressed the question of whether the Supremacy Clause[213] of the United States Constitution preempts a partition by a state court of military retirement benefits not divided in a prior final divorce decree. Prior to *McCarty* the law in Texas was well established that military retirement benefits earned during marriage were divisible upon divorce.[214] Moreover, if no division was made upon divorce, a subsequent suit for partition was possible.[215] The court held that in any case where final judgment had not been reached before June 26, 1981, the date of the *McCarty* decision, a division of military retirement benefits through application of Texas community property laws would be preempted.[216] It makes no difference that a final draft decree existed and that all that was being sought was a partition of property, which under the law at the time of the rendition of the decree was "community."[217] The court concluded: "No final adjudication regarding . . . military retirement benefits has or

208. 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

209. For a general discussion of the tension between the goals of finality and validity, see Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1041-44 (1971). By implication of *Hisquierdo*, division problems may also exist with respect to social security benefits. *See* Reppy, *Learning to Live with Hisquierdo*, 6 COMMUNITY PROP. J. 5 (1979). The division of civil service benefits does not seem to be affected. 5 U.S.C. § 8345(j)(1) (1976 & Supp. IV 1980).

210. *See* Kornfeld, *Commentary: Supreme Court Majority Shoots Down Community Property Division of Military Retired Pay*, 8 COMMUNITY PROP. J. 87 (1981).

211. President U.S. Grant, Inaugural Address, March 4, 1869. For articles generally dealing with the problems raised by *McCarty* see Kahn, *McCarty v. McCarty*, TRIAL LAW. F., July-Sept. 1981, at 12; Kahn, *McCarty Revisited*, TRIAL LAW. F., Apr.-June 1982, at 11; McKnight, *Dealing with Reimbursement and Federal Retirement Benefits on Divorce*, TRIAL LAW F., Jan.-March 1982, at 13.

212. 626 S.W.2d 485 (Tex. 1981).

213. U.S. CONST. art. IV, § 2.

214. Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976).

215. Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

216. 626 S.W.2d at 487-88.

217. Id.

will be made until this Court renders its opinion (in the appeal of this partition case). In the absence of a final adjudication, the doctrine of res judicata is inapplicable."[218]

In reaching this conclusion the court recognized that *McCarty* held that military retirement benefits are simply not subject to division upon divorce pursuant to the laws of a state. *McCarty's* reasoning was that Congress enacted the military retirement system specifically for the military and that application of community property principles to that system gravely threatened it and its goals. Under the Supremacy Clause Texas courts are required to reverse the previous rule that military retirement benefits earned during marriage constitute community property.

After reaching this conclusion the court then distinguished the *Trahan* fact situation, a direct appeal from a judgment dividing previously undivided retirement benefits, from the fact situation in the Fifth Circuit case of *Erspan v. Badgett*,[219] which was an appeal from a judgment enforcing a decree that divided retirement benefits and became final before *McCarty* was decided. *Erspan* raised the second major question—what effect is to be given to a partition of military benefits awarded in a past final divorce decree.[220] Badgett and Erspan obtained a divorce in El Paso in 1963. Part of the divorce decree declared army benefits to be community property and ordered Badgett to maintain with the army an allotment order providing for the payment directly to plaintiff of one-half of all future payments. After maintaining this allotment pursuant to the decree from 1963 to 1967, Badgett discontinued payment and had made no payments since that date. Erspan sued in federal court seeking her share of the retirement benefits paid by the government but not forwarded to her in the past.[221] In addition, she sought an order ensuring receipt of future benefits. The court ordered payment of past accrued benefits and ordered the execution of an allotment order.[222] After affirmance by the Fifth Circuit,[223] Badgett sought a rehearing, alleging that the order made by the district court was precluded by the holding in *Hisquierdo* and *McCarty*. In a per curiam opinion the Fifth Circuit rejected Badgett's argument.[224]

Central to the opinion of the Fifth Circuit denying rehearing was the fact that *Hisquierdo* and *McCarty* were direct appeals.[225] The Fifth Circuit was persuaded that the judgment was entitled to its usual res judicata

218. Id. at 488. *See also* Jeffrey v. Kendrick, 621 S.W.2d 207 (Tex. Civ. App.—Amarillo 1981, no writ); Powell v. Powell, 620 S.W.2d 253 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

219. 659 F.2d 26 (5th Cir. 1981).

220. By implication the Texas Supreme Court agreed with *Erspan*'s application of res judicata to preclude retroactive application of *McCarty*.

221. In 1971 Erspan obtained a judgment for benefits due. That judgment was affirmed on appeal in Badgett v. Erspan, 476 S.W.2d 381 (Tex. Civ. App.—Fort Worth 1972, no writ).

222. *See* Erspan v. Badgett, 647 F.2d 550, 552 (5th Cir. 1981).

223. *Id.* at 556.

224. 659 F.2d 26 (5th Cir. 1981).

225. *Id.* at 28.

effect.[226] Citing as authority *Moitie*, the opinion stated that a final judgment settles not only issues actually litigated but also any issues that could have been litigated.[227] Further, the effect of res judicata is not altered by the fact that the judgment may have been wrong or premised on a legal principle subsequently overruled in another case.[228]

The San Antonio court of appeals faced essentially the same question but reached an opposite result in the case of *Ex Parte Buckhanan*.[229] Realtor Buckhanan sought relief through a habeas corpus proceeding after having been held in contempt for failing to obey a final divorce decree rendered in 1977. Pursuant to that decree, Buckhanan was to pay his former wife a part of his military retirement pay, an obligation he did not fulfill. His former spouse initiated contempt proceedings resulting in the issuance of a contempt citation and an order of confinement, thus directly raising the question of the effect of *McCarty* on the application of res judicata to a past divorce decree awarding military retirement benefits.

Unlike the Fifth Circuit in *Erspan*, the San Antonio court of appeals acknowledged the difference between a validity problem and a problem involving a mistake of law or fact.[230] Relator's application for a writ of habeas corpus was recognized as a collateral attack on a final judgment. Consequently, the court ruled that such an attack is not possible unless the district court lacked the power to make an award of military retirement pay.[231] Because Texas follows the general rule of res judicata that a final judgment which is only erroneous cannot be collaterally attacked,[232] the controlling question in this case was "whether applicable federal law, through the supremacy clause of the United States Constitution, preempted the power of Texas courts to treat the relator's military retire(ment) pay as community property. . . ."[233] The court, in reversing the order of the lower court, concluded that because the payments are not subject to division upon divorce as property under federal law a contempt order for nonpayment is unenforceable under the Supremacy Clause.[234]

A decision such as *McCarty* raises a conflict between two important policies: validity and finality of judgments. In fact, the tension between the two is one of the major concerns dealt with under the res judicata doctrine. Initially the policy of validity was emphasized more heavily than the policy of finality. Early English cases held that judgments of a court lacking

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226. *Id.*
227. *Id.*
228. *Id.*
229. 626 S.W.2d 65 (Tex. Civ. App.—San Antonio 1981, no writ).
230. *Id.* at 65.
231. *Id.*
232. *Id.* (citing Humble Oil & Ref. Co. v. Fisher, 152 Tex. 29, 253 S.W.2d 656 (1953) and Clayton v. Hurt, 88 Tex. 595, 32 S.W. 876 (1895).
233. *Id.*; *see Ex parte* Johnson, 591 S.W.2d 453 (Tex. 1979), in which the Texas Supreme Court refused to enforce a contempt order for federal benefits that were "solely" for the use of the relator. Relying on *Hisquierdo*, the court held that the contempt order was preempted by the Supremacy Clause. 591 S.W.2d at 456. *See also Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981).
234. 626 S.W.2d at 68.

subject matter jurisdiction were void.[235] Courts in the United States adopted this doctrine.[236] As explained in a recent law review article:

> [T]he traditional theory has a logical but simplistic appeal. Both federal and state courts are limited in their subject matter jurisdiction by constitutions and legislation. Courts that act beyond those constraints act without power; judgments of courts lacking subject matter jurisdiction are void—not deserving of respect by other judicial bodies or by the litigants. This is so even if the litigants want the court to exercise jurisdiction; parties cannot confer power upon a court if the legislature or constitution has denied it power. Thus the parties could collaterally attack a judgment at any time.[237]

By the 1800's courts in the United States began to carve out exceptions to the validity oriented traditional voidness doctrine. By the early 1930's the Supreme Court adopted a rule which did more than simply carve out an exception to the traditional voidness doctrine—it held that finality interest could outweigh validity.[238]

By the late 1930's the Supreme Court announced that a determination of subject matter jurisdiction by a court of general jurisdiction in a contested action was res judicata.[239] While there remained some ambiguity,[240] the position of the Supreme Court seemed clear—instead of validity interests occassionally curtailed by finality interests the rule now favored finality interests occasionally curtailed by validity interests.[241] All that remained was to determine the exceptions to the new general rule of res judicata. Case law, as reflected in the First and Second Restatements of Judgments, provided the answer.

Kalb v. Feuerstein,[242] decided by the Supreme Court in 1940, employed language which recalled the traditional rule. But the real issue in *Kalb* was whether a state court could render judgment during the pendency of a petition filed in a federal bankruptcy court. Federal bankruptcy law results from an explicit exercise by Congress of its exclusive and plenary power under the constitution to regulate bankruptcy.[243] The rule of *Kalb* is that once Congress has assured exclusive jurisdiction over the subject matter (bankruptcy) state court jurisdiction is preempted and any judgment by a state court purporting to exercise jurisdiction in the preempted area is a nullity subject to collateral attack.

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235. *See, e.g.*, Marshalsea, 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1612). *See generally* Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C.L. REV. 49 (1961).

236. Dobbs, *supra* note 235, at 77-78.

237. Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 537 (1981). *See also* Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164 (1977).

238. Baldwin v. Iowa State Traveling Men's Assoc., 283 U.S. 522 (1931).

239. *See* Stoll v. Gottlieb, 305 U.S. 165 (1938).

240. See Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939).

241. Federated Dep't Stores, Inc. v. Moitie, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); Allen v. McCurry, 449 U.S. 90 (1980); Montana v. United States, 440 U.S. 147 (1979); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

242. 308 U.S. 433 (1940).

243. Frazier-Lemke Act, Pub. L. No. 74-384, 49 Stat. 942 (1935).

United States v. United States Fidelity & Guaranty Co.,[244] decided by the Supreme Court in the same year as *Kalb*, further illustrates the nature of the validity exception to the finality rule. In that case the court refused to foreclose a collateral attack against a judgment of a federal court awarding damages against the United States because the claim was not raised in the courts specified by Congress. What is clear from the discussion of the rationale for the conclusion is that finality cannot be used to foreclose or vitiate determination properly attributed within the scheme of our government to some other body, in this case Congress. Where "extrinsic policies implicating the powers or policies of other branches of government"[245] are involved, finality interests may properly yield.

A judgment was void if the rendering court lacked jurisdiction over the subject matter according to the first *Restatement of Judgments*.[246] But there might be an exception. If a court with jurisdiction over the parties had determined that it had subject matter jurisdiction then a court reviewing a collateral attack was to use a balancing test which weighted the finality policy against the validity policy.[247] In the 1963 case of *Durfee v. Duke*[248] the Supreme Court referred to the *Restatement*, *Kalb* and *Fidelity* and said "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal preemption or sovereign immunity may in some contexts be controlling."[249] The *Restatement (Second)* provides that in cases in which the proceeding was contested but the question of subject matter jurisdiction was not raised,[250] whether the judgment is entitled to finality depends on a balancing of (1) any justifiable interest of reliance that must be protected,[251] and (2) the extent to which giving effect to the judgment would substantially infringe the authority of another tribunal or agency of government.[252] This formulation is one which gives reasonable guidance without inflexibly attempting to definitively characterize each and every situation. Application of this formula supports the conclusion of the majority in *Ex Parte Buckhanan*, supplies further rationale for Texas Supreme Court cases like *Ex Parte Johnson*[253] and *Ex Parte Burson*,[254] and allows for answers to certain problems which have not yet come before the courts directly.

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244. 309 U.S. 506 (1940).

245. *See* Moore, *supra* note 237, at 562.

246. RESTATEMENT OF JUDGMENTS § 7 (1942).

247. *Id.* § 10. The five facts that favored validity were (1) clarity of lack of subject matter jurisdiction, (2) whether the jurisdictional issue hinged on a question of law or fact, (3) whether the rendering court was one of limited or general jurisdiction, (4) whether the jurisdictional issue was litigated, and (5) the strength of the policy against permitting the court to exceed its subject matter jurisdiction.

248. 375 U.S. 106 (1963). The Court actually quoted the RESTATEMENT OF CONFLICT OF LAWS § 451(2) (Supp. 1948), which adopted the RESTATEMENT OF JUDGMENTS § 10 (1942).

249. 375 U.S. at 114.

250. These are cases in which the parties assumed the court had authority.

251. RESTATEMENT (SECOND) OF JUDGMENTS § 117 (Tent. Draft No. 6, 1979).

252. *Id.*, § 15.

253. 591 S.W.2d 453 (Tex. 1979).

254. 615 S.W.2d 192 (Tex. 1981).

Justifiable interests of reliance that must be protected are involved in prospective enforcement of final divorce decrees since such a decree creates a justifiable interest of reliance. That interest is one based on the fairness of the division, the law as it was at the time in question, and a final judgment. Each aspect of the justifiable interest of reliance is illustrated in the following hypothetical. The husband, about to retire from the service, asks for and receives the house in the city, the cars, the bank accounts and his personalty because he wants to remain in the city after retirement and begin a second career. The wife, anxious to leave the city, settles for 100% of her husband's soon-to-be awarded retirement benefits. She uses all of her separate property to make a downpayment on a farm with future payments to be made with the monthly retirement benefits. The divorce is granted, the husband retires and retirement payments commence. Now the husband ceases to pay. The wife has lost her portion of the community property, the awarded military retirement benefits and may well lose all of her separate property as well if she is unable to meet payments as they come due.

This type of justifiable interest of reliance is compelling. But it must be balanced against the extent to which giving effect to the past judgment would substantially infringe the authority of another tribunal or agency of government. If the military retirement is a federally preempted personal entitlement (regardless of the propriety of such a characterization)[255] then any state court action in opposition to the federal interest necessarily infringes on the authority of the federal government.

Thus in a case like *Ex Parte Buckhanan*[256] a balancing must take place. First, there must be a finding as to the nature of the justifiable interest of reliance to be protected. Prospective desires for participation in military retirement benefits are such an interest.[257] Second, there must be a finding as to whether giving effect to the judgment would substantially infringe the authority of another agency of government. As the Supreme Court of the United States,[258] the Supreme Court of Texas[259] and the San Antonio court of appeals[260] recognize, enforcement by court action after June 26, 1981 in a Texas court of claims against military benefits would substantially infringe federal authority. In *McCarty* the majority stated:

[W]e agree with Appellant's . . . argument that the application of

255. The question is not whether Congress should make such a determination or even whether it actually did make such a determination. Rather, the question is whether state courts can ignore the Supremacy Clause.

256. 626 S.W.2d 65 (Tex. Civ. App.—San Antonio 1981, no writ). For purpose of this discussion, all that is necessary for a case to be similar is that it grow out of a past final judgment. It does not matter whether the case is an appeal from an attempt to enforce a past final divorce decree directly or whether it is an appeal by habeas corpus from a contempt proceeding.

257. A court might well take judicial notice of such reliance.

258. Ridgway v. Ridgway, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981); McCarty v. McCarty, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

259. Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981); *Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981); *Ex parte* Johnson, 591 S.W.2d 453 (Tex. 1979).

260. *Ex parte* Buckhanan, 626 S.W.2d 65 (Tex. Ct. App.—San Antonio 1981, no writ).

> community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation. The statutory language is straight-forward: "A member of the Army retired under this chapter is entitled to retired pay . . . ." In Hisquierdo . . . we emphasized that under the Railroad Retirement Act a spouse of a retired railroad worker was entitled to a separate annuity that terminated upon divorce . . .; in contrast, the military retirement system confers no entitlement to retired pay upon the retired service member's spouse. Thus, unlike the Railroad Retirement Act, the military retirement system does not embody even a limited "community property concept." Indeed, Congress has explicitly stated: "Historically, military retired pay has been a *personal entitlement* payable to the retired member himself as long as he lives."[261]

This is clear, unequivocal and absolute preemption. Application of this aspect of the Supremacy Clause weighs the balance conclusively against application of res judicata.

On the other hand, failure to apply res judicata to prospective enforcement does not mean that res judicata is inapplicable to prevent recoupment of past payments made[262] under a proper application of the *Restatement (Second)* approach. This is so because as the previous discussion has made clear, the old void/voidness dichotomy of the traditional rule no longer applies. Rather res judicata applies even in cases involving subject matter jurisdiction, subject to exceptions. The fact that a request to a Texas court for enforcement cannot be allowed after June 26, 1981 does not mean that retired military personnel can now seek to recover for past payments made under final decrees as to payments already made, since the *Restatement (Second)* balancing test upholds finality.

A spouse who has spent money received pursuant to a final judgment has a justifiable interest of reliance which must be protected. The passage of time, the reality of the hardship of any requirement of repayment, and the imponderable impact on public perceptions as to finality and justice if res judicata were not allowed conclusively establish a justifiable interest of reliance which must be protected. Allowing res judicata to apply to past payments does not substantially infringe the authority of another agency of government. Even though the governmental desire that payments go to the military members has been thwarted, that "loss" to the government is past. Its effect, whatever its nature and magnitude, has been successfully borne. It is a loss which will continue to diminish as time goes by.

Although the effect of *McCarty* on past final divorce decrees squarely presents a res judicata issue, some courts have chosen to analyze the issue under the doctrine of nonretroactive application of judicial decisions.[263]

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261. 101 S. Ct. at 2736-37, 69 L. Ed. 2d at 600-01 (footnote and citations omitted).

262. Judge Klingeman assumes in his dissent in Buckhanan that res judicata either applies across the board or not at all. 626 S.W.2d at 68.

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

The San Antonio court of appeals in *Ex parte Rodriquez*[264] and the Austin court of appeals in *Ex parte Gaudion*[265] do not explain why they chose to apply the doctrine of nonretroactive application instead of res judicata. By the terms of the respective doctrines, res judicata appears to be the more applicable test. The Texas Supreme Court did not even apply the doctrine of nonretroactive application in *Trahan*,[266] a case where res judicata was inapplicable but the doctrine of nonretroactive application was clearly applicable. Perhaps the nonretroactive doctrine is chosen because it allows avoidance of the *McCarty* decision. Under this doctrine the court considers three separate factors. (1) The decision to be applied nonretroactively must establish a new principle of law.[267] (2) The court must weigh the merits and demerits in each case by looking to the prior history of the rule and whether retrospective operation will further or retard its operation.[268] (3) The court must decide whether the inequity imposed by retroactive application is so harsh as to require avoidance of injustice or hardship by decreeing that the case shall be nonretroactive.[269]

The courts that have applied the nonretroactive doctrine have concluded that *McCarty* ought to be nonretroactive. Analysis of the three prongs of the test provides clear support for this result under the first and third elements. But the second element raises the same issue previously discussed under the doctrine of res judicata: to what extent is *McCarty* a case preempting state action? To the extent that *McCarty* is a preemption case, retrospective operation is mandated. *McCarty* by its own terms is a preemption case.[270]

Since *McCarty* the United States Supreme Court has again considered a case involving an interpretation of an act of Congress which resulted in certain inequities. In *Ridgway v. Ridgway*[271] the question was one of competing claims to a Servicemen's Group Life Insurance policy. The serviceman was divorced and the divorce decree ordered him to keep policies in force for the benefit of the couple's three children. Later the serviceman remarried and immediately changed the beneficiary designation to his second wife. When the serviceman died there was a contest over the proceeds of the policy. While recognizing that the result was "unpalatable," the Supreme Court nonetheless unwaiveringly held that federal law preempts

264. No. C-911 (Tex. Ct. App.—San Antonio 1981). The Texas Supreme Court subsequently denied a petition for writ of habeas corpus. 25 Tex. Sup. Ct. J. 110 (Dec. 31, 1981).

265. 628 S.W.2d 500 (Tex. Ct. App.—Austin 1982). The Texas Supreme Court denied a petition for writ of habeas corpus in this case as well. 25 Tex. Sup. Ct. J. 170 (Feb. 10, 1982). *See also* Mattern v. Mattern, 624 S.W.2d 400 (Tex. Ct. App.—Forth Worth 1981, no writ); Anthony v. Anthony, 624 S.W.2d 388 (Tex. Ct. App.—Austin 1981, no writ).

266. 626 S.W.2d 485 (Tex. 1981).

267. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (citing Allen v. State Bd. of Elections, 393 U.S. 544 (1969) and Hanover Shoe v. United States Shoe Machinery Corp. 392 U.S. 481 (1968).

268. 404 U.S. at 106-07 (citing Linkletter v. Walker, 381 U.S. 618 (1975)).

269. 404 U.S. at 107 (citing Cipriano v. City of Houma, 395 U.S. 701 (1969)).

270. *See* text accompanying note 261 *supra*.

271. 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981).

state law.[272]

While the decisions of the Supreme Court are clear, the equities served by ignoring res judicata's proper application or misapplying the doctrine of nonretroactive application are appealing. Until a final United States Supreme Court determination forecloses avoidance of *McCarty*, creative decisions can be expected to flourish.[273]

B. New Texas Uniform Judgment Acts

Uniform Foreign Country Money Judgment Recognition Act. Traditionally, unnecessary post-litigation problems existed both for Texans who obtained money judgments against foreigners and for Texans who successfully defended against money judgments in foreign states. For example, assume that Slater, a United States citizen domiciled in Texas, enters into a contract for the sale of a computer in Laredo with Segundo, a Mexican citizen. Segundo changes his mind after signing a legal and binding contract and refuses to carry out the contract. Slater sues in a court in Texas and obtains a valid final judgment. Although Segundo has no assets in Texas, he has more than enough assets to satisfy the Texas judgment in Mexico. Slater, therefore, seeks to have his Texas judgment recognized in Mexico. Any enforcement of one nation's judgments in another nation is governed by the general doctrine of comity. In Mexico, as in most nations, comity requires reciprocity.[274] Thus, the Texas judgment will be enforced in Mexico to the same extent that a valid Mexican judgment will be enforced in Texas. The issue then becomes whether a Texas court would enforce a valid Mexican judgment. Pertinent Texas cases arguably support a finding of reciprocity.[275] But the cases are both equivocal and as legal authority an anathema to civil law courts. It is thus understandable that civil law nations would refuse to recognize reciprocity established or proven only by case law.[276] If the highest court in a jurisdiction were to certify the existence of a rule of reciprocity or if there were a statute establishing reciprocity, then a civil law country would undoubtedly recognize reciprocity. Absent certification or a statute, Slater would be unlikely to prevail in Mexico.

What if the operative facts were reversed? Assume that Slater went to Mexico and there entered into negotiations with Segundo for the purchase

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272. *Id.* at 59, 70 L. Ed. 2d at 53.

273. Cases from other jurisdictions that agree with the result reached in *Erspan*, *Rodriquez*, and *Gaudion* include Erbe v. Eady, 406 So. 2d 936 (Ala. Civ. App. 1981); Fellers v. Fellers, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (Cal. Ct. App. 1981); Sheldon v. Sheldon, 124 Cal. App. 3d 377, 177 Cal. Rptr. 380 (Cal. Ct. App. 1981), Mahone v. Mahone, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (Cal. Ct. App. 1981).

274. With the exception of previous members of the British Commonwealth and communist nations, most nations have civil law as opposed to common law legal systems. The general rule of comity in civil law systems requires reciprocity. *See* Carl, *Recognition of Texas Judgments in Courts of Foreign Nations—and Vice Versa*, 13 HOUS. L. REV. 680, 686 (1976).

275. *Id.* at 681-86.

276. *Id.* at 686.

of a computer. Although no agreement could be reached as to price, Segundo sues Slater in a Mexican court alleging that a contract did exist. Slater prevails and a judgment on the merits is rendered. Relieved, Slater returns to Laredo. What if Segundo follows Slater to Laredo and files the same suit in a Texas district court? Will Slater be able to assert his Mexican judgment as a bar to the Texas suit? Probably, but the answer is not guaranteed.[277]

Clearly when the granting or denying of a money judgment depends upon comity between common law and civil law nations, a governing statute will be most helpful. A statutory basis for comity has been provided through the 67th Texas Legislature's adoption of the Uniform Foreign Country Money-Judgment Recognition Act (the Money Act or the Act).[278] This statute applies to judgments granting or denying a sum of money,[279] but does not include tax judgments, fines, penalties, or familial support judgments rendered by a governmental unit outside of the United States system.[280] Such a final money judgment is to be enforced in the same manner as the judgment rendered in another state in the United States and is entitled to full faith and credit.[281]

Two major concerns exist in any determination of the comity to be given to a foreign country judgment: whether there was personal jurisdiction, and whether the process of judgment rendition was fair.[282] The Act deals with questions of jurisdiction by including provisions for voluntary appearance, voluntary agreement, domicile, specifically-affiliating commercial presence, operation of a motor vehicle or airplane, and such other bases as the court might recognize.[283] It also provides that recognition shall not be refused if the defendant was served personally in the foreign country.[284]

Detailed safeguards against forced recognition of "unfair" judgments do exist in the Money Act. The major grounds for nonrecognition involve

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277. *Id.* at 684-86.

278. TEX. REV. CIV. STAT. ANN. art. 2328b—6 (Vernon Supp. 1982) [hereinafter cited as Money Act]. The Act was part of the State Bar's legislative program. Professor Beverly Carl of SMU, who has written extensively on this subject served as vice-chairman of the State Bar's International Law Section during the Bar sponsorship and subsequent legislative adoption of the Act. Professor Carl initially suggested that the word money be added to the title of the Act. *See generally* Carl, *supra* note 274. As of 1980 the Act has been adopted in nineteen states other than Texas. They are Alaska, Arizona, Colorado, Connecticut, Idaho, Iowa, Kansas, Maine, Minnesota, Nevada, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

279. Money Act, *supra* note 278, §§ 2(2), 4.

280. *Id.* § 2(2).

281. *Id.* § 4.

282. *See* Hilton v. Guyot, 159 U.S. 113 (1895).

283. Money Act, *supra* note 278, § 6.

284. *Id.* § 6(a)(1). Under the doctrine of Pennoyer v. Neff, 95 U.S. 714 (1878), this result is acceptable. *See* Ehrenzweig, *The Transient Rule of Personal Jursidiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956). This basis is highly questionable under current Supreme Court decisions, however, because in some cases an exercise of jurisdiction based only on personal service in a foreign country might fail under due process requirements. *See* Newton, *Conflict of Laws, Annual Survey of Texas Law*, 35 SW. L.J. 333, 333-39 (1981); Money Act, *supra* note 278, § 5(a)(1).

tribunals or procedures incompatible with due process of law or a failure of subject matter jurisdiction.[285] In addition, recognition need not be given where there is insufficient notice, the judgment was obtained by fraud, the judgment is repugnant to Texas public policy, the judgment conflicts with another final judgment, the judgment ignores an agreed disposition, the judgment is one involving only personal service and the rendering court was a seriously inconvenient forum, or the rendering state would not recognize Texas judgments.[286]

Of the remaining miscellaneous provisions, two merit special notice. Under section 8 of the Act, a Texan may recognize a foreign country judgment in situations not covered by the Act.[287] Comity is not and should not be static. It is appropriate, therefore, that the Act invite its continued general growth and application. Under section 10, the provisions of the Act apply only prospectively.[288] Judgments rendered before June 17, 1981, the effective date of the Act, are not covered.

C. Uniform Enforcement of Foreign Judgments Act

Pursuant to the United States Constitution, state court judgments are entitled to full faith and credit.[289] The usual practice is to require an action based on the foreign judgment which entails the application of full procedural requirements. In an attempt to eliminate such unnecessary full procedural proceedings the 67th Texas Legislature adapted the Uniform Enforcement of Foreign Judgments Act (the Judgments Act).[290]

Any judgment entitled to full faith and credit is covered by the Act.[291] Such a judgment, authenticated either under a federal or Texas statute,[292] is filed with the clerk of any Texas court of competent jurisdiction. Once filed this judgment "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying as a judgment of the court in which it is filed."[293] In addition to filing an authenticated judgment, the judgment creditor must pay a $10 filing fee,[294] and by affidavit show: (1) the name and last known post office address of the judgment debtor; (2) the name and last known post office address of the judgment creditor; and (3) if the judgment creditor has any attorney in Texas, the attorney's name and address. Upon receipt of this information, in proper form, the clerk shall "promptly" mail notice to the judgment debtor and note the mailing in the docket.[295] Of

285. Money Act, *supra* note 278, § 5.
286. *Id.*
287. *Id.* § 8.
288. *Id.* § 10.
289. U.S. CONST. art. IV, § 1.
290. TEX. REV. CIV. STAT. ANN. art. 2328b—5 (Vernon Sup. 1982).
291. *Id.* § 1.
292. *Id.* § 2.
293. *Id.*
294. *Id.* § 5. Section 5 further provides "fees for other enforcement proceedings shall be as otherwise provided by law for judgments of the courts of this state." *Id.*
295. *Id.* § 3(b).

course it is possible that some clerks in some courts might not "promptly" mail the required notice. The Act, therefore, provides that a judgment creditor may mail notice to the judgment debtor and file proof with the clerk.[296] If the judgment creditor mails notice and files proof, then any lack of mailing of notice by the clerk has no effect on the enforcement proceedings.

After notice has been filed according to either of the two permissible methods, the judgment becomes enforceable pursuant to the law of Texas. A showing under Texas law made to the court by a judgment debtor of any ground staying the enforcement will be effective.[297] Furthermore the Texas court will stay enforcement[298] upon a showing by the judgment debtor that an appeal of the foreign judgment is pending or will be taken, or that a stay has been properly granted.

The commissioner's prefatory note correctly describes the Uniform Enforcement of Foreign Judgments Act as providing for a summary proceeding. This summary proceeding achieves a laudable goal—it makes a foreign judgment a Texas judgment. This reduces a great deal of the time and effort which would be required under the usual procedure. As section 6 makes clear, however, the new procedure is not mandatory and does not replace the current Texas procedure.

296. *Id.*
297. The judgment debtor must provide security pursuant to Texas law, *Id.* § 4.
298. *Id.*