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Conflict of Laws

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CONFLICT OF LAWS*

by

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Conflict of laws involves primarily the areas of choice of law, judgments, and judicial jurisdiction. During this survey period Texas case law reflects continued refinement of choice of law principles, 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

During the survey period, courts in Texas continued to refine their application of the most significant relationship test,[1] which, by a decision reported during the previous survey period, was extended to apply to nearly every case heard in Texas.[2] In so doing the courts appeared to lend some

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* 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.

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1. The most significant relationship test directs a court, absent a contrary statutory directive, to apply to a case the law of the state that has the most significant relationship with the cause of action. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) provides:

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

2. During the previous survey period the Texas Supreme Court decided Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). In *Duncan* the court extended the application of the most significant relationship test from the Restatement (Second) of Conflict of Laws to actions based on contract decided in Texas. *Id.* at 421. The test had first been applied to tort cases decided in Texas in Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980),

degree of certainty to the factors considered in interest analysis.[3] In *Wood v. Hustler Magazine, Inc.*[4] the court considered choice of law questions in connection with an action alleging multistate publication of matter that allegedly invaded the plaintiff's right to privacy. The court opined that in actions of the sort considered in *Wood*, the plaintiff's domicile is the primary determinant of which state's law will apply.[5] The case arose as a result of the conversion of certain sensitive photographs by an individual who subsequently sold them to the defendant, the publisher of an adult magazine. The defendant ran the photographs in its magazine along with certain textual material, the latter of which the court held placed the plaintiff in a false light.[6] In upholding a substantial jury verdict in the plaintiff's favor, the court determined that Texas law applied to the case because the plaintiff's domicile was Texas.[7] In its opinion the court reasoned that Texas choice of law rules required application of that state's substantive law, placing great emphasis upon the plaintiff's domicile and effectively disregarding the defendant's contacts with another jurisdiction.[8]

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and Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979). For a discussion of *Duncan*, see Dalton, Josephs & Oleynik, *Conflict of Laws, Annual Survey of Texas Law*, 38 Sw. L.J. 395, 395-97 (1984) [hereinafter cited as Dalton]. 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).

3. Interest analysis, a factor in the most significant relationship test, is the determination of which state's interests are most affected by the adjudication of the particular cause of action. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), which sets forth the determinative factors to be considered by a court when undertaking interest analysis, provides:

> (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 domicile, 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.

4. 736 F.2d 1084 (5th Cir. 1984).

5. *Id.* at 1087.

6. *Id.* at 1089-90.

7. *See id.* at 1087.

8. The court noted that the injury occurred in Texas, the parties' relationship was centered in Texas, and the plaintiffs' residence was in Texas. *Id.* The court also relied extensively upon commentary appended to § 145 of the Restatement (Second), which states in part:

> In situations involving the multistate publication of matter that injures the plaintiff's reputation . . . or causes him financial injury . . . or invades his right of privacy . . . , the place of the plaintiff's domicile, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment f (1971). The court virtually disregarded any contacts other than those associated with the plaintiffs, stating that the only contacts in California were the defendant's place of business and the place where the conduct causing the injury occurred. 736 F.2d at 1087. Those contacts were, obviously, not nearly sufficient in the court's view to raise a colorable argument that California law should apply. *See id.* By applying Texas law, the court determined that the applicable limitations period was supplied by the Texas two-year statute that governs actions "for injury done to the person of another." *Id.* at 1087 (quoting TEX. REV. CIV. STAT. ANN. art. 5526(4) (Vernon Supp. 1985). Under that reasoning the plaintiffs could maintain their action, which would

In *Brown v. Cities Service Oil Co.*[9] the court applied the most significant relationship test to a personal injury action in which the plaintiff invoked the court's diversity jurisdiction. In *Brown* the plaintiff was an employee of the third-party defendant, Augenstein Construction Company, a contractor at the defendant's facilities in the Lake Charles, Louisiana area. Under contract with the defendant Augenstein was to provide maintenance, repair, and renovation of the defendant's installations. That contract, which was executed in Louisiana and was to be performed in Louisiana by Louisiana labor, contained a clause providing that Augenstein would indemnify Cities Service for claims made thereunder. In granting the plaintiff a judgment notwithstanding the verdict, the district court applied Texas law.[10] The Fifth Circuit reversed, holding that the parties' contacts with Texas were minimal and that Louisiana law should, therefore, apply.[11]

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have been barred under either California law or the one-year Texas statute of limitations that applies to injuries to character or reputation by libel or slander. 736 F.2d at 1087; *See* TEX. REV. CIV. STAT. ANN. art. 5524(1) (Vernon 1958).

Similarly, in Levine v. CMP Publications, Inc., 738 F.2d 660, 667 (5th Cir. 1984), the Fifth Circuit held that the district court had properly applied Texas law to a libel action. As it had done several weeks earlier in the *Wood* case, the court held that the plaintiff's domicile is virtually dispositive of the choice of law issues in cases involving injury to reputation. The court noted that Texas had expressed a strong interest in protecting its citizens from defamation, as is evident in the Texas defamation law. *Id.* Texas courts, therefore, would apply Texas law to the the case. *Id.* Although *Wood* and *Levine* both gloss over the defendant's domicile as a factor to be taken into consideration in interest analysis, commentators and courts alike have suggested that the plaintiff's residence might be one of the less significant interest analysis factors in libel actions. For example, one commentator has suggested that a uniform law governing libel actions be adopted, containing a choice of law provision applicable to interstate libel actions and providing that the defendant's liability must be proven under the law of the jurisdiction where the actions claimed to be faulty occurred. Rose, *Interstate Libel and Choice of Law: Proposals for the Future*, 30 HASTINGS L.J. 1515, 1540 (1979). At the very least, the authors suggest that § 150 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS be amended to include as a factor in interest analysis a directive that the court determine the defendant's liability according to the "*standards established by the local law of the state where the particular actions claims to be fault-producing had their occurrence.*" *Id.* at 1538 (emphasis in original). *See also* Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1242 n.7 (5th Cir. 1980) (discussing possible application of the law of the situs of the publisher's operation in lieu of the law of the plaintiff's domicile, without deciding issue), *cert. denied*, 452 U.S. 962 (1981). The authors suggest that the law of the defendant's situs of operation comports more closely to the issues of fault that must be decided subsequent to New York Times v. Sullivan, 376 U.S. 254 (1964). The courts' analyses in *Wood* and *Levine*, which give short shrift to any contact with the defendant's forum, appear, therefore, somewhat superficially reasoned.

9. 733 F.2d 1156 (5th Cir. 1984).

10. *Id.* at 1159.

11. *Id.* In concluding that Louisiana had the most significant relationship to the accident, the court noted the following facts as significant: (1) Brown was residing in Louisiana, was hired in Louisiana by a Louisiana employer, and would work in Louisiana for a Louisiana-based principal; and (2) the accident occurred in Louisiana. *Id.* Brown's contacts with Texas, his residency at the time of trial and his examination by two Texas doctors in preparation for trial, were too minimal to influence the choice of law. *Id. Brown* presents a fairly clear case for the application of Louisiana law. The circuit court's opinion, however, does not clarify which contacts with Texas the district court relied on in applying Texas law. *Brown*, therefore, may illustrate a choice of law determination that was complicated by use of the most significant relationship test. Under previously recognized lex loci analyses applicable to contract and tort, the district court would have been compelled to apply Louisiana law because Augenstein's indemnity contract was executed in Louisiana and the plaintiff's injury occurred in that state. *See id.* at 1158-59.

In *Sosa v. M/V Lago Isabel*[12] the court discussed federal choice of law principles similar to those recognized under Texas choice of law rules. In *Sosa* a Mexican seaman brought a personal injury action against his employer, and its vessel, for damages allegedly sustained as a result of the unseaworthiness of the defendant vessel. In appealing a judgment entered for the plaintiff, the defendant contended that the district court was "clearly erroneous"[13] in applying the law of the United States, rather than Mexico. The Fifth Circuit held that the district court's application of American law was justified when considered under the relationship analysis test used in maritime cases.[14] The court noted the following contacts with the United States: (1) the ship involved in the incident forming the basis for the plaintiff's action regularly loaded cargo in Houston, Texas; (2) all operations for the management of the vessel were conducted out of a Houston office; (3) actual maintenance of the vessel, other than that done by the crew, was performed in Houston; and (4) the vessel's shipping agent was a corporation located in Houston.[15] As a result the court upheld in large part the judgment that had been entered in favor of the plaintiff.[16]

Several cases decided during the survey period discussed the applicability or viability of state substantive laws in cases decided primarily under federal statutes. For example, in *Scokin v. State*[17] the court applied a state statute of limitations to the federal Education of the Handicapped Act (EAHCA).[18] The EAHCA directs that free, "appropriate" education shall be provided to handicapped children and establishes a procedural scheme whereby parents or guardians of handicapped children may appeal decisions relating to the

12. 736 F.2d 1028 (5th Cir. 1984).

13. The clearly erroneous standard of review seems to be a particularly appropriate standard for appellate review of choice of law determinations, due to the obvious mix of factual and legal questions involved in a trial court's decision. The standard of review under Texas choice of law rules has not as yet, however, been clearly enunciated. *See generally* Dalton, *supra* note 2, at 399 & n.34 (advocating a clearer standard of appellate review in choice of law cases).

14. 736 F.2d at 1031-32.

15. *Id.* at 1032. The court considered the following factors in deciding whether to apply American or foreign law: (1) the place of the wrong; (2) the law of the flag; (3) the domicile of the injured seaman; (4) the allegiance of the shipowner; (5) the place of contract; (6) the accessibility of a foreign forum; (7) the law of the forum; and (8) the base of operations. *Id.* at 1031 (citing Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 308 (1970); Lauritzen v. Larsen, 345 U.S. 571, 583-92 (1953)); *see also In re* Geophysical Serv., Inc., 590 F. Supp. 1346, 1358-61 (S.D. Tex. 1984) (Canadian law applied under *Lauritzen* and case dismissed on grounds of *forum non conveniens*); Munusamy v. McClelland Eng'rs, Inc., 579 F. Supp. 149, 152-53, 159 (E.D. Tex. 1984) (United States law applied under *Lauritzen* and motion to dismiss on *forum non conveniens* denied), *aff'd mem. sub nom. In re* McClelland Eng'rs, Inc., 739 F.2d 631 (5th Cir. 1984); Cuevas v. Reading & Bates Corp., 577 F. Supp. 462, 465-70, 476-77 (S.D. Tex. 1983) (Phillipine law applied using *Lauritzen* test and case dismissed on grounds of *forum non conveniens*). The *Sosa* court also noted that its review of the trial court's choice of law was de novo. 736 F.2d at 1031 (citing Diaz v. Humboldt, 722 F.2d 1216, 1218 (5th Cir. 1984)).

16. The court vacated the district court's awards for rehabilitative expenses and pain and suffering and remanded those issues for reconsideration at the trial court level. 736 F.2d at 1034-35.

17. 723 F.2d 432 (5th Cir. 1984).

18. 20 U.S.C. §§ 1400-1461 (1982).

child's education.[19] The EAHCA, however, is silent as to the appropriate limitations period for such actions.[20] Because the *Scokin* case was an action brought under the procedural framework of the EAHCA, and because the district court held that the plaintiff's claim for monetary and injunctive relief under the EAHCA was barred by limitations, the Fifth Circuit was required to determine the applicable limitations period.

In making its determination, the court noted that federal courts generally will apply the limitations period applicable to an analogous action that is provided by the law of the state in which the court sits.[21] The most analogous state cause of action in Texas to a suit filed under the EAHCA, the court stated, is an appeal from a state agency to a state court, which is governed by a thirty-day statute of limitations.[22] Because the court also determined that the thirty-day limitations period is inconsistent with the general policies of the EAHCA, however, Texas's general two-year tort statute of limitations[23] was deemed applicable to cases heard in Texas and brought under the EAHCA.[24]

Texas law, which had been held to preclude bifurcated trial on the issues of liability and damages in personal injury actions,[25] did not preclude a federal court from ordering a bifurcated trial of those issues in *Rosales v. Honda Motor Co.*[26] In *Rosales*, a Texas diversity action that had been removed to federal court by the defendant, the plaintiff sued for personal injuries allegedly caused by a product defect. The plaintiff appealed from a take-nothing judgment on the ground that the district court had ordered separate trials under federal rule 42(b)[27] on the issues of liability and damages. On appeal the plaintiff's only contention was that Texas substantive law entitled him to a unified trial of those issues. The *Rosales* court initially noted that it would not reach the issue of whether, under *Erie Railroad Co. v. Tompkins*,[28] it would be required to give effect to the state substantive rule if the subject matter of the substantive rule was outside the scope of the federal procedural rule.[29] The court stated that rule 42 is consistently interpreted as sufficiently broad to permit separate trials of the issues of liability and damages in personal injuries suits; thus, the federal rule clearly encompasses the same subject matter as the state law prohibiting bifurcated trials.[30] In rejecting the plaintiff's contention that he was entitled to a single trial under state law, the court determined that "a rule authorizing or prohibiting a bifurcated trial of

19. *Id.* §§ 1411, 1415.
20. 723 F.2d at 436.
21. *Id.*
22. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(b) (Vernon Supp. 1984).
23. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1984).
24. 723 F.2d at 438.
25. *See* Eubank v. Winn, 420 S.W.2d 698, 701 (Tex. 1967); Iley v. Hughes, 158 Tex. 362, 363, 311 S.W.2d 648, 649 (1958).
26. 726 F.2d 259, 260 (5th Cir. 1984).
27. FED. R. CIV. P. 42(b).
28. 304 U.S. 64 (1938).
29. 726 F.2d at 260.
30. *Id.*

liability-damage issues" is not clearly either substantive or procedural.[31] The state's characterization of its own rule as substantive, therefore, must nevertheless yield to the strong presumptive validity of the federal procedural rule, which will be upheld as controlling a federal court.[32]

In *Commerce Park at DFW Freeport v. Mardian Construction Co.*[33] the Fifth Circuit held that the no-waiver provision of the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA)[34] was preempted by a federal statute.[35] In *Commerce Park* a contractor and an owner had executed a contract for the construction of an office warehouse project and included in the contract a provision that disputes would be settled through arbitration. After disputes had arisen between the parties the contractor filed a demand for arbitration, and the owner subsequently filed suit in state court seeking a declaratory judgment that the matters sought to be arbitrated were not arbitrable. The state court action was removed to federal court, and that court stayed the action pending determination of the arbitration. From the federal court's stay order the owner appealed to the Fifth Court.

The choice of law question before the *Commerce Park* court centered on the interrelationship of the DTPA and the Federal Arbitration Act.[36] The owner contended that its claims brought under the DTPA were non-arbitrable because the no-waiver provisions of the DTPA guaranteed judicial redress of alleged violations of the statute. The court rejected that contention,[37] relying upon the United States Supreme Court's decision in *Southland Corp. v. Keating*.[38] The *Commerce Park* court held that the par-

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31. *Id.* at 262 (citing Hanna v. Plumer, 380 U.S. 460 (1965)).

32. 726 F.2d at 262.

33. 729 F.2d 334 (5th Cir. 1984).

34. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984). Section 17.42 of the DTPA provides that a waiver by a consumer of the subchapter's provisions is contrary to public policy, unenforceable, and void. *Id.* § 17.42. Section 17.50 of the DTPA provides the remedies for violations thereof, including an award of treble damages in certain instances. *Id.* § 17.50.

35. 729 F.2d at 338.

36. 9 U.S.C. §§ 1-14 (1982). Section 2 of the Act provides that:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2. Section 3 of the Act provides that:

> [i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id. § 3.

37. 729 F.2d at 337.

38. 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). In *Keating* the plaintiffs brought suit in California state court pursuant to a California statute containing a no-waiver provision similar to that

ties, by agreeing to arbitrate, had invoked the federal arbitration statute and that the DTPA waiver provision, if applied, would abrogate section 2 of the arbitration act.[39] The court noted that this abrogation would violate the supremacy clause.[40]

Just as the Fifth Circuit in *Commerce Park* held that a federal statute preempted state substantive law, the court in *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*[41] held that a United States treaty preempted state law and, therefore, precluded a recovery of attorneys fees under a state statute.[42] The *Boehringer-Mannheim* case arose under the Warsaw Convention,[43] an agreement that limits air carriers' liability to passengers in international travel and customers sending international cargo. The court held that the treaty preempted the plaintiff's action to the extent that the action was based upon state negligence law.[44] The plaintiff had attempted to ship cargo with the defendant, and when that cargo was damaged the plaintiff brought an action seeking to recover for the damaged items. The Fifth Circuit held that the plaintiff's damages were limited by the Warsaw Convention and that an award of attorneys' fees under state law was improper because that law had been preempted.[45]

At least three decisions during the survey period gave effect to a forum selection clause agreed upon by the parties, one of the few remaining instances in which courts in Texas will not apply the most significant relationship test.[46] In *Bergstrom Air Force Base Federal Credit Union v. Mellon Mortgage, Inc. – East*[47] the Tyler court of appeals gave effect to a forum selection clause contained in a contract for the sale of certain government mortgage bonds.[48] In *Queen Noor, Inc. v. McGinn*[49] the court enforced a

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contained in the DTPA. As in *Commerce Park*, the parties in *Keating* had included an arbitration agreement in their contract. The Supreme Court held that the Federal Arbitration Act preempted the no-waiver provision of the California statute and that the claims brought under that statute were, therefore, arbitrable. 104 S. Ct. at 860-61, 79 L. Ed. 2d at 15-16.

39. 729 F.2d at 337-38.

40. *Id.*; *see* U.S. CONST. art. XI, cl. 2.

41. 737 F.2d 456 (5th Cir. 1984).

42. *Id.* at 458-59; *see* TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984).

43. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876.

44. 737 F.2d at 458-59.

45. *Id.* at 459. In Eichelberger v. Eichelberger, 584 F. Supp. 899, 901 (S.D. Tex. 1984), the court determined that Texas community property laws were not preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982) (ERISA). In *Eichelberger* a wife was awarded an undivided one-half interest in her husband's accrued monthly pension under the terms of a divorce decree. The pension fund had been organized pursuant to ERISA. The court, citing federal and state authorities, concluded that ERISA had not preempted the Texas community property laws. 584 F. Supp. at 901.

46. In Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984), the Texas Supreme Court stated that choice of law questions in cases based upon contract would henceforth be determined using the most significant relationship test. *Id.* at 421. 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. *Id.*; *see* Dalton, *supra* note 2, at 396 n.3.

47. 674 S.W.2d 845 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

48. *Id.* at 848. The court stated that the contract provided that the agreement was deemed to have been made in New York and would be construed and the rights and liabilities

forum selection clause notwithstanding the plaintiff's contention that the provision should be vitiated due to fraud.[50] In its opinion, however, the court stated that courts generally look with disfavor upon forum selection clauses.[51]

Perhaps the most interesting case decided during the survey period and dealing with the parties' selection of applicable law was *Austin Elcon Corp. v. Avco Corp.*[52] In *Avco* the parties had executed an agreement, but had not included in their contract a forum selection clause. The district court, applying Texas choice of law principles, held that because the parties both argued for application of Texas law, it would follow the contracting parties' lead and apply Texas law.[53] The court, therefore, gave effect to an ex post facto choice of law by the parties.

II. JUDGMENTS—FULL FAITH AND CREDIT

The full faith and credit clause of the United States Constitution[54] has continued to generate cases in Texas concerning the validity, enforcement, or effect of judgments or orders. Cases decided during the survey period involved challenges by non-residents to Texas courts' default judgments and the mechanical requisites of the Uniform Enforcement of Foreign Judgments Act[55] and the Uniform Foreign Country Money-Judgment Recognition Act.[56]

A. Default Judgments—Challenges to Jurisdiction

Last year's survey article discussed the Corpus Christi court of appeals'

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of the parties determined in accordance with New York laws; therefore, New York law controlled matters of substantive law and Texas law controlled matters of procedural law. *Id.*

49. 578 F. Supp. 218 (S.D. Tex. 1984).

50. *Id.* at 221.

51. *Id.* The court quoted language from the Supreme Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), in which the Court stated that a party resisting application of a forum selection clause must demonstrate either that the litigation in the agreed forum would be unreasonable and unjust, or that the clause is unenforceable due to fraud or overreaching. 578 F. Supp. at 221 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)). The *McGinn* court, however, was considering a forum selection clause that recited both the applicable state law and the jurisdiction to whom the parties would agree to subject themselves, "whatever their domicile may be." 578 F. Supp. at 219. The jurisdictional aspects of the provision might, therefore, provide some insight into the court's hostility toward such an agreement.

52. 590 F. Supp. 507 (W.D. Tex. 1984).

53. *Id.* at 512. The court stated that the parties briefed only Texas law and assumed that it governed the controversy; the court requested the parties to submit supplemental briefs discussing choice of law, but both parties argued that Texas law applied. *Id.*

54. U.S. CONST. art. IV, § 1. The full faith and credit clause provides that "Full Faith and Credit shall be given in each States to the . . . Judicial Proceedings of every other State." *Id.*

55. TEX. REV. CIV. STAT. ANN. art. 2328b-5 (Vernon Supp. 1984). The Uniform Enforcement of Foreign Judgments Act delineates the procedure to obtain full faith and credit in Texas on a foreign judgment.

56. TEX. REV. CIV. STAT. ANN. art. 2328b-6 (Vernon Supp. 1984). The Uniform Foreign Country Money-Judgment Recognition Act delineates when a foreign country's money judgment is conclusive and entitled to full faith and credit in Texas.

analysis in *Fuhrer v. Rinyu*,[57] which generally explained the treatment Texas courts give to default judgments, both foreign and domestic.[58] In its analysis the *Fuhrer* court included among the rules for attacking default judgments one providing that no presumptions can be indulged in favoring the judgment recitations in a direct attack on a Texas default judgment.[59] Three cases during this survey period exemplified the application of that principle. The first of these was *Roland Communications, Inc. v. American Communications Corpus Christi, Inc.*,[60] in which the plaintiff filed an action against a nonresident defendant complaining of breaches of contract and warranties and violations of the DTPA.[61] The plaintiff attempted to obtain service upon the defendant by serving the Secretary of State of Texas pursuant to the Business Corporation Act.[62] Although a statement from the trial judge and a notation on the docket sheet indicated that the Secretary of State had forwarded a copy of the process to the defendant, no certificate to that effect from the Secretary of State or any other competent evidence thereof was available. The court, therefore, held that the trial court was never shown to have acquired jurisdiction over that defendant.[63] Because the defendant was attacking the default judgment by way of writ of error, the trial court's recitations, standing alone, were held insufficient to confer jurisdiction.[64]

While the preceding case involved problems of proof under the *Fuhrer* rule, the remaining two dealt with pleading deficiencies. In *Franecke v. Dolenz*[65] the plaintiff failed to plead that the defendant was a nonresident natural person. Because any attempt to use a form of substituted service requires strict compliance with the enabling statute,[66] the appellate court held the plaintiff to the Texas Supreme Court's requirements set forth in *Whitney v. L & L Realty Corp.*,[67] which compels the plaintiff to: "(1) plead facts that, if true, would require the defendant to answer; and (2) prove that the defendant, in fact, was served in the required manner."[68] The defendant's application for writ of error was granted because of the plaintiff's failure to plead that the defendant was a nonresident natural person, one of the facts that must be pleaded before article 2031b[69] can invoke the substituted service.[70]

A similar pleading defect was the basis of the Austin court of appeals' reversal of a default judgment in *Steve Tyrell Productions, Inc. v. Ray*.[71] The plaintiff in *Ray* failed to allege that any of the acts complained of were com-

57. 647 S.W.2d 315 (Tex. App.—Corpus Christi 1982, no writ).
58. Dalton, *supra* note 2, at 402-07.
59. 647 S.W.2d at 317 (citing McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965)).
60. 662 S.W.2d 145 (Tex. App.—Corpus Christi 1983, no writ).
61. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).
62. TEX. BUS. CORP. ACT ANN. art. 810 (Vernon 1980).
63. 662 S.W.2d at 147.
64. *Id.*
65. 668 S.W.2d 481 (Tex. App.—Austin 1984, writ dism'd).
66. *Id.* at 482-83.
67. 500 S.W.2d 94, 95-96 (Tex. 1973).
68. 668 S.W.2d at 482.
69. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1984).
70. 668 S.W.2d at 482-83.
71. 674 S.W.2d 430 (Tex. App.—Austin 1984, no writ).

mitted in or related to Texas. The *Ray* court, therefore, held that the trial court did not have jurisdiction to grant the default judgment.[72]

Of these three cases, the first two were attacks by writ of error and the third was an appeal. As these were all direct attacks, the rule of "absolute verity"[73] could not be applied and the defendants were all successful in having the default judgments set aside. Interestingly, however, all three of those cases were remanded, rather than reversed. As the *Franecke* court noted, since the defendant appeared to attack the judgment he was presumed to have entered his appearance,[74] even though the appearance was in the appellate court only. Consequently, by engaging in a direct attack, upon a default judgment complaining of deficiencies in pleading or proof, by either writ of error or appeal, a nonresident defendant subjects himself to the jurisdiction of Texas' courts for further proceedings in the cause. The *Ray* court made a general observation distinguishing this treatment from that afforded when a special appearance has been improperly overruled. The court noted that when a trial court erroneously overrules a nonresident's properly made and litigated special appearance based upon lack of amenability to process, then the appellate court must reverse the judgment and require that the case be dismissed.[75] If the appeal concerns a defect in the mode of service, however, then the appellate court must reverse the judgment and remand for a trial on the merits.[76]

In *Ray* a default judgment was taken following the defendants' failure timely to appear and answer.[77] Three days after the entry of that judgment, the defendants filed a special appearance and, eighteen days later, filed a motion for new trial. The motion for new trial was brought on for hearing and was overruled without any specific reference to the attempted special appearance.[78] The court held that by participating in the hearing on the motion for new trial, the defendants waived their special appearance.[79] The defendants, therefore, were held to have entered a general appearance and to have thereby subjected themselves to the jurisdiction of the Texas courts.[80] The court, however, chose not to address whether a special appearance can properly be filed by a nonresident defendant after rendition of a judgment.[81]

B. Finality, Conclusiveness, Res Judicata, and Collateral Estoppel

In three opinions the Fifth Circuit Court of Appeals has limited and carefully defined the res judicata and collateral estoppel effect that a federal

72. *Id.* at 434, 437.
73. The rule of absolute verity is discussed in more detail at Dalton, *supra* note 2, at 404-07.
74. 668 S.W.2d at 483.
75. 674 S.W.2d at 435.
76. *Id.* Considering the other cases cited in the text, this analysis apparently applies equally to cases involving failures to prove necessary jurisdictional facts.
77. *Id.* at 433.
78. *Id.* at 436-37.
79. *Id.* at 437.
80. *Id.* at 436-37.
81. *Id.* at 436.

bankruptcy court must give state court judgments in making determinations as to the nondischargeability of those obligations. In *In re Schuler*[82] the court was presented with the argument by a creditor that a default judgment, which recited that it was based upon a debt for obtaining items by false pretenses, should be recognized as proof of the nondischargeability of the debt by application of collateral estoppel principles. The court rejected that argument,[83] basically relying upon the United State Supreme Court's opinion in *Brown v. Felsen*.[84] In doing so, however, the Fifth Circuit court applied the *Brown* analysis to express the conclusion that "collateral estoppel may apply [in a bankruptcy proceeding] to subsidiary facts actually litigated and necessarily decided [in the state court judgment]."[85] The corollary to that position that the *Shuler* court enunciated and actually applied is that, when the state court judgment does not contain detailed facts sufficient to meet the federal test of nondischargeability, the bankruptcy court may ignore conclusory statements in the judgment concerning the nature of the cause of action and hold that the debt is dischargeable.[86] The court specifically noted that the competing federal interest of the bankruptcy laws is a proper reason for imposing this type of limitation upon the application of full faith and credit principles.[87]

On July 9, 1984, the Fifth Circuit court decided, in conjunction, *In Re Allman*[88] and *In Re Poston*.[89] The court adopted and applied by reference in *Poston* the reasoning of its opinion in *Allman*. These opinions rely substantially on the prior opinion in *Shuler*,[90] along with the Supreme Court's opinion in *Brown v. Felsen*.[91] The court refined and more clearly expressed its *Shuler* holding as follows:

> [I]n cases where the state court judgment '[does] not contain detailed facts sufficient as findings to meet the federal test of non-dischargeability,' leaving the bankruptcy court 'unable to discern from the record the subsidiary facts upon which the false-pretense allegation was made,' the bankruptcy court may properly refuse to accord collateral estoppel effect to the state court judgment.[92]

The court held in *Allman* that, because the judgment had no specific recital with regard to fraud or false pretenses, the bankruptcy court properly concluded that the state court's judgment was limited to a statement of the

82. 722 F.2d 1253 (5th Cir.), *cert. denied*, 105 S. Ct. 85, 83 L. Ed. 2d. 32 (1984).
83. 722 F.2d at 1254.
84. 442 U.S. 127 (1979). In *Brown* the Supreme Court held that res judicata principles do not prohibit a bankruptcy court from determining the dischargeability of an obligation under the federal bankruptcy law. *Id.* at 138-39. The Supreme Court also observed that if a state court determines a factual issue using standards identical to the standards that the bankruptcy court uses, then collateral estoppel bars relitigation of those issues in the bankruptcy court. *Id.* at 139 n.10.
85. 722 F.2d at 1256.
86. *Id.* at 1257.
87. *Id.* at 1258 n.10.
88. 735 F.2d 863 (5th Cir. 1984).
89. 735 F.2d 866 (5th Cir. 1984).
90. *See Poston*, 735 F.2d at 868; *Allman*, 735 F.2d at 864.
91. 442 U.S. 127 (1979).
92. 735 F.2d at 865 (quoting *In re* Schuler, 722 F.2d at 1257-58).

validity of the indebtedness,[93] that collateral estoppel principles did not control a determination of the issue of dischargeability,[94] and that the debt was dischargeable.[95] In *Poston*, rather than finding that the state court judgment had not expressly referenced the issues of fraud and false pretenses, the court affirmed the bankruptcy court's conclusion that recitals in the state court judgment concerning fraud and false pretenses were not factually supported in the record.[96] The bankruptcy court, therefore, properly refused to accord collateral estoppel to the state court judgment in making its determination that the debt was dischargeable.[97] These opinions indicate that, in order to successfully contend in a subsequent bankruptcy proceeding that a state court judgment is nondischargeable, a creditor should, when seeking and obtaining that judgment, be certain that: (1) the record contains ample factual evidence to support findings of fraud or false pretenses; (2) the judgment contains findings of fraud or false pretenses; and (3) the judgment contains recitals that it is based upon such findings of fraud or false pretenses. If all three of these are present, the Fifth Circuit court has indicated that those facts actually litigated and necessary to the state court's decision should not be reopened without a compelling reason to avoid injustice.[98]

Conlon v. Heckler[99] was a Fifth Circuit court opinion addressing the enforceability of those portions of a Texas divorce decree that purported to determine the paternity of a child. The case represents an interesting effort to obtain an adjudication of paternity under circumstances in which the alleged father was not in Texas. While stationed in Texas with the United States Army, Michael Conlon lived with Judy Ellis for approximately two weeks during the latter part of June 1968. At the end of June 1968, Michael left Judy and returned to his original home state of Vermont where he married in 1970, had children by that marriage in 1970 and 1974, and died in 1975. In March of 1969, however, Judy had a child, Trisha, back in Texas. In early 1970 Judy filed an action for divorce in Texas, alleging that she and Michael had been married and that Trisha was an issue of that marriage. Although Michael was personally served in that action, he made no appearance. Prior to Michael's marriage in Vermont, the Texas court granted Judy's request for a divorce and, in that decree, determined that Trisha was Michael's child and ordered that the name on her birth certificate be changed to reflect "Conlon" as her surname.[100]

After Michael's death in 1975 his wife in Vermont and their two children applied for and began receiving federal social security survivor's benefits. Judy, on behalf of Trisha, also sought and received federal social security survivor's benefits, which resulted in a decrease in the benefits payable to the

93. 735 F.2d at 865 n.2, 866.
94. *Id.* at 866.
95. *Id.*
96. 735 F.2d at 869.
97. *Id.* at 869-70.
98. *In re* Schuler, 722 F.2d at 1256 (quoting Franks v. Thomason, 4 Bankr. 814, 820-21 (Bankr. N.D. Ga. 1980)).
99. 719 F.2d 788 (5th Cir. 1983).
100. Michael's Vermont marriage occurred subsequent to the Texas divorce.

Vermont wife and children. The Vermont wife challenged the payment to Trisha, and the final administrative determination upheld that challenge. Judy subsequently filed suit in a Texas district court to have that administrative determination reversed; her appeal from an adverse summary judgment resulted in the subject opinion.[101]

Judy's principal claim on appeal was that the Social Security Administration was required to give full faith and credit to the Texas divorce decree in all its particulars, including the determination that Trisha was Michael's child. The Fifth Circuit court found that the Texas domestic relations court had never acquired personal jurisdiction over Michael.[102] The court did not dispute the validity of the divorce decree insofar as it purported to sever a marital bond between Judy and Michael,[103] because Judy's Texas domicile gave the court in rem jurisdiction to grant her a divorce without in personam jurisdiction over Michael.[104] The court, nevertheless, refused to enforce or give effect to that portion of the divorce decree that purported to determine that Trisha was Michael's child.[105] This determination was made based upon application of the "divisible divorce" concept derived from the United States Supreme Court's opinion in *Estin v. Estin*.[106] In *Conlon* the Fifth Circuit reasoned that a determination that Michael was the father of Trisha would adversely affect his personal and property rights to determine, *inter alia*, the distribution and descent of his estate upon his death.[107] That portion of the Texas divorce decree that purported to determine that Trisha was Michael's child was, therefore, held not to be entitled to full faith and credit and federal social security survivor's benefits were held properly denied to Trisha.[108]

C. *Foreign Judgment Enforcement Statutes*

The two principal Texas statutes dealing with enforcement of foreign judgments, the Uniform Enforcement of Foreign Judgments Act[109] (UEFJA) and the Uniform Foreign Country Money-Judgment Recognition

101. 719 F.2d at 792.

102. *Id.* at 794-95.

103. *Id.* at 788. The court did, however, refer to the administrative law judge's legal conclusion that even under Texas law no marriage existed. *Id.* at 792 n.2.

104. *Id.* at 798.

105. *Id.* at 798-99.

106. 334 U.S. 541 (1948). The Supreme Court determined in *Estin* that, in a case in which personal jurisdiction has not been obtained over an out-of-state respondent, any portion of a divorce decree that purports to affect that respondent's property interests or personal rights is not enforceable under principles of full faith and credit. This concept is called "divisible divorce."

107. 719 F.2d at 797.

108. *Id.* at 798-99. In a footnote the court recognized the apparently insurmountable statutory and procedural hurdles facing Judy in 1970. Texas Rule of Civil Procedure 108 had no jurisdictional effect, and article 2031b could not be used for jurisdictional purposes in a paternity suit. *Id.* at 794-95 nn.5-7. The court further noted that § 11.051 of the Texas Family Code, adopted in 1975, may now provide that jurisdictional foundation that was not available in 1970. *Id.* at 795 n.7; *see* TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1984).

109. TEX. REV. CIV. STAT. ANN. art. 2328b-5 (Vernon Supp. 1984); *see supra* note 55.

Act[110] (UFCMJRA), are both reasonably short, relatively clear, and fairly precise. Although neither is particularly complicated, several cases during the survey period addressed the procedural requirements of these acts and the consequences of failing to follow their statutory schemes.

In *Northwest Sign Co. v. Jack H. Brown & Co.*[111] the supreme court reversed the Dallas court of appeals' opinion[112] denying enforcement of an Idaho judgment under the UEFJA.[113] In an earlier opinion of the Dallas court of appeals in this same case, however, the court discussed the authentication requirements of the UEFJA.[114] Northwest had originally filed the Idaho judgment in a Dallas district court in April 1982, with an affidavit reciting that "Signgraphics, Inc." was the defendant. The affidavit, however, did not mention Jack H. Brown & Co., or its assumed name, or Signgraphics. This defect was apparently brought to the attention of Northwest by the trial court, and in March 1983 Northwest filed an identical copy of the Idaho judgment with an affidavit stating that the proper defendants were doing business under the assumed name of Signgraphics. In April Jack H. Brown & Co. filed a motion for new trial, which was overruled.

When Jack H. Brown & Co. appealed, Northwest filed a motion to dismiss the appeal for want of jurisdiction, alleging that the UEFJA afforded the Idaho judgment the same effect as a Texas judgment and, therefore, Jack H. Brown & Co.'s motion for a new trial should have been filed within thirty days after Northwest originally filed the Idaho judgment. The court rejected Northwest's motion, holding that under the UEFJA the Idaho judgment was entitled to the same effect as a Texas judgment only if Northwest complied with the UEFJA's requirements of authentication and filing of an affidavit properly naming the defendants.[115] Because the affidavit filed in April 1982 did not name Jack H. Brown & Co., it was defective as to such party; since Northwest had not complied with the UEFJA, the filing did not start the timetable for the filing of a motion for new trial.[116]

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110. TEX. REV. CIV. STAT. ANN. art. 2328b-6 (Vernon Supp. 1984); *see supra* note 56.

111. 28 Tex. Sup. Ct. J. 110, 111 (Nov. 21, 1984).

112. 677 S.W.2d 135, 137 (Tex. App.—Dallas 1984).

113. In these two opinions the issue in controversy was whether the entity against which the judgment was sought to be enforced in Texas had actually been served with process in the original Idaho lawsuit. Two Texas corporations were involved: (1) Signgraphics, Inc. and (2) Jack H. Brown & Co., which did business under the assumed name of "Signgraphics." Each corporation's registered agent for service of process was Jack H. Brown. 28 Tex. Sup. Ct. J. at 110. The record reflected that the Idaho suit was against Signgraphics and that service of process was had upon Signgraphics by delivering the service to its registered agent. *Id.* at 110. The Texas Supreme Court granted Northwest's application for writ of error, reversed the court of appeals, and affirmed the trial court judgment enforcing the Idaho judgment because the service return reflected service only on Signgraphics, not Signgraphics, Inc. The fact was erroneously stated by the court of appeals. *See* 28 Tex. Sup. Ct. J. at 111; 677 S.W.2d at 137. Since Signgraphics was admittedly an assumed name for Jack H. Brown & Co. and under Texas Rule of Civil Procedure 28 suit may be brought in an assumed name, the supreme court held that service was proper and that the Idaho judgment was enforceable against Jack H. Brown & Co. 28 Tex. Sup. Ct. J. at 110-11.

114. Jack H. Brown & Co. v. Northwest Sign Co., 665 S.W.2d 219 (Tex. App.—Dallas 1984, no writ).

115. *Id.* at 221.

116. *See id.* at 221-22.

In *Allen v. Tenant*[117] the Houston court of appeals granted a writ of mandamus against a district court that had entered an order enforcing an English judgment under the UFCMJRA. In *Allen* the plaintiffs sought enforcement of their judgment by using the simplified filing option, rather than the adversary proceeding option. All requirements of the Act were complied with except that the clerk did not mail notice of the filing of the English judgment to the debtor.[118] The creditor claimed that the debtor's remedy was limited to a bill of review and that mandamus would, therefore, be improper. The court rejected that argument, citing *Brown v. Northwest Sign Co.* for the proposition that a foreign judgment has the same effect as a Texas judgment only when a creditor complies with the statutory requirements for its recognition.[119] Because the statutory requirements were not met, the district court had no power to enforce the English judgment, and all orders pertaining thereto were held to be void.[120]

In *Hunt v. BP Exploration Co. (Libya)*[121] and *Norkan Lodge Co. v. Gillum*[122] two different Dallas federal district courts were presented with very similar arguments by debtors attempting to avoid enforcement of foreign judgments. In each case the debtor alleged that enforcement was barred under section 5(b)(7) of the UFCMJRA, which provides that "[a] foreign country judgment need not be recognized if . . . it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state . . . ."[123] The *Hunt* court concluded that the legislature had placed the burden of proof on the party that opposed the recognition of the foreign money judgment.[124] The *Norkan* court, by implication, also concluded that the burden of proof on this issue falls upon the alleged debtor.[125]

The conclusion that can be drawn from these opinions, therefore, is that, if a debtor intends to attempt to avoid enforcement of a foreign country money judgment by claiming nonrecognition under the UFCMJRA, he not only should plead such as a defense, but also should offer some evidence, either by affidavit[126] or by documentation of that country's rejection of a Texas money judgment.[127] Since this portion of the UFCMJRA is discretionary with the court,[128] however, even these efforts may not prevent recognition and enforcement.

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117. 678 S.W.2d 743 (Tex. App.—Houston [14th Dist.] 1984, no writ).

118. The UFCMJRA's procedural requirements are contained in the UEFJA. *Id.* at 744; *see* TEX. REV. CIV. STAT. ANN. art. 2328b-5, § 3 (Vernon Supp. 1984). The UFCMJRA gives the creditor the option of mailing the notice and filing proof of that mailing with the clerk.

119. 678 S.W.2d at 744.

120. *Id.*

121. 580 F. Supp. 304 (N.D. Tex. 1984).

122. 587 F. Supp. 1457 (N.D. Tex. 1984).

123. TEX. REV. CIV. STAT. ANN. art. 2328b-6, § 5(b)(7) (Vernon Supp. 1984).

124. 580 F. Supp. at 307.

125. 587 F. Supp. at 1461.

126. In *Hunt* the creditors offered an affidavit from the English barrister that an English court would recognize the Texas money judgment.

127. The *Norkan* court appears to make this suggestion.

128. 580 F. Supp. at 307.

III. JURISDICTION

The reach of the Texas long-arm statute,[129] as interpreted in the Texas Supreme Court's second opinion in *Hall v. Helicopteros Nacionales de Colombia, S.A.*[130] (*Hall II*), once again provides the focus of the jurisdiction section of this survey article[131] because the United States Supreme Court reversed that opinion.[132] The significance of the Supreme Court's decision, however, lies not in the portion of its opinion addressing the reach of the Texas long-arm statute, but, rather, in that portion discussing the permissible scope of state jurisdiction over nonresident defendants.

In reversing the Texas Supreme Court's decision in *Hall II*, the United States Supreme Court accepted the Texas court's holding that the state's long-arm statute reaches as far as the due process clause of the fourteenth amendment of the United States States Constitution[133] permits.[134] The Court, nevertheless, found that the exercise of in personam jurisdiction in this case would be inconsistent with constitutional requirements.[135] The nature of the defendant's contacts with Texas, the court stated, were not the kind of continuous and systematic contacts necessary to support jurisdiction when the cause of action did not arise out of or relate to such contacts.[136] Contrary to the opinion of the Texas Supreme Court in *Hall II*, the number of contacts that the nonresident defendant has with the forum does not solely determine whether the exercise of jurisdiction is proper, but the qualitative nature of those contacts must also be considered.

Article 2031b, the Texas long-arm statute, provides for the exercise of in personam jurisdiction over nonresident defendants when the underlying cause of action arises out of the nonresident's contacts with the state.[137] Prior to the Texas Supreme Court's decision in *Hall II*, the prevailing view among lower courts in Texas, as well as in the Fifth Circuit, was 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 defend-

129. TEX. REV. CIV. STAT. ANN. art 2031b (Vernon 1964 & Supp. 1984).

130. 638 S.W.2d 870 (Tex. 1982), *rev'd*, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). The court withdrew its first opinion, which is located at 25 Tex. Sup. Ct. J. 190 (Feb. 24, 1982).

131. *See* Dalton, *supra* note 2, at 411-20; Newton, *Conflict of Laws, Annual Survey of Texas Law*, 36 SW. L.J. 397, 397-403 (1982).

132. Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S. Ct. 1868, 1874, 80 L. Ed. 2d 404, 414 (1984).

133. U.S. CONST. amend. XIV, § 1.

134. 104 S. Ct. at 1871 & n.7, 80 L. Ed. 2d at 410 & n.7.

135. *Id.* at 1872-73, 80 L. Ed. 2d at 411-12.

136. *Id.* at 1872, 80 L. Ed. 2d at 411.

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

> Any . . . non-resident natural person that engages in business in this State . . . 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.

ant's contacts with Texas.[138] Despite that clear language in the statute, the Texas Supreme Court in *Hall II* eliminated the nexus requirement in situations in which the nonresident defendant is present in the forum through numerous contacts that satisfy the demands of the due process test.[139] In the court's opinion, when the nonresident defendant has had numerous contacts with the state, the reach of article 2031b is coextensive with that of the due process clause.[140]

The United States Supreme Court in *Hall* declined to decide whether the Texas Supreme Court had correctly interpreted 2031b because such a decision was not within their province; the Court, therefore, accepted the Texas Supreme Court's holding that the limits of the Texas statute are coextensive with those of the due process clause.[141] Thus, the only question before the United States Supreme Court in *Hall* was whether the due process clause allowed Texas courts to assert in personam jurisdiction over the defendant, Helicopteros Nacionales de Colombia, S.A.[142] (Helicol). The issue before the Supreme Court, therefore, really only concerned the limits of constitutional due process and the constitutional limits to the Texas long-arm statute.

The *Hall* case arose out of the crash of a helicopter provided by Helicol to transport men and supplies to and from a job site in the jungles of Peru. The parties did not dispute that the claims against Helicol did not arise out of and were not related to Helicol's activities within Texas.[143] Even though the cause of action did not arise out of or relate to Helicol's activities within Texas, the Court found that subjecting the corporation to in personam jurisdiction would not offend due process if the corporation's activities in the forum state were of a continuous and systematic nature.[144] The Court referred to this power as the exercise of "general jurisdiction" by the state over the defendant.[145] In contrast, the Court stated, "specific jurisdiction" exists when the suit does arise out of or relate to the defendant's contacts with the forum.[146]

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138. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1266 n.8 (5th Cir. 1981). *But see* Figari, Grave & Dwyer, *Texas Civil Procedure, Annual Survey of Texas Law*, 37 SW. L.J. 289, 290 (1983).

139. 638 S.W.2d at 872. For a further discussion of *Hall II*, see Dalton, *supra* note 2, at 415-16.

140. 638 S.W.2d at 872.

141. 104 S. Ct. at 1871 n.7, 80 L. Ed. 2d at 410 n.7.

142. *Id.* at 1872, 80 L. Ed. 2d at 410.

143. *Id.* at 1872-73, 80 L. Ed. 2d at 411. *Contra* 104 S. Ct. at 1877 n.3, 80 L. Ed. 2d at 418 n.3 (Brennan, J., dissenting).

144. *Id.* at 1872, 80 L. Ed. 2d at 411.

145. *Id.* at 1872 n.9, 80 L. Ed. 2d at 411 n.9.

146. *Id.* at 1872 n.8, 80 L. Ed. 2d at 411 n.8. For a detailed discussion of general versus specific jurisdiction, see von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-79 (1966). Although the Texas Supreme Court's decision in *Hall II* did not speak in terms of general versus specific jurisdiction, the court's analysis in eliminating the nexus requirement contained in article 2031b in cases in which the defendant has numerous contacts with Texas is substantially similar to the Supreme Court's analysis limiting it opinion to the exercise of general jurisdiction by the state. When read in this context, by extending the reach of the Texas long-arm statute to the constitutional limits of due

In reaching the decision that Texas could not exercise general jurisdiction over Helicol, the Court first analyzed Helicol's activities in Texas.[147] Helicol's contacts with Texas consisted of: (1) sending an executive officer to Houston to negotiate a contract; (2) accepting checks drawn on Houston banks; (3) purchasing helicopters, equipment, and training services from Bell Helicopter; and (4) sending personnel to Bell's facilities in Fort Worth for training.[148] The Court did not find these contacts to constitute the kind of continuous and systematic general business contacts necessary for the state to exercise general jurisdiction over a foreign corporation.[149] The Court then analyzed the contacts consisting of the purchases and related training trips, which the Texas Supreme Court focused on in finding sufficient contacts to support jurisdiction over the defendant.[150]

The Court, relying on a case[151] that had been decided before the expansion of personal jurisdiction heralded by *International Shoe Co. v. Washington*,[152] held that such purchases, even if occurring at regular intervals, were not enough to warrant the exercise of in personam jurisdiction over a nonresident corporation in a cause not related to those purchases.[153] The fact that Helicol sent personnel to Texas for training in connection with the purchase of helicopter equipment also did not, in the Court's opinion, enhance the nature of the defendant's contacts with the forum statute.[154] Thus, Helicol's contacts with Texas were found insufficient to satisfy the requirements of the due process clause of the fourteenth amendment, and, accordingly, the judgment of the Supreme Court of Texas was reversed.[155]

In taking this action, the Court appears to have narrowed the constitutionally permissible scope of in personam jurisdiction. Justice Brennan was concerned with this change, and he dissented because he found "troubling the implications that might be drawn" from the Court's opinion concerning limitations on the amount and type of contacts that will satisfy the constitutional minimums.[156] Whether the Court's decision is so far reaching as to

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process, the Texas Supreme Court in *Hall II* clearly did not entirely eliminate the nexus requirement contained in the statute. *See* Dalton, *supra* note 2, at 416-20.

147. 104 S. Ct. at 1873, 80 L. Ed. 2d at 412.

148. *Id.*

149. *Id.*

150. *Id.* at 1874, 80 L. Ed. 2d at 413.

151. Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923). In *Rosenberg* the Court held that the purchase of merchandise from New York wholesalers on a regular basis, along with occasional trips by an employee to New York for that purpose, was not sufficient to support the exercise of in personam jurisdiction over the nonresident. *Id.* at 518.

152. 326 U.S. 310 (1945). For a discussion of the expansion of in personam jurisdiction since *International Shoe*, see Note, *The Texas Long-Arm Statute After Hall v. Helicopteros Nacionales de Colombia, S.A. Will Texas Become a Magnet Forum?*, 20 HOUS. L. REV. 1221, 1223-28 (1983).

153. 104 S. Ct. at 1874, 80 L. Ed. 2d at 413.

154. *Id.* (the training was part of the package of goods and services that Helicol purchased from Bell).

155. *Id.*, 80 L. Ed. 2d at 414.

156. *Id.* at 1875, 80 L. Ed. 2d at 414-15 (Brennan, J., dissenting). Justice Brennan criticized the Court for relying on *Rosenberg*, a 1923 decision of dubious validity given the Court's subsequent expansion of personal jurisdiction. *Id.* at 1876, 80 L. Ed. 2d at 415. The dissent acknowledged that *Rosenberg* was factually on point, but opined that the analysis of the Court

place "severe limitations" on the exercise of in personam jurisdiction is unclear at this time. The effect will, of course, depend on how the opinion is interpreted in the future by the United States Supreme Court and the lower courts.[157] Nevertheless, the Court's trend of expanding the permissible

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was flawed because it failed to ascertain whether the narrow view of in personam jurisdiction that the *Rosenberg* court adopted comports with the transformation of the national economy that has occurred since 1923. *Id.*, 80 L. Ed. 2d at 415-16. In Justice Brennan's view, the decision of the Court was contrary to the trend toward expanding the permissible scope of jurisdiction over nonresidents that has become both necessary and desirable because of the increased frequency with which foreign corporations pursue commercial transactions throughout the various states. *Id.* at 1876, 80 L. Ed. 2d at 416. The dissent stated that the Court's conclusion that Helicol's sending of management personnel and pilots to Texas did not "enhance the nature of Helicol's contacts" completely ignored the realities of a modern economy. *Id.* at 1877 & n.2, 80 L. Ed. 2d at 417 & n.2. Justice Brennan also disagreed with the Court's view of the case as one involving a question of general jurisdiction. *Id.* at 1877-78 & n.3, 80 L. Ed. 2d at 418 & n.3. According to Justice Brennan, this limiting of the decision to "an assertion of general jurisdiction" by the Texas courts over a foreign defendant failed to recognize any distinction between contacts that are "related to" the underlying cause of action and those that "give rise to" the cause of action. *Id.* at 1877-78, 80 L. Ed. 2d at 418. The dissent argued that, despite the fact that the cause of action did not formally arise out of specific activities initiated by Helicol in Texas, the claim was significantly related to Helicol's contacts with Texas because: (1) the negotiations that took place in Texas led to the contact by which Helicol agreed to provide the transportation services being used at the time of the crash; (2) Helicol purchased the helicopter involved in the crash in Texas; and (3) the pilot whose negligence was alleged to have caused the crash was actually trained in Texas. *Id.* at 1878, 80 L. Ed. 2d at 418-19. Justice Brennan, therefore, found that the substantial relationship between the contacts and the cause of action would support an assertion of specific jurisdiction by the Texas courts in this case. *Id.*

In Justice Brennan's view, the Court's opinion could be read as limiting a forum's specific jurisdiction to cases in which the cause of action arose out of the nonresident's contacts with the state. *Id.* at 1879, 80 L. Ed. 2d at 419. If this reading reflected the Court's holding, the dissent argued, the Court had lost sight of the "ultimate inquiry" as set forth in *International Shoe* and its progeny, which is: whether subjecting a nonresident corporate defendant to the jurisdiction of the state when that defendant has purposely availed itself of the benefits and obligations of the particular forum is fair and reasonable. *Id.* The dissent concluded that the Court, by relying on a precedent with invalid premises and by refusing to recognize any distinction between controversies the "relate to" as opposed "arise out of" the defendant's contacts with the forum, may be limiting severely the type and amount of contacts that will satisfy the constitutional minimum. *Id.* at 1875, 80 L. Ed. 2d at 415.

157. Although the dissent argued that the Court has "lost sight of the ultimate inquiry," the interpretation of the lower courts thus far appears to be that the Court has not abandoned this inquiry, but, rather, has set forth two different tests, depending on whether the forum is asserting general or specific jurisdiction. This position has been taken by two federal district courts that have had occasion to interpret the Supreme Court's decision in *Hall II*. In Jones v. North Am. Aerodynamics, Inc., 594 F. Supp. 657 (D. Me. 1984), the federal district court stated that *Hall* and other Supreme Court decisions require a three-step analysis. *Id.* at 659. First, the defendant must have some contact with the forum state. Second, the suit must arise out of or be related to defendant's forum contacts. Third, if the suit arises out of or relates to the defendant's forum contacts, the relationship among the defendant, the forum, and the litigation must form a fair and reasonable foundation for the exercise of jurisdiction; if the cause of action does not arise out of or relate to the defendant's forum contacts, the court considers only the relationship between the forum and the defendant. *Id.* The federal district court in *Pepsi Cola Bottling Co. v. Buffalo Rock Co.*, 593 F. Supp. 1559 (N.D. Ala. 1984), interpreted *Hall* similarly, requiring continuous and systematic contacts for the court to acquire jurisdiction over the defendant when the litigation is unrelated to the defendant's contacts with the forum. *Id.* at 1561-62.

Another reading of *Hall II* is that, in an effort to simplify the three-step analysis, the Court is willing to assume that exercising jurisdiction over a nonresident is fair and reasonable when the nonresident's contacts are continuous and systematic. *Cf.* Dalton, *supra* note 2, at 417

scope of state jurisdiction over nonresidents appears to have halted.[158]

Other than the Court's decision in *Hall II*, little activity in the area of jurisdiction occurred during the survey period. The few decisions that were reported, however, indicate that some confusion still exists among the state appellate courts[159] as to whether *Hall II*, which was unaffected by the Supreme Court's decision insofar as its interpretation of article 2031b is concerned, eliminated the nexus requirement of the statute and, if so, in what situations. The courts' confusion is exemplified by the Austin court of appeals' decision in *Steve Tyrell Production, Inc. v. Ray*.[160] In *Tyrell* the court stated that the cause of action must be shown to have arisen from or have been connected with the defendant's activities within the state before long-arm jurisdiction in Texas can be asserted; the court then, however, cited *Hall II* as authority to the contrary.[161] Any disagreement within the Fifth Circuit related to article 2031b,[162] however, appears to have been settled. The lone Fifth Circuit decision during the survey period clearly recognized that *Hall II* obviated the requirement that the cause of action arise from or

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n.192 (when the nonresident has numerous contacts with the forum state, the court presumes that if it closely examined those contacts the court would find some relationship between those contacts and the cause of action).

158. Two other significant United States Supreme Court decisions during the survey period, however, appeared to extend the reach of in personam jurisdiction with respect to nonresident print media defendants. In *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), the Court held that although a defendant publisher's activities in the forum, consisting of the sale of a substantial number of magazines in that state each month, may not be sufficient to support the exercise of general jurisdiction over the publisher, such activities would be sufficient to support the exercise of specific jurisdiction over the defendant because the underlying cause of action for libel arose out of those very sales. *Id.* at 1481-82, 79 L. Ed. 2d at 801-02. The plaintiff's lack of residence in the forum state did not defeat otherwise proper jurisdiction, and, therefore, the defendant publisher could be required to defend a multistate libel action in the forum state. *Id.* at 1480-81, 79 L. Ed. 2d at 800-01. In a companion case, *Calder v. Jones*, 104 S. Ct. 1482, 1487-88, 79 L. Ed. 2d 804, 812-13 (1984), the Court permitted the exercise of in personam jurisdiction over a nonresident reporter and editor of an article defaming plaintiff because the nonresidents' intentional and tortious actions were aimed at the forum state, where both the publication had its largest circulation and the plaintiff resided. The Court rejected the suggestion that first amendment concerns should enter into the jurisdictional analysis, because protected first amendment activity is considered in the constitutional limitations on the substantive law governing defamation suits and reintroducing those concerns at the jurisdictional stage would result in double counting. *Id.* The Court's holding is directly contrary to the Fifth Circuit's position, as recently stated by a federal district court, that "[f]irst amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." Stabler v. New York Times Co., 569 F. Supp. 1131, 1134 (S.D. Tex. 1983) (quoting New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966)). *Keeton* and *Calder* seem to indicate that although *Hall* may have narrowed the scope of permissible jurisdiction over nonresident defendants in general, print media defendants can reasonably anticipate being haled into court in any state where the publication has a regular circulation and the forum has an interest in redressing the injury.

159. *See* Dalton, *supra* note 2, at 416-20 & nn.185-203.

160. 674 S.W.2d 430 (Tex. App.—Austin 1984, no writ).

161. *Id.* at 434-35. The court interpreted *Hall II* as eliminating the nexus requirement only in cases in which the nonresident has numerous contacts with Texas. *Id.* at 435; *see also* C.W. Brown Mach. Shop, Inc. v. Stanley Mach. Corp., 670 S.W.2d 791, 793 (Tex. App.—Fort Worth 1984, no writ) (citing *Hall II* for the proposition that due process requires a nexus between the cause of action and the nonresident's contacts with the forum state).

162. *See* Dalton, *supra* note 2, at 416-19 nn.185-97.

be connected with the nonresident defendant's activities in the forum state *only* when his numerous contacts are of such a nature as to satisfy the demands of the ultimate test of due process.[163]

163. Union Carbide Corp. v. UGI Corp., 731 F.2d 1186, 1189 (5th Cir. 1984).