SMU | Dedman School of Law

SMU Law Review

Volume 38
Issue 1 *Annual Survey of Texas Law*

Article 16

January 1984

Conflict of Laws

D. Paul Dalton

Mark T. Josephs

Jeffrey E. Oleynik

CONFLICT OF LAWS*

by

*D. Paul Dalton***
*Mark T. Josephs****
*Jeffrey E. Oleynik*****

CONFLICT of laws involves primarily the areas of choice of law, judgments, and judicial jurisdiction. During this survey period Texas case law reflects a major but expected choice of law development, some activity with little substantive change concerning treatment of foreign judgments, and a continuing state of flux as to judicial jurisdiction.

I. CHOICE OF LAW

Undoubtedly the most significant case decided during the survey period in Texas dealing with choice of law principles was *Duncan v. Cessna Aircraft Co.*[1] In *Duncan* the Texas Supreme Court extended the use of the most significant relationship test proposed by the *Restatement (Second) of Conflict of Laws*,[2] holding that the *Restatement (Second)* interest analysis

---

* This Article is dedicated to the memory of A.J. Thomas, late Dean Ad Interim and William Hawley Atwell Professor of Constitutional Law at Southern Methodist University School of Law. Dean Thomas authored several of the prior survey articles on Conflict of Laws.

** B.S., University of Houston College of Pharmacy; J.D., Southern Methodist University. Attorney at Law, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Texas.

*** B.A., University of Texas; J.D., Southern Methodist University. Attorney at Law, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Texas.

**** B.A., College of William & Mary; J.D., University of Virginia. Attorney at Law, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Texas.

1. 27 Tex. Sup. Ct. J. 213 (Feb. 15, 1984). This opinion replaces the court's prior opinion in this case, which appeared at 26 Tex. Sup. Ct. J. 507 (July 13, 1983). The new opinion makes no change in the court's decision concerning conflict of laws, the court having granted a motion for rehearing on an entirely separate issue.

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971). Section 6 sets forth the *Restatement (Second)* choice of law principles, and provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international system,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

will apply to nearly every future choice of law question in Texas.[3] In so doing, the court took the next logical step after *Gutierrez v. Collins*[4] and *Robertson v. Estate of McKnight*,[5] cases in which the court had first applied the most significant relationship test to tort choice of law issues.

The *Duncan* case involved choice of law as applied to a contractual release agreement. Carolyn Parker Duncan, the plaintiff, brought suit for damages occasioned by the death of her husband in a 1976 crash of a Cessna aircraft in New Mexico. The crash also killed Benjamin Smithson, the instructor pilot who was giving Parker flying lessons at the time of the crash. Smithson was employed by Air Plains West, Inc., the aircraft's owner. Mrs. Duncan originally sued Air Plains West and Smithson's estate, complaining of their alleged negligence, but that suit was terminated when she settled with Air Plains West for $90,000 and executed a release.[6] Mrs. Duncan and Smithson's widow subsequently instituted wrongful death actions against Cessna, alleging the existence of design and manufacturing defects in the aircraft.[7]

The choice of law question became crucial to Mrs. Duncan's action against Cessna. If construed under Texas law, the release previously signed by Mrs. Duncan, which had terminated her suit against Air Plains West and Smithson's estate, would not have barred her subsequent action against Cessna.[8] Under New Mexico law, however, the release would have discharged any named tortfeasor or any tortfeasor who came within a named general class.[9] Therefore, if construed under New Mexico law, the

---

Id. § 6. Section 145 establishes the general principles with regard to interest analysis. Subsection 2 of § 145 states:

> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 145(2).

3. The court specifically excepted from application of the most significant relationship test those situations in which the parties' contract contains a valid forum selection clause. 27 Tex. Sup. Ct. J. at 216. For an example during the survey period of a court's giving effect to a forum selection clause, see City of Austin v. Decker Coal Co., 701 F.2d 420 (5th Cir. 1983).

4. 583 S.W.2d 312 (Tex. 1979).

5. 609 S.W.2d 534 (Tex. 1980). For a discussion of *Gutierrez* and *Robertson*, see Newton, *Conflict of Laws, Annual Survey of Texas Law*, 35 Sw. L.J. 333, 349-51 (1981).

6. The release did not specifically mention Cessna but released generally "*any other corporations or persons whomsoever responsible therefor, whether named herein or not . . . .*" 27 Tex. Sup. Ct. J. at 213 (emphasis in original).

7. While Mrs. Duncan's action against Smithson's estate and Air Plains West, Inc. had complained of the crash itself, the suit against Cessna alleged that design and manufacturing defects in the legs of the aircraft's cockpit seats caused the legs to break during the crash, resulting in the deaths of Parker and Smithson. *Id.*

8. *Id.* at 215.

9. *Id.*

release would have barred Mrs. Duncan's claims against Cessna.[10]

The Supreme Court of Texas used the *Duncan* case as its vehicle for completely abandoning lex loci choice of law principles in other than extremely limited situations. As had been anticipated,[11] in place of lex loci the court substituted the *Restatement (Second)* analysis it had previously adopted in *Gutierrez* for tort cases in Texas. Under the most significant relationship test, the court in *Duncan* determined that Texas law should apply to the construction of the release, noting that the interests of New Mexico defendants were not at stake.[12] The court concluded that Texas interests outweighed any possible contacts the parties may have had with New Mexico.[13] Thus, Mrs. Duncan's claims against Cessna were not barred by the previously executed release.

Under the principles of law in effect prior to the *Duncan* decision, contract cases had remained subject to lex loci choice of law principles.[14] In fact, Texas courts had taken the better part of two decades since interest analysis was first applied[15] to apply the test in Texas. The *Duncan* case completed the evolution of the judicial adoption of interest analysis in Texas, leaving only minor exceptions to the application of the *Restatement (Second)* method of determining which state's law should apply.[16] As a result, "in all choice of law cases [in Texas], . . . the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue."[17]

Although *Duncan* clearly makes choice of law questions easier by elimi-

---

10. *Id.* (citing Johnson v. City of Las Cruces, 86 N.M. 196, 521 P.2d 1037 (Ct. App. 1974)).

11. Obviously, abandonment of lex loci for contract actions in Texas seemed certain to occur. Courts and commentators alike predicted completion of the demise of lex loci after the *Gutierrez* case. *See, e.g.*, Whitley v. Hartford Accident & Indem. Co., 532 F. Supp. 190 (N.D. Tex. 1981), *aff'd per curiam*, 670 F.2d 183 (5th Cir. 1982); Comment, *Abandonment of Lex Loci Delicti in Texas: The Adoption of the Most Significant Relationship Test*, 33 Sw. L.J. 1221 (1980). In discussing *Gutierrez*, the *Whitley* court stated: "Although the court's decision [in *Gutierrez*] was limited to tort actions, there is some opinion that the decision could also portend the demise of the mechanical choice of law rule governing contract actions in Texas and the incorporation of the 'most significant relationship' test." 532 F. Supp. at 194.

12. 27 Tex. Sup. Ct. J. at 216.

13. *Id.* The only New Mexico contacts were the following: the decedent James Parker worked in New Mexico; the decedent Benjamin Smithson lived and worked in New Mexico; and Air Plains West was a New Mexico corporation. *Id.*

14. The fact that interest analysis, as first adopted in *Gutierrez*, had not been extended to contract cases in Texas was not lost upon the court of appeals. That court stated:

> Neither *Gutierrez* nor *Robertson* hold that contractual releases of tort liability are governed by the "most significant relationship" test of § 145 of the Restatement, and we find . . . no Texas case which holds that such contractual releases from tort liability are governed by the test. Until the Supreme Court expressly decides that conflicts cases involving tort releases are to be governed by the § 145 test, this Court will continue to apply the *lex loci contractus* rule
>
> . . . .

Duncan v. Cessna Aircraft Co., 632 S.W.2d 375, 380 (Tex. Civ. App.—Austin 1982) (footnote omitted), *rev'd*, 27 Tex. Sup. Ct. J. 213 (Feb. 15, 1984).

15. The most significant relationship test was first used by a court in the United States in 1963. *See* Babcock v. Jackson, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

16. *See supra* note 3 and accompanying text.

17. 27 Tex. Sup. Ct. J. at 216.

nating the need to characterize the case as being based upon tort or upon contract,[18] interest analysis under the *Restatement (Second)* principles complicates choice of law questions in other ways.[19] The relative advantages and disadvantages of interest analysis and lex loci principles were demonstrated by several cases decided during the survey period, including *Guillory v. United States*,[20] *New York Life Insurance Co. v. Baum*,[21] and *Houston North Hospital Properties v. Telco Leasing, Inc.*[22]

In *Guillory v. United States*[23] the Fifth Circuit, using Texas choice of law rules,[24] applied the most significant relationship test of the *Restatement (Second)*.[25] Noting that the district court's decision on the choice of law issue would not be disturbed unless " 'against the more cogent reasoning of the best and most widespread authority,' "[26] the court reversed the lower court's determination that Texas law should apply to the case. The *Guillory* case arose as a result of the death of David Guillory, who had been treated at a Veterans Administration hospital in Houston, Texas. Guillory subsequently died in Lake Charles, Louisiana, but his death was traced to his earlier treatment at the Texas hospital. Guillory's survivors brought suit in a Louisiana federal district court and argued for application of Louisiana substantive law, which would have permitted a recovery for loss of love and affection, damages not compensable under Texas law.[27] The trial court ruled that Texas law would apply.[28]

The Fifth Circuit conceded that both Louisiana and Texas had "legitimate policy interests in applying their respective substantive law."[29] The court further opined that Texas had a real interest in forcing doctors within its boundaries to comply with the state's relevant standard of care.[30]

---

18. *See infra* notes 19, 42-44, and accompanying text.

19. For discussion of some of the difficulties encountered in applying the most significant relationship tests, see Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593 (1983), and Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207 (1981).

20. 699 F.2d 781 (5th Cir. 1983).

21. 700 F.2d 928 (5th Cir. 1983) (originally published at 697 F.2d 1245, and subsequently withdrawn from publication).

22. 688 F.2d 408 (5th Cir. 1982).

23. 699 F.2d 781 (5th Cir. 1983).

24. Texas choice of law principles applied in *Guillory* because the suit was under the federal tort claims act. Under that statute, the place where the acts or omissions occurred determines which state's choice of law rules apply. *Id.* at 784 (citing Richards v. United States, 369 U.S. 1 (1962)). The other federal cases discussed herein involving choice of law apply Texas choice of law principles because Texas was the forum in which the court was sitting. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

25. For the factors to consider in the *Restatement (Second)* interest analysis, see *supra* note 2 and accompanying text.

26. 699 F.2d at 784 (quoting Harville v. Anchor-Wate Co., 663 F.2d 598, 601 (5th Cir. 1981)). This statement does not appear to provide a particularly clear standard for review of lower court rulings.

27. 699 F.2d at 784.

28. *Id.*

29. *Id.* at 785.

30. *Id.*

Nevertheless, the court reversed in favor of applying Louisiana law, concluding that "Louisiana unarguably has a legitimate interest in assuring that its citizens are adequately compensated for injuries caused by doctors' substandard conduct."[31] The court deemed Texas's interest in policing the conduct of its physicians "of diminished consequence,"[32] because Louisiana also requires a relatively stringent standard of care for its physicians.[33]

Guillory seems to underscore the difficulty that the *Restatement (Second)* analysis creates in cases involving close choice of law questions. Ultimately, the determination of which state's law should apply in such cases becomes a nearly immeasurable quantitative and qualitative positioning of the *Restatement (Second)* factors. Thus, a more clearly defined standard of appellate review seems appropriate.[34] Nevertheless, interest analysis provides the courts with a " 'rational yet flexible approach to conflicts problems, . . .' "[35] an approach arguably more in tune with "the demands of our highly mobile modern society."[36]

In *New York Life Insurance Co. v. Baum*,[37] decided prior to *Duncan*, the court grappled with the now-outdated lex loci contractus approach to choice of law. The *Baum* case involved interpretation of an insurance contract that was, in the district court's opinion, to be performed in several states. The contract insured the life of an individual who was killed in Texas. Both a Louisiana resident, Baum, and a Texas corporation sought payment of the proceeds under the insurance policy. Thus, according to the district court, performance of the contract was contemplated in more than one jurisdiction. The lower court also concluded that Louisiana law applied to the construction of the contract, reasoning that because " 'Louisiana is the place where the contract was made, Texas law presumes that the parties to the contract intended for Louisiana law to govern. . . .' "[38]

The Fifth Circuit reversed, holding that New York law should apply to the interpretation of the contract. The court disagreed with the district court's analysis concerning performance in more than one jurisdiction, noting "that incidental performance in one state would not preclude the application of the law of the state where the bulk of performance occurred, and in which the contract itself was made."[39] The court further determined that the contract had in fact been made in New York, relying upon the fine distinctions governing the place of making of an insurance con-

---

31. *Id.*
32. *Id.* at 786.
33. *Id.*
34. Specifically, the question arises whether a federal trial court's decision, weighing the appropriate factors and applying a particular state's law, should be subject to review under standards applicable to conclusions of law, or standards for findings of fact.
35. Duncan v. Cessna Aircraft Co., 27 Tex. Sup. Ct. J. 213, 215 (Feb. 15, 1984) (quoting Guitierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979)).
36. 27 Tex. Sup. Ct. J. at 215.
37. 700 F.2d 928 (5th Cir. 1983) (originally published at 697 F.2d 1245, and subsequently withdrawn from publication).
38. *Id.* at 930 (quoting New York Life Ins. Co. v. Baum, 617 F.2d 1201, 1201-03 (5th Cir. 1980)).
39. 700 F.2d at 931.

tract that had become critical to the lex loci contractus analysis.[40] *Baum* illustrates, therefore, the fortuitous nature of certain actions that can give effect to, and determine the interpretation of, contractual agreements under the lex loci analysis.[41]

In *Houston North Hospital Properties v. Telco Leasing, Inc.*,[42] also decided before *Duncan*, the Fifth Circuit applied the most significant relationship test to a case arising out of a dispute over a contract.[43] In the opinion on rehearing, the court apparently held that the plaintiff's economic duress claim arising out of the contract's negotiation was based upon tort. The court held that the most significant relationship test of *Gutierrez* therefore should apply.[44]

Each of the cases discussed points to the respective shortcomings of the *Restatement (Second)* and lex loci analyses. In *Guillory*[45] the possibility of subjective or unpredictable results in close choice of law questions decided under the *Restatement (Second)* test was apparent. *Baum*[46] illustrated the difficulty of determining place of making and the fortuitous nature of certain aspects of contract formation, with each aspect of the case becoming a relevant factor in the court's lex loci analysis. *Telco Leasing*[47] presented the potential problem of characterizing the action as being based upon tort or contract principles during the pre-*Duncan*, post-*Gutierrez* era. Obviously, the *Duncan* case resolves the last two of the three problem areas.

The survey period produced only two other cases that considered choice of law principles. In *Meyers v. Moody*[48] the court discussed the inter-relationship of the Texas Business Corporation Act[49] and the Insurance Code[50] in the context of choice of law. Article 9.14 of the Business Corpo-

---

40. The court noted a distinction, for the purposes of the place of making the contract, between conditional and unconditional delivery of insurance contracts. It stated:

> Thus, it is clear that, under Texas law, where an agent must verify to his satisfaction a certain condition of the insured prior to delivering the insurance contract, the final act of the making of the contract occurs at the place where the insured resides. However, where delivery of the policy is unconditional, the contract is deemed to have been made at the domicile of the insurance company.

Id. at 932.

41. *See also* Kuzel v. Aetna Ins. Co., 650 S.W.2d 193 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (place of making insurance contract analyzed by court).

42. 688 F.2d 408 (5th Cir. 1982).

43. *See* Houston N. Hosp. Properties v. Telco Leasing, 680 F.2d 19 (5th Cir. 1982) (initial opinion on debtor-creditor action).

44. 688 F.2d at 409.

45. Guillory v. United States, 699 F.2d 781 (5th Cir. 1983).

46. New York Life Insurance Co. v. Baum, 700 F.2d 928 (5th Cir. 1983) (originally published at 697 F.2d 1245, and subsequently withdrawn from publication).

47. Houston N. Hosp. Properties v. Telco Leasing, Inc., 688 F.2d 408 (5th Cir. 1982).

48. 693 F.2d 1196 (5th Cir. 1982).

49. TEX. BUS. CORP. ACT ANN. art. 9.14 (Vernon 1980).

50. TEX. INS. CODE ANN. arts. 3.57, 21.43 (Vernon 1981). Article 3.57 provides:

> No foreign or domestic insurance company shall transact any insurance business in this State, other than the lending of money, unless it shall first procure from the Board of Insurance Commissioners a certificate of authority, stating that the laws of this State have been fully complied with by it, and authorizing it to do business in this State. Such certificate of authority shall expire on the

ration Act provides that the provisions of the Act do not apply "to any foreign corporations which are granted authority to transact business within this State under any special statutes . . . ."[51] The *Meyers* court noted that insurance companies are among those foreign corporations authorized to transact business in Texas under a special statute, but observed that the Insurance Code does not specify the duties or liabilities of the officers or directors of insurance companies.[52] The court found, however, that the officers and directors of a foreign corporation doing business in Texas are subject to the same duties and liabilities that are imposed upon officers and directors of domestic corporations under the Business Corporation Act.[53] Finding nothing inconsistent with that provision in the Insurance Code, the court held that the defendant was subject to the same duties and liabilities that Texas law imposes upon officers and directors of Texas corporations.[54]

In *Hines v. Tenneco Chemicals, Inc.*[55] the court held that, although North Carolina substantive law would apply to the plaintiff's claims, Texas's limitations statutes applied to the plaintiff's cause of action.[56] Noting that statutes of limitations are procedural, the court concluded that Texas courts, like courts in most jurisdictions, prefer to apply their state's procedural law to the cases before them.[57] Thus, even though the question of which state's statute of limitations should apply can have a significant substantive effect on the outcome of a case, interest analysis does not affect application of the statute of limitations, because limitations questions are procedural in nature.

---

day fixed by the Board under Articles 3.06 and 3.08 of this code and shall be renewed annually so long as the company shall continue to comply with the laws of the State, such renewals to be granted upon the same terms and considerations as the original certificate.

Id. art. 3.57. Article 21.43 sets forth the conditions upon which foreign insurance corporations are permitted to do business in Texas and provides in part:

(c) No foreign or alien insurance corporation shall be denied permission to do business within this state for the reason that all of its authorized capital stock has not been fully subscribed and paid for; provided

(1) That at least the minimum dollar amount of capital stock of such corporation required by the laws of this state (which may be less than all of its authorized capital stock) has been subscribed and paid for; and

(2) That it has at least the minimum dollar amount of surplus required by the laws of this state for the kinds of business such corporations seek to write; and

(3) That such corporation has fully complied with all laws of its domiciliary state relating to authorization and issuance of capital stock.

Id. art. 21.43.

51. TEX. BUS. CORP. ACT ANN. art. 9.14 (Vernon 1980).

52. 693 F.2d at 1209.

53. *Id.*

54. *Id.*

55. 546 F. Supp. 1229 (S.D. Tex. 1982).

56. *Id.* at 1232.

57. *Id.* at 1233.

II. JUDGMENTS—FULL FAITH AND CREDIT

The United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[58] Although no remarkably new Texas law was made concerning foreign judgments during the survey period, several cases discussed the validity, enforcement, or effect of foreign judgments under Texas law. Additionally, the legislature enacted a minor amendment to the Uniform Enforcement of Foreign Judgments Act[59] during the survey period.

A. Default Judgments—Challenges to Jurisdiction

In recent years, cases involving foreign default judgments presented for enforcement in Texas courts have provided several opportunities for commentators to address the significance of, and the requirements for, challenging the jurisdiction of the court that entered the default judgment.[60] During the survey period, the Corpus Christi court of appeals in *Fuhrer v. Rinyu*[61] attempted to distill and clarify the analysis elements for these cases. After initially concluding that the law concerning jurisdictional challenges to default judgments had become confused, the *Fuhrer* court endeavored to present and describe the rules applicable to direct and collateral attacks on default judgments.[62] As it turns out, however, this attempt at clarification may itself have created a new wrinkle of confusion.

The *Fuhrer* case arose out of a default judgment obtained in Michigan by Fuhrer against Rinyu and Altype Mortgage Service, Inc. Fuhrer brought suit against both defendants in Texas to enforce the judgment. His entire case consisted only of an authenticated copy of the judgment and an order from the Michigan court authorizing service upon the defendants by regular first class mail.[63] The sole defense offered was a claim that the Michigan court had no personal jurisdiction over either defendant because of improper service of process.[64]

In rejecting the defendants' claim and ordering enforcement of the Michigan judgment, the Corpus Christi court stated:

> [The Michigan] judgment is entitled to the same presumption of regularity in jurisdiction as a domestic judgment and such presumption can be overthrown only by clear and convincing evidence of want of jurisdiction. The burden of proof with respect to the jurisdiction of the court of a sister state to render judgment is ordinarily on the party

58. U.S. CONST. art. IV, § 1.
59. TEX. REV. CIV. STAT. ANN. art. 2328b—5 (Vernon Supp. 1984).
60. *See, e.g.*, Newton, *Conflict of Laws, Annual Survey of Texas Law*, 34 SW. L.J. 385, 389-95 (1980); Newton, *Conflict of Laws, Annual Survey of Texas Law*, 33 SW. L.J. 425, 434-42 (1979); Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 32 SW. L.J. 387, 399 (1978).
61. 647 S.W.2d 315 (Tex. App.—Corpus Christi 1982, no writ).
62. *Id.* at 317.
63. *Id.* at 316.
64. *Id.*

claiming want of jurisdiction.[65]

The court further observed that the defendants failed to offer any evidence to show that they were not actually served in the manner provided by the Michigan court's order, that the order regarding service of process was invalid, or that the recitals in the judgment were invalid.[66] The court therefore held that the Michigan judgment was entitled to full faith and credit and would be enforced.[67]

Predictably, Rinyu filed a motion for rehearing.[68] This motion challenged the court's holding that a foreign default judgment is entitled to a presumption of validity and regularity. In support of that position, Rinyu cited four Texas court of appeals opinions.[69] While the *Fuhrer* court admitted that those cases "seem to adopt the view that there are no presumptions in favor of a foreign default judgment,"[70] it disagreed that such position was actually the law in Texas.[71]

The earliest case relied upon by Rinyu, *Country Clubs, Inc. v. Ward*,[72] involved a Kentucky judgment presented for enforcement in Texas. In that opinion, the Dallas court of civil appeals actually stated that "the ordinary presumptions in support of the judgment . . . are not available in attacks against default judgments."[73] The court cited the Texas Supreme Court's opinion in *McKanna v. Edgar*[74] as support for that proposition.[75] In *McKanna*, however, the supreme court reviewed a *direct* attack on a *Texas* judgment,[76] and the court's specific holding was that "[w]hile ordinarily presumptions are made in support of a judgment . . . , no such presumptions are made in a *direct* attack upon a default judgment."[77] By contrast, the proceeding reviewed in *Country Club* unquestionably was a collateral, rather than a direct, attack on the foreign default judgment.[78]

---

65. *Id.* at 317.
66. *Id.*
67. *Id.*
68. *Id.* It is apparent from a review of the court's opinion that Altype Mortgage Service Company, Inc. did not join in the motion for rehearing. *Id.* at 317-19.
69. Rinyu cited Bayne v. Heid, 638 S.W.2d 40 (Tex. App.—Houston [1st Dist.] 1982, no writ); Mathis v. Wachovia Bank & Trust Co., 583 S.W.2d 800 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.); Jackson v. Randall, 544 S.W.2d 439 (Tex. Civ. App.—Texarkana 1976, no writ); Country Clubs, Inc. v. Ward, 461 S.W.2d 651 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.). *Fuhrer*, 647 S.W.2d at 317.
70. 647 S.W.2d at 317.
71. *Id.*
72. 461 S.W.2d 651 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).
73. *Id.* at 655. A later opinion of the Dallas court repudiated the correctness of this position. *See* A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281, 286 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).
74. 388 S.W.2d 927 (Tex. 1965).
75. 461 S.W.2d at 655.
76. 388 S.W.2d at 928.
77. *Id.* at 929 (emphasis added).
78. *Cf.* Reeves v. Fuqua, 277 S.W. 418, 423 (Tex. Civ. App.—Amarillo 1925, writ dism'd) (collateral attack is any proceeding in which integrity of judgment is challenged, other than action where judgment rendered). *Id.* For a thorough explanation of what constitutes a collateral attack, including descriptions of exceptions to the above definition, see generally Hodges, *Collateral Attacks on Judgments*, 41 TEX. L. REV. 163, 170-73 (1962-63) (listing examples of collateral attacks).

Although the supreme court refused to grant a writ of error in *Country Club*, it is possible that the court's conclusion that no reversible error had occurred resulted because the facts set forth by the Dallas court in the *Country Club* opinion sufficiently demonstrated that any such presumption in favor of the regularity of the judgment would nonetheless have been rebutted. Consequently, the granting of a writ addressing the points would probably have led to the same result.[79]

Each of the other three cases cited *Country Club*, *McKanna*, or both for the proposition that no presumptions are indulged in favor of a default judgment. These cases, like *Country Club*, made no distinction between direct and collateral attacks. Of the three, only *Mathis v. Wachovia Bank & Trust Co.*[80] resulted in the filing of an application for writ of error. Again, the supreme court refused to grant the writ. An examination of the facts stated by the Houston court in its *Mathis* opinion reveals that, as in *Country Club*, any presumption of regularity that might have been imposed would probably have been met and overcome.

While each of the other two cited opinions contains language to support the *Fuhrer* court's conclusion that those cases stand for the proposition that no presumptions are to be indulged in favor of foreign default judgments, the analysis in each of those opinions actually assumes the existence of such a presumption and discusses how the presumption is rebutted by the evidence presented.[81] In any event, those four cases probably did "confuse the various rules which apply to direct and collateral attacks on default judgments."[82]

The *Fuhrer* court attempted to clear up the confusion caused by the apparent misstatements of law by stating the following rules: (1) For *direct* attacks on *Texas* default judgments,[83] "no presumptions will be indulged in support of the judgment's validity;"[84] (2) for *collateral* attacks on *Texas* default judgments, "a clear and definite recital in the judgment on jurisdictional matters is conclusive of the issues of jurisdiction"[85] and confers absolute verity upon such recitals such that no evidence in contradiction

79. *Cf.* A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281, 286 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (subsequent opinion reaching same general conclusion as in text about *Country Club*).

80. 583 S.W.2d 800 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

81. *See* Bayne v. Heid, 638 S.W.2d 40, 41 (Tex. App.—Houston [1st Dist.] 1982, no writ); Jackson v. Randall, 544 S.W.2d 439, 441 (Tex. Civ. App.—Texarkana 1976, no writ). The *Bayne* court stated: "[T]he evidence presented by the appellant in his affidavit is sufficient to overcome the presumption of regularity of service contained in the foreign [default] judgment." 638 S.W.2d at 41. The *Jackson* court stated: "The burden of going forward with the evidence then shifted to the appellants . . . to rebut the presumption of the validity of the New York judgment. In meeting this burden, the appellants have refuted by affidavit the applicability of each element of the New York long arm statute . . . ." 544 S.W.2d at 441.

82. *Fuhrer*, 647 S.W.2d at 317.

83. By definition, there could not be a direct attack in a Texas court on a foreign default judgment. *See supra* note 78 and accompanying text.

84. 647 S.W.2d at 317.

85. *Id.*

thereof will be heard, even if irrefutable;[86] (3) for attacks on *foreign* default judgments,[87] jurisdictional recitals in the default judgment are presumed to be valid, such that the person attacking the validity of the judgment has the burden of proving that the issuing court had no jurisdiction.[88]

The first rule stated is an accurate summary of the supreme court's holding in *McKanna*.[89] Application of this rule is, however, clearly restricted to *direct* attacks on default judgments. Since any attack in a Texas court on a default judgment rendered by a sister state must, by definition, constitute a *collateral* attack,[90] the limitation in the *McKanna* opinion, if not precluding, does not not support any application of this rule to attacks on foreign default judgments.

The second rule presented by the *Fuhrer* court broadly states the general principle of Texas law applicable to collateral attacks on Texas default judgments.[91] The troublesome effect of the breadth of this statement while not clear on the basis of its language, is addressed later in this discussion.

The third rule is also a generally correct statement of the law and represents a permissible inquiry.[92] An initial examination reveals, however, that the different standard set forth in the third *Fuhrer* rule for review of foreign default judgments is much weaker, being subject to rebuttal, than the standard identified in the second rule for Texas default judgments. Although this distinction may appear to offend principles of full faith and credit, it actually does not do so.

Under the rule set forth by the United States Supreme Court in *Pennoyer v. Neff*,[93] Texas courts unquestionably possess exclusive jurisdiction over

86. *Id.* at 317-18.

87. Attacks on foreign default judgments by their very nature can only be collateral attacks. *Id.* at 318.

88. *Id.* Although the *Fuhrer* court did not limit its description of this rule to only jurisdictional recitals, these authors submit that such a limitation is actually a clearer description of the true scope of the rule. Principles of full faith and credit require that the substantive provisions of a final foreign judgment, whether default or otherwise, receive the same res judicata treatment as would a domestic judgment, excluding only inquiries into the foreign court's jurisdiction and fraudulent procurement. *See, e.g.*, Bondeson v. Pepsico, Inc., 573 S.W.2d 842, 844 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (defense of fraudulent procurement of judgment available); A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281, 283 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (general civil jurisdiction of foreign state noted). If, therefore, the foreign court had jurisdiction to issue the judgment, and there is no showing of fraud, that judgment is conclusive of the matters it encompasses and the doctrine of res judicata precludes another opportunity to relitigate the merits. *See* Williamson v. Rodgers, 489 S.W.2d 558, 560 (Tex. 1973). Such conclusive treatment must also be applied to a jurisdictional challenge where the defendant actually appeared in the foreign proceeding. *See* Sherrer v. Sherrer, 334 U.S. 343, 348 (1948). Abramowitz v. Miller, 649 S.W.2d 339, 342 (Tex. App.—Tyler 1983, no writ).

89. 388 S.W.2d 927, 929 (Tex. 1965).

90. *See* 647 S.W.2d at 318; A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281, 286 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *see also supra* note 78.

91. *See* Imatani v. Marmolego, 606 S.W.2d 710, 713 (Tex. Civ. App.—Corpus Christi 1980, no writ), and cases cited therein.

92. *See* Mitchim v. Mitchim, 518 S.W.2d 362, 366 (Tex. 1975); Colson v. Thunderbird Bldg. Materials, 589 S.W.2d 836, 839-40 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

93. 95 U.S. 714 (1877).

persons within the state's boundaries.[94] Texas, therefore, has legitimate and justifiable policy reasons for insuring the sanctity and finality of judgments rendered in Texas against Texas residents.[95] The converse of the *Pennoyer* rule is that a state does not have jurisdiction over persons outside its boundaries.[96] This rule is, of course, subject to long-arm jurisdiction exceptions. These exceptions necessarily involve the presentation and examination of, as well as a ruling upon, facts relative to the propriety of a state's exercise of its jurisdiction over a nonresident.[97]

For these reasons, a state has an undeniable interest in ascertaining whether any assertion of jurisdiction over its residents by a sister state is proper. Of course, when the defendant actually appeared in the foreign proceeding, that foreign forum unquestionably obtained personal jurisdiction over him, and that issue may not be relitigated.[98] Consequently, it seems that only in a case seeking enforcement of a foreign default judgment would a state's interest in reviewing a sister state court's jurisdiction arise. In order to permit assertion of that interest, therefore, the jurisdiction of the foreign court may be only presumed, rather than held, to be conclusive.[99] While this discussion clears up one apparent problem with the *Fuhrer* court's statement of applicable rules, yet another problem could arise from application of the literal language the court used in expressing these rules.

A literal application of the second and third *Fuhrer* court rules for collateral attacks in Texas on default judgments could produce differing rights to jurisdictional challenges based upon whether or not the defendant is a Texas resident. Under the third rule, a Texas resident clearly would have an opportunity to contest the assertion of jurisdiction over him by a foreign court by offering evidence to overcome the presumption. On the other hand, the second rule appears to prohibit a non-Texas resident from offering any evidence to refute the jurisdiction of a Texas court that had entered a default judgment against him. Consequently, use of the second and third *Fuhrer* court rules *as stated* could create an anomalous situation wherein Texas courts would seem to favor the validity of a Texas judgment against a non-Texas resident over a foreign state's judgment rendered against a Texas resident. Fortunately, this situation is not truly a problem with existing law; rather, it results from an oversight by the *Fuhrer* court to incorporate into its statement of the applicable rules the principle that a state may not apply the rule of absolute verity for jurisdictional

94. *Id.* at 722.

95. For a description of these policies, see Hodges, *supra* note 78, at 528.

96. *See Pennoyer*, 95 U.S. at 722.

97. *See infra* notes 149-206 and accompanying text.

98. Sherrer v. Sherrer, 334 U.S. 343 (1948).

99. *See, e.g.*, McElreath v. McElreath, 345 S.W.2d 722, 744 (Tex. 1961) (Texas court considers validity of Oklahoma divorce decree); Roath v. Uniroyal, Inc., 582 S.W.2d 185, 186 (Tex. Civ. App.—Beaumont 1979, no writ) (Texas court may examine foreign state's assertion of jurisdiction); A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281, 283 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (authentication of foreign judgment establishes presumption of jurisdiction).

recitations in default judgments to nonresidents.[100] Incorporating this principle into the statement of the rules would result in consistent treatment of judgments, fully in accord with full faith and credit requirements. In setting forth its three rules governing attacks on default judgments, therefore, the *Fuhrer* court should probably have noted two qualifications: that the second rule applies to collateral attacks on Texas default judgments, but only as against Texas residents; and that the third rule applies to attacks by nonresidents against Texas default judgments as well as to attacks on foreign default judgments.

B. Finality, Limitations, and Res Judicata

An earlier survey article discussed the most recent Texas Supreme Court opinion dealing with the issue of finality of a foreign default judgment sought to be enforced in Texas.[101] Recently, the first district court of appeals in Houston, in *Medical Administrators, Inc. v. Koger Properties, Inc.*,[102] considered a contention that a Florida judgment was not final because the Florida court had reserved jurisdiction to consider additional attorney's fees incurred in attempts to enforce the judgment. Citing the supreme court's opinion in *State of Washington v. Williams*,[103] as well as the opinions in *Beavers v. Beavers*,[104] *Hargrove v. Insurance Investment Corp.*,[105] and *Moody v. State*,[106] the Houston court held the Florida judgment to be final and subject to enforcement in Texas, stating:

> [A] judgment otherwise disposing of all issues between the parties is not rendered interlocutory if further proceedings may be required to carry the judgment into effect . . . . Thus, a judgment may be final even though further proceedings incidental to its proper execution are provided for on the face of the judgment.[107]

The Houston court logically extended the supreme court's holding in *State of Washington*, concluding that enforcement of a foreign judgment cannot be avoided by a claim of no finality merely because the judgment permits assessment of additional attorney's fees incurred in enforcement of, or collection upon, that judgment.[108]

Ringer v. TransAmerica Insurance Co.[109] offered an opportunity for discussion of the application of limitations statutes to foreign judgments presented for enforcement in Texas. In *Ringer* Clinical Development Corporation brought an action in Oklahoma against its employees, B.R. and

---

100. *See* O'Boyle v. Bevil, 259 F.2d 506 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); Hicks v. Sias, 102 S.W.2d 460 (Tex. Civ. App.—Beaumont 1937, writ ref'd).

101. *See* Newton, *supra* note 60, at 408-09.

102. No. 01-83-0111-CV (Tex. App.—Houston [1st Dist.], Sept. 1, 1983, no writ) (available Jan. 15, 1984, on LEXIS, States library, Tex. file).

103. 584 S.W.2d 260 (Tex. 1979).

104. 651 S.W.2d 52 (Tex. App.—Dallas 1983, no writ).

105. 142 Tex. 111, 176 S.W.2d 744 (1944).

106. 520 S.W.2d 452 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

107. No. 01-83-0111-CV.

108. *Id.*

109. 650 S.W.2d 520 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

Mary Ringer, and against its insurer, TransAmerica. The action was based upon alleged fraud by the employees and a claim of policy coverage for losses resulting from such fraud. TransAmerica cross-claimed for indemnity against the Ringers. The Oklahoma court entered judgment against the Ringers and TransAmerica for $73,659 on July 14, 1969.[110] Upon TransAmerica's appeal, the Oklahoma Supreme Court affirmed the judgment on August 3, 1971.[111] The Ringers did not appeal and moved to Texas in 1970. On April 14, 1976, TransAmerica, having satisfied the entire judgment to the original Oklahoma plaintiff, sued in Texas to enforce its judgment for indemnity against Mr. Ringer.[112] Ringer defended the action on the basis that, at the time the Texas suit was commenced, the judgment was not enforceable because it was dormant under the Oklahome five-year dormancy statute.[113] Ringer alternatively contended that the Oklahoma one year limitations statute for foreign judgments had expired well before the Texas action was filed.

The *Ringer* court first noted the general principle in Texas that a suit on a foreign judgment is barred "if it would have been barred in the foreign jurisdiction under its laws."[114] The Oklahoma dormancy statute was unquestionably five years.[115] Ringer contended, however, that because he had not appealed the Oklahoma judgment against him, it was final as to him on September 30, 1969, the date his motion for new trial in the Oklahoma proceeding had been overruled. Thus, according to Ringer, the Texas action had been brought more than five years following rendition of the judgment against him. In short, Ringer wanted the court to find that two separate judgments emanated from that lawsuit, one as to the Ringers and a subsequent one as to TransAmerica.[116]

The court rejected this contention, holding that there can be "only one judgment per cause"[117] and that, since "[a] judgment for indemnity necessarily requires a prior determination of liability . . . , [Ringer's] liability to [TransAmerica] did not accrue until [TransAmerica's] liability to Clinical had been finally determined by the Oklahoma Supreme Court."[118] As Ringer's liability accrued less than five years prior to the filing of the Texas suit, enforcement of the Oklahoma judgment was not barred by the five-year Oklahoma dormancy statute.[119]

The court also summarily rejected Ringer's suggestion that the Texas action was barred under the Oklahoma one-year limitations statute for suits on foreign judgments, because the judgment being sued upon was not

110. *Id.* at 521.
111. *Id.*
112. *Id.* Mary Ringer apparently was not a party to the action to enforce the judgment.
113. OKLA. STAT. ANN. tit. 12, § 735 (West 1960).
114. 650 S.W.2d at 522 (citing TEX. REV. CIV. STAT. ANN. art. 5530 (Vernon 1958)).
115. 650 S.W.2d at 522.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

foreign to Oklahoma.[120] Finally, the court addressed the question of post-judgment interest on foreign judgments. Observing that the laws of Oklahoma on post-judgment interest had not been proven, the court presumed such laws to be identical to those of Texas.[121] Thus, the court held that the six percent post-judgment interest provided for by Texas's article 5069—1.05 was applicable and remanded for calculation of that interest.[122]

An interesting discussion of res judicata principles appeared during the survey period in *Goodier v. Duncan*.[123] Goodier and Duncan had submitted their controversy to arbitration in California, which resulted in an award for Goodier. Goodier subsequently brought an action seeking to have a Texas court give full faith and credit to, and enforce, the arbitration award. That action was eventually nonsuited with prejudice. Meanwhile, Goodier obtained a California judgment nunc pro tunc confirming the original arbitration award. Goodier thereafter filed a second lawsuit in the same Texas court seeking enforcement of the California judgment. Duncan claimed that the nonsuit with prejudice of the first Texas lawsuit barred the second lawsuit under principles of res judicata.

Recognizing that the California judgment was simply a judicial confirmation of the same arbitration award that Mr. Goodier had sued upon in the first Texas action, the *Goodier* court nevertheless held that the second lawsuit was not barred because the court found "no identity of cause of action in the two lawsuits."[124] In support of that conclusion the Dallas court expressly held "that the cause of action upon the judgment stands separate and apart with an identity all its own from the cause of action out of which it arose."[125] The court's analysis included a lengthy quote from the United States Supreme Court's opinion in *Milwaukee County v. M.E. White Co.*[126] In *Milwaukee County* the Court specifically held that a cause of action on a judgment differs from the cause of action upon which the judgment was entered.[127] The *Goodier* court concluded that the trial court erroneously treated the order of dismissal in the first action as barring the second action under the doctrine of res judicata.[128] The court thus ordered that the California judgment be enforced.[129]

One other case during the survey period discussed the interrelationship of principles of res judicata and conflict of laws. In *Hornsby Oil Co. v. Champion Spark Plug Co.*[130] a prior Texas state court action between the

120. *Id.*
121. *Id.* at 523.
122. *Id.* (citing TEX. REV. CIV. STAT. ANN art. 5069—1.05 (Vernon Pam. Supp. 1971-83)).
123. 651 S.W.2d 25 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).
124. *Id.* at 27.
125. *Id.*
126. 296 U.S. 268 (1935).
127. *Id.* at 275.
128. 651 S.W.2d at 27.
129. *Id.*
130. 714 F.2d 1384 (5th Cir. 1983).

same parties involving some of the same claims asserted in the federal action had been dismissed for want of prosecution. Hornsby contended that assertion of those claims in a subsequent federal suit was barred by Federal Rule of Civil Procedure 41(b). The rule specifies that a dismissal, unless otherwise specified therein, "operates as an adjudication upon the merits."[131] The Fifth Circuit Court of Appeals rejected this contention holding that a federal court is required to accord a state court dismissal the same effect as would the state courts. The court observed that, as Texas courts do not treat a dismissal for failure to prosecute as an adjudication on the merits, no res judicata effect attached to the state court dismissal.[132]

C. Uniform Enforcement of Foreign Judgments Act

A thorough analysis of the provisions of the Uniform Enforcement of Foreign Judgments Act[133] (hereinafter the Judgments Act) as adopted in Texas has been presented in a previous survey article.[134] The Texas legislature, however, made a minor change to that statute during the survey period.[135] The Judgments Act, as originally adopted in Texas, required a filing fee of ten dollars, but it contained no provision as to when that fee had to be paid.[136] The legislature amended the act to require that the fee be "the amount as otherwise provided by law for filing suit in the courts of this state."[137] The amendment also made the fee due and payable at the time of filing.[138] These amendments should effect no significant change in the manner in which foreign judgments are presented for enforcement. Additionally, equating the amount of the fee with that for filing suit should simplify bookkeeping procedures for both attorneys and court clerks, even though it will undoubtedly result in an increase in the actual amount of the fee paid.

Although the article referenced above detailed the provisions of the Judgments Act,[139] it made no mention of the mechanics of using the statute. While the act states that "[a] copy of any foreign judgment authenticated in accordance with an act of congress or statutes of this state may be filed in the office of the clerk of any court of competent jurisdiction of this state,"[140] it does not identify the statutes of this state in accordance with which authentication may be achieved.

Medical Administrators, Inc. v. Koger Properties, Inc.[141] described proce-

131. FED. R. CIV. P. 41(b).
132. 714 F.2d at 1397.
133. TEX. REV. CIV. STAT. ANN. art. 2328b—5 (Vernon Supp. 1984).
134. Newton, *Conflict of Laws, Annual Survey of Texas Law*, 36 SW. L.J. 397, 433-34 (1982).
135. Act of May 26, 1983, ch. 731, 1983 Tex. Gen. Laws 4504.
136. TEX. REV. CIV. STAT. ANN. art. 2328b—5, § 5 (Vernon Supp. 1984).
137. Act of May 26, 1983, ch. 731, § 5(a), 1983 Tex. Gen. Laws 4504.
138. *Id.* § 5(b).
139. Newton, *supra* note 134, at 433-34.
140. TEX. REV. CIV. STAT. ANN. art. 2328b—5, § 2 (Vernon Supp. 1984).
141. No. 01-83-0111-CV (Tex. App.—Houston [1st Dist.] Sept. 1, 1984, no writ) (available Jan. 15, 1984, on LEXIS, States library, Tex. file).

dures by which the Judgments Act may be effectuated. In *Medical Administrators* the plaintiff filed a summary final judgment attested by a Florida court clerk and a certificate from a Florida judge that the attestation was in proper form in accordance with article 3731a.[142] Finding that foreign judgments are included within the scope of documents referenced in section 2 of article 3731a, the court held that authentication thereof in accordance with the provisions of section 4 of article 3731a was completely sufficient to constitute the authentication requirement of the Judgments Act.[143] On September 1, 1983, however, the new Texas Rules of Evidence became effective, thereby repealing article 3731a.[144] Texas Rules of Evidence 902(1) and 902(2) address authentication of domestic public documents under seal and not under seal.[145] Rule 902 provides, in general, that a sister state's judgment is properly authenticated if presented with a certification under seal by a public officer or employee of the political subdivision or district issuing the judgment that the signature on the judgment is genuine and the signer was vested with official capacity.[146] The same rule may be used to certify a copy of that judgment.[147]

Additionally, the *Medical Administrators* court identified a federal statute that also may be used to achieve authentication in compliance with the Judgments Act.[148] The court did not, however, invoke that statute. A foreign judgment, therefore, can be properly authenticated for filing under the Judgments Act in accordance with either the federal statute or Texas Rule of Evidence 902.

III. JURISDICTION

The jurisdiction section of the last Conflict of Laws survey focused on the reach of the Texas long-arm statute.[149] Attention was particularly addressed to the scope of the Texas Supreme Court's first opinion in the case of *Hall v. Helicopteros Nacionales de Colombia, S.A. (Hall I)*.[150] That Article concluded that *Hall I* left open the question of whether article

142. TEX. REV. CIV. STAT. ANN. art. 3731a (Vernon Supp. 1984). Section 2 of art. 3731a permitted admission into evidence:

> Any written instrument which is permitted or required by law to be made, filed, kept or recorded (including but not limited to certificate, written statement, contract, deed, conveyance, lease, concession, covenant, grant, record, return, report or recorded event) by an officer or clerk of . . . another state . . . or by his deputy or employer . . . .

Id. § 2. Although that statute did not specifically mention judgments, the *Medical Administrators* court found that such are encompassed within the foregoing provision. No. 01-83-0111-CV.

143. No. 01-83-0111-CV.

144. *See* TEX. R. EVID., Order of Adoption and Enumeration of Repealed Statutes.

145. *Id.* 902(1), (2).

146. *Id.* 902(2).

147. *Id.* 1005.

148. No. 01-83-0111-CV. The statute identified by the court was 28 U.S.C. § 1738 (1976).

149. *See* Newton, *supra* note 134, at 397-403.

150. 25 Tex. Sup. Ct. J. 190 (Feb. 24, 1982), *discussed in* Newton, *supra* note 134, at 399-401.

2031b,[151] the Texas long-arm statute, "extend[s] jurisdiction to the constitutional limits in every case."[152] Specifically, *Hall I* left unclear whether the determination of personal jurisdiction in Texas necessarily entails a two-step evaluation. For any given case involving a personal jurisdiction issue, the two-step process in question would ask, first, whether the requirements of article 2031b had been met and, second, whether the exercise of jurisdiction would be consistent with constitutional requirements of due process.[153]

During the survey period, the Texas Supreme Court withdrew its original opinion in *Hall* and substituted a new opinion (*Hall II*),[154] once again placing the reach of article 2031b in issue. One federal district court has opined that *Hall I* "apparently negated the need for the first step in the process and permitted courts to move directly to the question of due process."[155] The authors of this Article submit, however, that *Hall II* has not negated the first step of the process for all jurisdictional questions. Although the federal district court in the referenced decision actually found it unnecessary to determine *Hall II*'s exact scope,[156] this review of survey period decisions focuses on precisely such an analysis.

A. Historical Background

Determining the limits of long-arm jurisdiction in Texas involves interpreting the legislature's language limiting article 2031b to "causes of action arising out of such business done in this State" and "action[s], suit[s] or proceedings arising out of such business done in this State."[157] Efforts at such interpretation have provided a continuing source of controversy since the enactment of the statute.[158] Prior to the *Hall* decisions, earlier opin-

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

152. Newton, *supra* note 134, at 401.

153. *See infra* notes 199-203 and accompanying text.

154. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (Tex. 1982), *cert. granted*, 103 S. Ct. 1270, 75 L. Ed. 2d 493 (1983).

155. Bennett Indus., Inc. v. Laher, 557 F. Supp. 965, 966 (N.D. Tex. 1983).

156. *Id.*

157. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964) provides:

> Any . . . non-resident 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 . . . non-resident natural person of the Secretary of State . . . 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 . . . non-resident natural person is a party or is to be made a party.

Id. (emphasis added).

158. *See* Newton, *supra* note 134, at 397-403; Newton, *supra* note 60; Thomas, *supra* note 60; Comment, *Article 2031b and Rule 108 after Hall v. Helicopteros: Another Proposal*, 34 BAYLOR L. REV. 497 (1982) [hereinafter cited as Comment, *Article 2031b*]; Comment, Hall v. Helicopteros Nacionales de Colombia, S.A.: *Status of the Nexus Requirement in Texas Long-Arm Jurisdiction Analysis*, 24 S. TEX. L.J. 305 (1982) [hereinafter cited as Comment, *Status of the Nexus Requirement*]; Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process is Due*, 30 SW. L.J. 747 (1976) [hereinafter cited as Comment, *The Texas Long-*

ions of the Texas Supreme Court only increased the confusion.[159] The prevailing view among lower courts in Texas, as well as in the Fifth Circuit's decisions,[160] had been that the "arising out of" language of article 2031b should be read and applied literally "to require a nexus between the cause of action asserted and the defendant's contacts with Texas."[161] The basis for this position, in addition to the literal language of article 2031b, was the three-pronged test set forth by the Texas Supreme Court in *O'Brien v. Lanpar Co.*[162] This test provided for jurisdiction over a nonresident defendant only under the following circumstances:

> ". . . (1) [t]he nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation."[163]

The second prong of the *O'Brien* test, the nexus requirement, has been the subject of controversy since adoption of the test.[164]

Much of the controversy stemmed from the Texas Supreme Court's attempt to clarify the meaning of article 2031b in *U-Anchor Advertising, Inc. v. Burt*,[165] which, unfortunately, only muddied the water.[166] This confusion resulted primarily from the fact that in *U-Anchor* the supreme court, although expressly approving the *O'Brien* test, also broadly stated in a dictum: "Article 2031b reaches as far as the federal constitutional requirements of due process will permit. We let stand the statement in *Hopenfield*

Arm Statute]; Note, *Due Process Under the Texas Long-Arm Statute:* U-Anchor Advertising, Inc. v. Burt—*One More Tuft in the Morass of In Personam Jurisdiction Over the Non-Resident Defendant*, 15 HOUS. L. REV. 1054 (1978).

159. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977); O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex. 1966); *see infra* notes 165-68 and accompanying text.

160. *See* Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1266 n.8 (5th Cir. 1981). The prevailing view, however, was not unanimous. *See* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 37 SW. L.J. 289, 290 (1983).

161. Jim Fox Enter., Inc. v. Air France, 705 F.2d 738, 740 (5th Cir. 1983).

162. 399 S.W.2d 340 (Tex. 1966). The supreme court has restated this test on a number of occasions. *See, e.g., Hall I*, 25 Tex. S. Ct. J. at 192; *Hall II*, 638 S.W.2d at 872; Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 436 (Tex. 1982); U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977).

163. 399 S.W.2d at 342 (quoting Tyee Constr. Co. v. Dulien Steel Prods., Inc., 381 P.2d 245, 251 (Wash. 1963)).

164. *Hall II*, 638 S.W.2d at 872; *see also Hall I*, 25 Tex. Sup. Ct. J. at 192 (stating that nexus test is not a rigid due process requirement).

165. 553 S.W.2d 760 (Tex. 1977).

166. Thomas, *supra* note 60, at 387; *see also* Comment, *Article 2031b*, *supra* note 158, at 506. The Comment notes that the *U-Anchor* court "went out of its way to make it known that 2031b would be interpreted as reaching constitutional limits," *id.*, but unfortunately the fact that this statement was made in a dictum, coupled with the court's citation to *O'Brien* as the due process test, meant "the courts would be forced to again answer the question of whether article 2031b require[s] a nexus." *Id.*

v. Crook . . . 'that the reach of Art. 2031b is limited only by the United States Constitution.' "[167] Predictably, courts seeking to expand the reach of long-arm jurisdiction in Texas have cited the broad language of *U-Anchor* as authority for the position that the cause of action need not be related to the defendant's contacts with the state.[168] Such analysis was utilized despite the express language of article 2031b.

The Fifth Circuit Court of Appeals, however, specifically rejected this interpretation in its well-articulated and exhaustively researched opinion in *Prejean v. Sonatrach, Inc.*[169] In *Prejean* the plaintiff argued, relying on *U-Anchor*, that despite its literal language, article 2031b extended to causes of action unrelated to a defendant's contacts with the forum. Acknowledging that the broad language in the *U-Anchor* decision could be construed as implying that article 2031b reached the constitutional limits of due process, the Fifth Circuit nevertheless refused to accept the plaintiff's view. The Fifth Circuit instead concluded that the *U-Anchor* language directly addressed only the meaning of " 'doing business' in the context of whether it is coextensive with the constitutional confines of due process."[170]

In addition to *U-Anchor*, the plaintiff in *Prejean* also relied on *Navarro v. Sedco, Inc.*[171] The Fifth Circuit noted that the federal district court in *Navarro* had seized on *U-Anchor*'s broad language to support the proposition that the cause of action need not arise out of the defendant's business in Texas.[172] The *Prejean* court concluded, in light of the fact that the referenced language in *U-Anchor* addressed only the issue of doing business, that the *Navarro* court took the *U-Anchor* language out of context.[173] According to the *Prejean* court, *U-Anchor* had not extended the reach of the Texas long-arm statute. The Fifth Circuit determined the rule in Texas to be that:

> Article 2031b demands what due process merely takes into account: a nexus between the contacts with the forum and the cause of action of

---

167. 553 S.W.2d at 762. The Fifth Circuit indicated that the lack of clarity in interpretation of 2031b stems primarily from the *O'Brien* court's borrowing the three-pronged test from the *Tyee Construction* opinion. The Washington Supreme Court intended *Tyee Construction* to be a synthesis of the constitutional test and the requirements of the Washington long-arm statute. The Washington statute, like article 2031b, required that the cause of action arise out of the contacts with the forum. The Texas Supreme Court seemed to adopt the "arising out of" requirement as the test for due process. This adoption, according to the Fifth Circuit, has caused a great deal of the confusion as to whether the source of the nexus requirement in Texas is statutory or constitutional. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1266 n.8 (5th Cir. 1981).

168. *See* Navarro v. Sedco, Inc., 449 F. Supp. 1355 (S.D. Tex. 1978). Notwithstanding *O'Brien*, numerous courts have opted for a broad interpretation of the "arising out of" language of article 2031b since its adoption in 1959. *See* Figari, *supra* note 160, at 290 n.10. As pointed out by the Fifth Circuit, however, the "lower court decisions after *U-Anchor* . . . continued to require a nexus between the cause of action and the contacts with Texas." Prejean v. Sonatrach, 652 F.2d 1260, 1267 n.8 (5th Cir. 1981).

169. 652 F.2d 1260 (5th Cir. 1981).

170. *Id.* at 1265-66.

171. 449 F. Supp. 1355 (S.D. Tex. 1978).

172. 652 F.2d at 1267.

173. *Id.*

such a kind as to make the cause of action arise from those contacts. . . . Until such time as the Texas Legislature should see fit to eliminate the nexus requirement, service of process under Article 2031b cannot be made validly on a nonresident defendant whose contacts with Texas have no connection with the plaintiff's cause of action.[174]

B. Hall v. Helicopteros Nacionales de Colombia, S.A.

Shortly after the Fifth Circuit's decision in *Prejean*, the Texas Supreme Court once again addressed the nexus requirement of article 2031b in *Hall v. Helicopteros Nacionales de Colombia, S.A. (Hall I)*.[175] In *Hall I* the court appeared to relax the rigid nexus requirement,[176] recognizing:

[A] nexus between the cause of action and the defendant's contacts with the forum state is not a rigid due process requirement. It is, however, a significant factor to be considered when evaluating the fairness of the exercise of jurisdiction in a given case. A cause of action asserted against a nonresident defendant that does not arise out of something done in the foreign state compels proof of more pervasive contacts with the forum than a cause of action that is connected with the defendant's activities in the state. . . . As the relationship between the cause of action and the defendant's purposeful activity in the state grows more tenuous, the plaintiff faces an ever increasing burden of showing contacts with the forum sufficient to justify the exercise of jurisdiction.[177]

Despite its more flexible interpretation of the nexus requirement, however, the supreme court held that the cause of action could not be maintained.[178] This holding resulted from the court's finding neither a relationship between the forum and the cause of action nor substantial contacts between the defendant and the forum.[179]

The Fifth Circuit considered *Hall I* a diversion from the *Prejean* rule by a divided Texas court.[180] The Texas Supreme Court soon withdrew *Hall I* and substituted *Hall II*. *Hall II* "authoritatively ruled that business contacts unrelated to the asserted cause of action are relevant to and will sup-

174. *Id.* (footnotes omitted).

175. 25 Tex. Sup. Ct. J. at 190 (Feb. 24, 1982), *rev'd on rehearing*, 638 S.W.2d 870 (Tex. 1982). This decision involved a suit by the surviving relatives of four United States citizens killed in a helicopter crash in Peru. The deceased workers had been in Peru working on the construction of a pipeline. The defendant provided the helicopter to transport the men and supplies to and from the job site in the jungles of Peru.

176. *Hall I* suggested as an alternative to the rigid nexus requirement the balancing of the "tenuous nexus" against the sufficiency of the defendant's contact. *Id.* at 194; *see also* Comment, *Status of the Nexus Requirement, supra* note 158, at 313-14 (nexus possibly replaced by substantial continuous and systematic contacts).

177. 25 Tex. Sup. Ct. J. at 192.

178. *Id.* at 194.

179. *Id.* The court based this conclusion on the following facts: Neither any of the plaintiffs nor any of the deceased workers were Texas residents; the events, including the investigation, occurred in South America; the witnesses and evidence were located in South America; and the defendants' contacts with the state, primarily through negotiating contracts, were unrelated to the cause of action.

180. Placid Investment, Ltd. v. Girard Trust Bank, 689 F.2d 1218, 1219 (5th Cir. 1982).

port the exercise of personal jurisdiction under article 2031b."[181] The language of *Hall II* provides ample support for this position:

> [T]he second prong [of the three-pronged test of *O'Brien*] is unnecessary when the nonresident defendants [sic] presence in the forum through numerous contacts is of such a nature, *as in this case*, so as to satisfy the demands of the ultimate test of due process. Accordingly through the statutory authority of Art. 2031b Tex. Rev. Civ. Stat. Ann. there remains a single inquiry: is the exercise of jurisdiction consistent with the requirements of due process of law under the United States Constitution?[182]

The court in *Hall I* had not found the contacts to be substantial enough to sustain jurisdiction when the nexus between the cause of action and the forum was so tenuous as to be nonexistent.[183] Once *Hall II* redefined the nexus requirement, however, the defendant's presence in the forum through numerous unrelated contacts was clearly sufficient to satisfy the ultimate demands of due process.[184] *Hall II* is clearly authority for a Texas court's exercise of jurisdiction over a nonresident defendant whose business contacts with the state are substantial. Such an exercise of jurisdiction is valid even if the defendant's business contacts are unrelated to the specific cause of action. Other decisions during the survey period, however, demonstrate that a significant controversy remains as to whether the nexus requirement of article 2031b has been completely abandoned.

C. Decisions During the Survey Period

The earliest Fifth Circuit opinions following *Hall II* appear to have taken the position that the nexus requirement of article 2031b had been eliminated entirely. The first of the Fifth Circuit decisions to reexamine the reach of the Texas long-arm statute after *Hall II* was *Placid Investment, Ltd. v. Girard Trust Bank*.[185] In *Placid Investment* the Fifth Circuit concluded that its earlier view, expressed both in *Prejean* and in an earlier *Placid Investment* opinion was no longer in harmony with Texas authority.[186] The court viewed *Hall II* as having swept aside established precedent and extended the reach of article 2031b to the limits of due process.[187] Accordingly, the court remanded the case, noting that the district court had found that the defendant was doing business in Texas, but had made its finding without reference to the new Texas rule.[188]

Fifth Circuit decisions immediately following *Placid Investment*, including two others on petition for rehearing in light of *Hall II*,[189] were uniform

181. Figari, *supra* note 160, at 291.
182. 638 S.W.2d at 872 (emphasis added).
183. 25 Tex. Sup. Ct. J. at 194.
184. 638 S.W.2d at 871-72.
185. 689 F.2d 1218 (5th Cir. 1982).
186. *Id.* at 1219.
187. *Id.*
188. *Id.* at 1220.
189. Wyatt v. Kaplan, 712 F.2d 1002 (5th Cir. 1983); Jim Fox Enters., Inc. v. Air France, 705 F.2d 738 (5th Cir. 1983). In *Wyatt* the court originally held that the plaintiff was not

in holding that the Texas long-arm statute no longer required that the cause of action arise out of the defendant's contacts with Texas.[190] In finding that *Hall II* negated the need for the first step of the process, however, these Fifth Circuit decisions failed to give effect to the Texas Supreme Court's confirmation in *Hall II* of the vitality of the three-pronged *O'Brien* test. The *Hall II* court expressly stated: "The second prong is *useful* in any fact situation in which a jurisdiction question exists; and is a *necessary* requirement where the nonresident defendant only maintained single or few contacts with the forum."[191] The Fifth Circuit opinions focused instead on the *Hall II* statement making reference only to the situation where the defendant's presence in the forum through numerous contacts was of such a nature as to satisfy the demands of due process.[192]

---

entitled to discovery concerning personal jurisdiction, because the business contacts of the defendant within the state were unrelated to the cause of action. Noting the Texas Supreme Court's position against requiring that the cause of action arise out of contacts with Texas, the court nevertheless upheld the district court's dismissal for lack of jurisdiction. 712 F.2d at 1002. In *Jim Fox Enterprises* the court denied the petition for rehearing, withdrew its former opinion, and remanded the case a second time for further proceedings consistent with its finding that the sole inquiry after *Hall II* was whether the exercise of jurisdiction would be consistent with the requirements of constitutional due process. 705 F.2d at 741.

The court in *Jim Fox Enterprises* addressed in a footnote a related problem that often arises in personal jurisdiction cases: whether TEX. R. CIV. P. 108, extending service of process over an individual "to the full extent that he may be required to appear and answer under the constitution of the United States in an action either in rem or in personam," actually extends a Texas court's jurisdiction beyond that set forth by the Texas Legislature in art. 2031b. Plaintiffs in jurisdiction cases, including the plaintiff in *Jim Fox Enterprises*, have argued that even though the nonresident defendant may not be amenable to jurisdiction under article 2031b because of the nexus requirement contained therein, he may still be served pursuant to rule 108. Notwithstanding that the Texas Supreme Court had explicitly stated that the purpose of the amendment was to extend personal jurisdiction to the constitutional limits, *U-Anchor*, 553 S.W.2d at 762 n.1, the Fifth Circuit noted that its established rule has been not to allow a rule of procedure to be used as an end run around the jurisdictional requirements in art. 2031b, and that "we do not depart from our position here and do not suggest that Rule 108 be relied on here." 705 F.2d at 741 n.5.

If the early position of the Fifth Circuit that the Texas long-arm statute no longer has a nexus requirement after *Hall II* was correct, then its view of service of process under rule 108 should have been reconsidered at that time. Otherwise, the Fifth Circuit would seem to have been endorsing the Texas Supreme Court's accomplishing by case law what the Fifth Circuit would not have condoned being done by rule. For a further discussion of this problem, see Comment, *Article 2031b*, *supra* note 158, at 503.

190. Lapeyrouse v. Texaco, Inc., 693 F.2d 581 (5th Cir. 1982) (noting *Hall II* eliminated nexus requirement; thus finding jurisdiction over defendant because of fairly substantial general contacts with Texas); Loumar v. Smith, 698 F.2d 759 (5th Cir. 1983) (recognizing Texas long-arm statute stretches to limits of constitutional due process, but finding no jurisdiction over defendants whose only contact was advertising in nationally circulated publications possibly circulated in Texas).

Two district courts followed the Fifth Circuit's *Placid Investment* interpretation of *Hall II*. *See* Bennett Indus., Inc. v. Laher, 557 F. Supp. 965 (N.D. Tex. 1983); Samuels v. BMW of N. Am., Inc., 554 F. Supp. 1191 (E.D. Tex. 1983).

191. 638 S.W.2d at 872 (emphasis added).

192. *Prejean*, 652 F.2d at 1267 (discussing *Hall II*, 638 S.W.2d at 872). Furthermore, this statement by the court does not necessarily have to be read as inconsistent with the language of art. 2031b or the nexus requirement. Another reading is that, in an effort to simplify the three-pronged test, the court is willing to presume a nexus when the nonresident defendant has numerous contacts with the forum. Upon the presence of numerous contacts, a close

Those early Fifth Circuit decisions following *Hall II* could be interpreted as holding only that the nexus requirement of article 2031b need no longer be satisfied when the nonresident defendant has numerous contacts with the state.[193] The specific language of those opinions, however, appeared to be more sweeping. They seemed to ignore that *Hall II* was limited to the situation involving a nonresident defendant with numerous contacts with the state. Moreover, the plain language of article 2031b itself does not seem to have been considered.[194]

---

examination of the contacts should invariably reveal some relationship between those contacts and the cause of action.

193. The leading decision in the Fifth Circuit after *Hall II*, Placid Inv., Ltd. v. Girard Trust Bank, 689 F.2d 1218 (5th Cir. 1982), supports this position. *Placid* involved a nonresident defendant that maintained bank accounts in Texas, owned real estate in Texas, solicited business in Texas, and received revenue from Texas sources. Placid Inv., Ltd. v. Girard Trust Bank, 662 F.2d 1176, 1178 (5th Cir. 1981) (first *Placid* decision). Thus, no question existed whether the nonresident defendant had substantial contacts with the forum state. The Fifth Circuit's sweeping statements striking the nexus requirement after *Hall II* were possibly applicable solely in the context of a defendant with a definite presence in the forum. If so, the court failed to clarify this point. Other Fifth Circuit decisions may have been similarly motivated. *See also* Lapeyrouse v. Texaco, Inc., 693 F.2d 581 (5th Cir. 1981) (defendant's contacts with Texas derived from performing over 7000 hours of labor during fifteen separate periods of employment in state); Jim Fox Enters., Inc. v. Air France, 664 F.2d 63 (5th Cir. 1982), *opinion withdrawn in part on reh'g*, 705 F.2d 738 (5th Cir. 1983) (defendant maintained Houston airline ticket office, leased Texas property, employed Texas citizens, and listed numerous Houston office phone numbers).

Two other Fifth Circuit decisions involved nonresident defendants with no substantial contacts with the forum state. These decisions are equally unclear as to the exact scope of *Hall II*. Application of the nexus requirement to defendants whose contacts are minimal or nonexistent was not considered in either case. *See* Wyatt v. Kaplan, 712 F.2d 1002 (5th Cir. 1983) (plaintiff failed to make prima facie showing of tort and therefore did not meet "doing business" requirements of art. 2031b, § 4); Loumar v. Smith, 698 F.2d 759 (5th Cir. 1983) (requirements of due process not met; thus issue of whether defendant's minimum contacts must relate to cause of action not addressed).

194. A strong argument against the contention that *Hall II* eliminated the nexus requirement entirely is that it seems questionable that the Texas Supreme Court would ignore completely the express statutory language of art. 2031b. Justice Pope addressed this issue in his dissenting opinion in *Hall II*:

> Article 2031b limits Texas' interest, to suits arising out of acts done in this state. A desire to gain jurisdiction over nonresidents for unrelated actions arising from activities outside the state is not reflected in the history of the statute or in the act's clear and unambiguous wording. Certainly, the legislature could have drafted the statute in language expressly extending its effect to the full extent permitted by the Constitution, . . . or it could have left out the nexus requirement . . . . Absent such legislative action, however, we must enforce the clear provisions of article 2031b as presently written.

638 S.W.2d at 879-80 (Pope, J., dissenting).

Justice Pope's dissent aptly refuted the contention that the statute was originally enacted to extend to the full limits of constitutional due process. He pointed out that, at the time of the statute's enactment, authority existed for the proposition that states could exercise jurisdiction over unrelated causes of action in certain situations. Although other states's legislatures had incorporated that concept in their long-arm provisions, the Texas Legislature did not do so. Justice Pope also observed that the court could not simply assume that the drafters would have extended the statute to constitutional limits, as it is entirely possible that the legislature in drafting art. 2031b was willing to extend the limits of jurisdictional authority only to the extent that a nexus was present, thus ensuring its courts would hear only matters in which the state truly had an interest. *Id.* at 880.

Justice Pope was concerned that Texas might become "the courthouse for the world." *Id.* at 877. This fear could be justified if, after *Hall II*, Texas courts interpret art. 2031b as

A more recent Fifth Circuit opinion, however, *C & H Transportation Co. v. Jensen & Reynolds Construction Co.*,[195] has acknowledged the more limited language of *Hall II* and thereby has signaled an apparent movement away from the unqualified position expressed in the *Placid Investments* line of decisions. In *C & H Transportation* the Court recognized in a dictum:[196]

> Although in *Hall v. Helicopteros Nacionales* . . . the Texas Supreme Court extended the reach of article 2031b to the limits of due process, language in the opinion indicates that the second prong, the nexus requirement, is constitutionally required in cases where the nonresident defendant only maintained single or few contacts with the forum . . . .[197]

A recent Texas Supreme Court decision, *Siskind v. Villa Foundation for Education, Inc.*,[198] provides further support for the Fifth Circuit's acknowledgment in *C & H Transportation* that *Hall II* was not intended to eliminate entirely the nexus requirement of article 2031b. In *Siskind*, handed down less than a month after *Hall II*, the court reiterated its statement from *Hall II*, that it would apply the three-pronged *O'Brien* test in jurisdictional cases involving nonresidents with only a single or few Texas contacts.[199] The court then methodically applied that test to the acts of the defendant, an operator of an Arizona boarding school.[200] The defendant had solicited business in Texas through advertisements in national publications circulated in Texas, advertised in the telephone directories of various Texas cities, and mailed informational packets and applications to inquiring Texas families. The supreme court, after applying each prong of the test, determined that a Texas court could maintain jurisdiction over the operator of the Arizona boarding school.[201]

---

broadly as the Fifth Circuit has interpreted the constitutional limits of due process. *See* Oswald v. Scripto, 616 F.2d 191 (5th Cir. 1980) (permitting jurisdiction over Japanese manufacturer whose only contact with forum was national marketing of product by American distributor who purchased products in Japan).

195. 719 F.2d 1267 (5th Cir. 1983).

196. It was unnecessary for the court actually to address the nexus issue, as it apparently was uncontrovertible that this requirement was fully satisfied by the defendant's contacts. *Id.* at 1269 n.7.

197. *Id.* at 1269 n.8.

198. 642 S.W.2d 434 (Tex. 1982).

199. *Id.* at 436 (quoting U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978)). It can be inferred from the court's citation to *U-Anchor*, without any reference to *Hall II*, that the latter decision is not as sweeping as the Fifth Circuit in *Placid Investment* thought it to be. *Hall II* is possibly merely a clarification of *U-Anchor*.

200. 642 S.W.2d at 436.

201. *Id.* at 436-48. Specifically, the court found the plaintiff's cause of action for breach of contract and misrepresentations was connected with the defendant's advertisements, letters, and other activities in Texas. *Id.* at 437. The court dismissed the action, however, as to the employees of the boarding school because the plaintiff had not alleged that the employees had committed any acts in Texas. The court determined it could not exert jurisdiction over the defendants simply because their employer had solicited business in the state. As the supreme court noted, "[c]onstitutional considerations of due process forbid this bootstrapping of minimum contacts." *Id.* at 438. For a discussion of *Siskind* and the fiduciary shield principle, see Figari, *supra* note 160, at 292.

In writing the *Siskind* opinion the supreme court certainly would not have reiterated the *Hall II* language, cited the *O'Brien* test with approval, and painstakingly demonstrated that each of the three requirements under the *O'Brien* test had been met if the court actually had intended to eliminate altogether the nexus requirement of article 2031b. The Austin court of appeals shares this view. That court has held that its understanding of *Hall II* and *Siskind*, is that "under art. 2031b, a tripartite test must be met in order to subject a non-resident to jurisdiction in Texas when his contacts in Texas are few or only one."[202] The court recognized that after *Hall II* application of the second prong of the tripartite *O'Brien* test is unnecessary when a nonresident has numerous contacts with the forum state. The court concluded that jurisdiction was not proper because the only contact the defendant had with Texas was entering into a licensing agreement, an act totally unrelated to the cause of action.[203]

As discussed above, some courts have sought to view *Hall II* as having ended the confusion surrounding the reach of article 2031b by eliminating entirely the nexus requirement. These authors, however, believe that complete elimination of the nexus requirement was neither the holding nor the intent of *Hall II*. Although the Fifth Circuit now appears to be coming around to this viewpoint,[204] this area will nevertheless continue to be one of controversy until either the legislature amends article 2031b[205] or the supreme court has stated its position so often that it can no longer be misunderstood or ignored. Until then, the struggle as to "the exact scope of [*Hall II*]"[206] will continue.

202. King v. Dupuis, 649 S.W.2d 387, 389 (Tex. App.—Austin 1983, no writ).

203. *Id. But see* Verges v. Lomas & Nettleton Fin. Corp., 642 S.W.2d 820, 822 (Tex. App.—Dallas 1982, no writ) (Dallas court of appeals stated in a dictum that art. 2031b has been held to reach as far as due process will permit, citing *Hall II* and *U-Anchor*). The Amarillo court of appeals also addressed the question of the reach of art. 2031b after *Hall II*. That court appears to have confused the statutory requirement of art. 2031b and the constitutional requirements of due process. The Amarillo court first defined the constitutional limits of due process as developed through the Supreme Court cases beginning with International Shoe Co. v. Washington, 326 U.S. 310 (1945), but further stated: "Consistent with the foregoing principles, Texas has constructed a three element test, stated in O'Brien v. Lanpar Company, 399 S.W.2d 340, 342 (Tex. 1966), and recently reiterated in Hall v. Helicopteros Nationales De Colombia, 638 S.W.2d 870, 872 (Tex. 1982), *to determine whether due process is satisfied.*" Plain Bag & Bagging Co. v. Golby Bag Co., 643 S.W.2d 509, 511 (Tex. App.—Amarillo 1982, no writ) (emphasis added). That court obviously understood that the law requires the cause of action to be related to the defendant's contacts. The court, however, seems confused as to whether the source of this requirement is constitutional or statutory.

204. *See supra* 195-97 and accompanying text.

205. For discussions proposing such a revision, see Comment, *Article 2031b*, *supra* note 158, at 511-14; Comment, *The Texas Long-Arm Statute*, *supra* note 158, at 760.

206. Bennet Indus., Inc. v. Laher, 557 F. Supp. 965, 966 (N.D. Tex. 1983).