Representing Mexican Clients in U.S. Courts in Claims of Liability in Industrial Accidents

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REPRESENTING MEXICAN CLIENTS IN U.S. COURTS IN CLAIMS OF LIABILITY IN INDUSTRIAL Accidents
M.E. OCCHIALINO*

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This article is based on the following hypothetical:
After several years of successful association between GROWFAST Inc. (a Delaware corporation) with its principle place of business in Kansas,
and AGRICOLAS S.A. de C.V., a serious accident occurred at the AGRICOLAS plant in Monterrey. While transferring Sollate™ concentrate into vats for dilution and packaging, supervised by both AGRICOLAS employees and two technicians "on loan" from GROWFAST, an unexplained explosion occurred. Three supervisory persons and 35 other employees were killed. Serious injury was caused to dozens of other employees. The chemical laden smoke from the explosion drifted over parts of Monterrey and adjacent towns. By the time it had dissipated, it had caused serious burns to several hundred more people, including a number of foreigners. The foreigners included two United States citizens vacationing in Mexico. Lawsuits are being considered by Mexicans, the two United States citizens, and four Europeans.

I. REPRESENTING POTENTIAL PLAINTIFFS

A. Initial Thoughts as to Where to File Lawsuits

1. Identify the clients

First, the lawyer must know who the clients are. The lawyer who represents only U.S. citizens will plan the litigation differently from the lawyer who represents the Mexican nationals and the Europeans instead of, or in addition to, the U.S. Citizens.

If the lawyer now represents only one or a few persons, the lawyer should explore the possibility of expanding the client base to include everyone who was injured. This would make the lawsuit more efficient, allowing more thorough representation because the costs would be shared among more clients and the greater judgment available with multiple plaintiffs might justify higher expenditures for investigation, planning, legal research and hiring of expert witnesses.

The question of obtaining more clients raises an ethics question which also involves an issue of conflict of laws: Which rules of ethics would control the conduct of an U.S. lawyer seeking to obtain clients in Mexico? Is the lawyer subject to the ethical constraints imposed on lawyers in Mexico, the law of the U.S. state in which the lawyer is licensed to practice or both when the U.S. lawyer solicits clients in another jurisdiction or country?

The lawyer might consider choosing a forum for the litigation in part based upon which forums provide for class actions and have rules making class actions relatively easy to use.¹

2. Issues to Consider in Choosing Forum of Litigation

The U.S. lawyer who lacks knowledge of the jurisdictional and substantive laws of Mexico must first learn the rudiments of Mexican law,

¹ E.g., Fed. R. Civ. P. 23.
perhaps by consulting the Martindale-Hubble synopsis of the law of Mexico\(^2\) and then asking a law librarian for additional general sources, in English, on the laws of Mexico.\(^3\) A review only of library sources almost certainly would not suffice. After becoming familiar with the basic principles of Mexican law, the U.S. lawyer would want to retain a lawyer who practices law in Mexico to provide a detailed evaluation of relevant Mexican law.

The U.S. lawyer typically would begin analysis by determining the maximum number of forums that would be available in which to bring the lawsuit. For an U.S. lawyer, the forum-availability question requires consideration of the following: 1) Jurisdiction of the subject matter; 2) Jurisdiction over the person of the defendant(s); 3) Proper venue; and 4) Problems of service of process.

The lawyer would survey the law of every state of the United States that had any connection with the transactions or the potential defendants to see how many of them could meet the four requirements and qualify as proper forums for the litigation. The lawyer would analyze separately whether United States federal courts had jurisdiction to hear the case. Finally, the lawyer would ask the consulting Mexican attorney to do the equivalent analysis to determine the maximum number of forums in Mexico in which the lawsuit could be brought.

Consideration of possible forums includes not only an analysis of the place where the plaintiffs can obtain jurisdiction, but also whether the defendant would be able to veto the plaintiffs' choice of any of these available forums through the use of procedural rules allowing defendants to dismiss or move a case brought by plaintiffs in any of these forums. These "defendant-veto" procedures include: 1) Motion for change of venue;\(^4\) 2) Motion to dismiss for forum non conveniens;\(^5\) and 3) Removal of the action to federal court if the lawsuit is brought in a state court.\(^6\)

At this point, the goal is simply to identify all the places where the action could be brought and where the defendant could not frustrate the plaintiff's choice of forum. After the lawyer determines the number of possibilities, the lawyer would then proceed to choose from among the many possibilities the one forum which provides the greatest tactical advantages to the client. For the reasons described below, state and federal courts in Texas, Kansas and Delaware probably have jurisdiction to hear an action against GrowFast filed on behalf of the injured persons and the estates of the person killed in the accident in Mexico.

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a. Subject Matter Jurisdiction

i. State Courts

An action for personal injuries based on tort is a "transitory" cause of action which means that it can brought in the courts of any state where personal jurisdiction over the defendant(s) exists and venue is proper and valid service of process can be accomplished.7 Thus, in each of the fifty states there is a court that has subject matter jurisdiction to hear this tort case.

ii. Federal Courts

Unlike state courts, federal courts have only limited subject matter jurisdiction. Federal jurisdiction exists only if 1) the United States Constitution authorizes federal jurisdiction, and 2) Congress passes a statute affirmatively granting the federal court the power which the Constitution authorizes.8

In this case, the likely source of jurisdiction is "diversity" jurisdiction pursuant to 28 U.S.C. Section 1332. This federal statute authorizes federal courts to hear cases even when state law, rather than federal law provides the basis for the claim so long as all of the plaintiffs are citizens of U.S. states which are different from the home states of all of the defendants and the amount in controversy exceeds $50,000.9 The statute sets forth rules for determining the citizenship of a U.S. corporation such as GrowFast.10 GrowFast is a citizen of Delaware because it is incorporated there11 and, apparently, of Kansas because its main offices are there.12 If only the U.S. citizens who were injured sued GrowFast in federal court, there would be diversity jurisdiction so long as none of them is a citizen of Delaware or Kansas.

When foreign nationals are suing or being sued in federal court, the statute provides a different test for determining diversity: There is diversity if the law suit "is between. . .citizens of a State and citizens or subjects of a foreign state."13 This provision means that if the Mexican nationals injured in Mexico sued in a United States federal district court against GrowFast, there would be federal diversity jurisdiction so long as the amount in controversy exceeded the $50,000 minimum set by statute.14

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11. Id.
12. In addition to being a citizen of the state of incorporation, a corporation is also a citizen "of the State where it has its principal place of business. . . ." Id.
The diversity statute contains another relevant provision. When United States citizens and foreign subjects come together to sue a United States company there is federal diversity jurisdiction so long as none of the U.S. plaintiffs is a citizen of the same state as any of the U.S. defendants.\(^5\) This provision would allow for federal court subject matter jurisdiction of an action by the two U.S. plaintiffs, the Mexican nationals and the four Europeans against GrowFast so long as neither U.S. plaintiff is a citizen of Delaware or Kansas, the states of citizenship of GrowFast.\(^6\)

The result is that there is subject matter jurisdiction over the proposed action in all the state courts of the United States and also in all of the federal district courts of the United States.

b. Personal Jurisdiction

Even when a court has subject matter jurisdiction because it has the power to hear a particular type of case, the court must also have a sufficiently close relationship with each defendant to make it “fair” that the defendant be forced to defend in that court and be bound by the court’s ruling. This is the requirement of “personal jurisdiction” over the defendant. The outer limits of personal jurisdiction are set by the Due Process Clause of the United States Constitution\(^7\) which courts construe as requiring that defendant have “sufficient minimum contacts” with the forum state so that the assertion of jurisdiction over the defendant will not violate “traditional notions of fair play and substantial justice.”\(^8\)

When the federal court asserts diversity subject matter jurisdiction, the federal court applies the same rules for personal jurisdiction as the state in which the federal court is located.\(^9\) Thus, the federal court sitting in any state court that has jurisdiction over the person of GrowFast also has personal jurisdiction over GrowFast.

The specific rules of personal jurisdiction are complicated and vary from state to state. No attempt to provide a full summary is made here.\(^20\) Suffice it to say that the facts presented in this problem do not demonstrate that Agricolas has sufficient contacts with any U.S. state to justify the assertion of personal jurisdiction over Agricolas in any state or federal court of the United States. There is no indication that Agricolas conducted any purposeful activities in the United States. Therefore, unless Agricolas waived the defense of lack of personal jurisdiction,\(^21\) Agricolas probably cannot be sued in any U.S. court.

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17. U.S. Const. amend. XIV, § 1.
21. The defense of lack of jurisdiction over the person can be waived by a defendant through
GrowFast, however, has sufficient contacts with several U.S. states to subject GrowFast to personal jurisdiction in their courts for the injuries occurring in Mexico as a result of the explosion in Mexico:

Delaware is the state of incorporation of GrowFast. A corporation is subject to jurisdiction in the state of its incorporation for any cause of action, even if the corporation's business activities are largely conducted elsewhere and even if the cause of action arises outside the state of incorporation. Because GrowFast was incorporated in Delaware it may be sued in the courts of Delaware.

Kansas is the state in which the principal administrative offices of GrowFast are located. A corporation which is "doing business" in Kansas is subject to jurisdiction on any claim, even one that arises out of conduct done somewhere other than in Kansas. A corporation is doing business in Kansas if it has "an office or place of business within this state. . . ," and the corporation's activities are "permanent, continuous, and regular."

Texas is the state in which GrowFast operates a pesticide plant. Texas state courts probably have personal jurisdiction over GrowFast based on the operation of the factory in Texas, whether or not the Sollate™ was manufactured at the Texas factory. The hypothetical problem does not state whether the Sollate™ that blew up in Mexico was manufactured in the Texas plant. If it was, this would make finding personal jurisdiction in Texas relatively easy. Even if the Sollate™ was not manufactured in the Texas plant, a Texas state court would have jurisdiction if the operation of the Texas plant by GrowFast constituted "doing business" in Texas: "[J]urisdiction may be asserted when the cause of action does not arise from or relate to the nonresident defendant's purposeful conduct within the forum state but there are continuous and systematic contacts between the nonresident defendant and the forum state."

c. Venue

Venue statutes establish the location within a government's geographical area at which the lawsuit can be brought if there is jurisdiction over the subject and the person within that government's courts. For example,
Texas venue statutes might inform a litigant whether to bring the law suit in Dallas, Houston or San Antonio, assuming that there is subject matter and personal jurisdiction in the state courts of Texas.\textsuperscript{30} Federal venue statutes similarly set the location of the federal courts in which the action may be brought. Federal venue statutes will permit the plaintiffs to sue GrowFast in federal courts in Delaware, Kansas, or Texas.\textsuperscript{31} Thus, the venue statutes will not pose a barrier to suit in any of the forums, state or federal, that have jurisdiction of the subject matter and of the person in this case.

d. Service of Process

Wherever they sue, the plaintiffs will have to provide the defendant, GrowFast, with a copy of the summons and the complaint when they institute suit.\textsuperscript{32} Under some circumstances service must take place only within the boundaries of the state in which the suit is brought.\textsuperscript{33} Most often, the place of service is not relevant.\textsuperscript{34}

In the GrowFast hypothetical, there are no geographical limitations on service in the federal or state courts in Kansas, Delaware and Texas in which the plaintiffs would consider suing.

e. The “Internal Law” of each Forum that has Jurisdiction

U.S. state courts have a tendency to apply the law of their own state to resolve problems having interstate or international connections.\textsuperscript{35} Obviously, then, it is important to determine the relevant law of each of the U.S. states that has some significant connection to this problem. Counsel would limit the research to a determination of the law of each state that has personal jurisdiction over GrowFast because it is highly likely that if U.S. law is to apply to the problem, the law of one of the states that has jurisdiction over GrowFast will apply.\textsuperscript{36} There are innumerable legal issues relevant to this problem. A non-exhaustive list includes:

- Does the jurisdiction have strict products liability as a theory of recovery as well as negligence?

\textsuperscript{30} See TEX. CIV. PRAC. & REM. CODE ANN. ch. 15 (West 1986).
\textsuperscript{31} See 28 U.S.C. § 1391(c) (1993) (venue proper in any federal court located in a state that would have personal jurisdiction over GrowFast).
\textsuperscript{32} E.g., Fed. R. Civ. P. 4.
\textsuperscript{34} See, e.g., Fed. R. Civ. P. 4(e).
\textsuperscript{35} For example, one leading theorist of choice of law was Professor Brainerd Currie. See, e.g., Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L. J. 171. A leading treatise notes that “Currie’s analysis will always lead to forum law except in those cases in which the policy of the forum does not call for the application of its law, that is where it is ‘disinterested.’” Eugene Scoles and Peter Hay, Conflict of Laws § 2.6, at 18 (2d ed. 1992).
\textsuperscript{36} See Shaffer v. Heitner, 433 U.S. 186, 224-25 (1977) (Brennan, J., dissenting) (“I recognize that the jurisdictional and choice-of-law inquiries are not identical.... [but] both inquiries are ‘often closely related and to a substantial degree depend upon similar considerations.’” (quoting Hansen v. Denckla, 357 U.S. 235, 258 (1958) (Black, J., dissenting)).
- Does the jurisdiction provide liberal damages recovery for wrongful death?
- Does the jurisdiction have a law permitting recovery for emotional distress and pain and suffering as well as medical expenses and lost wages?
- Does the jurisdiction permit injured workers both to collect for Workers' Compensation against the employer and also to sue a company other than its own employer for negligence or products liability?
- Does the jurisdiction provide that every wrongdoer is responsible for all of the plaintiffs' damages or does it provide that the plaintiffs can recover from any one defendant only the percentage of damages that correspond to that defendant's percentage of fault?

It is unlikely that a separate body of U.S. federal law concerning products liability, damages or wrongful death recovery would apply in this case. Although the federal government has the power to write national laws on these subjects, it has not done so. Instead, state laws concerning wrongful death, torts and damages are likely to apply, even if the action is brought in the federal court based on diversity subject matter jurisdiction.

Counsel would ask the Mexican consulting attorney to do the same analysis of applicable rules of law for each Mexican court that had jurisdiction.

f. The Choice of Law Rules of each Forum that has Jurisdiction

It is not enough to know the substantive law of the U.S. states with jurisdiction. Although states have a tendency to apply their own substantive law, they do not always do so. Each U.S. state has a body of rules or a system of analysis for determining when its court will apply its own laws and when, instead, it will apply the laws of another state or foreign country. This body of rules is called the "choice of law" system of the forum. Within bounds set by the United States Constitution, each state is free to adopt whatever system it wants for resolving the question of when to apply its own internal law and when to apply the law of a different state or a foreign country. Thus, each state might have different rules for choosing between U.S. and Mexican law and for choosing which state's law to apply if U.S. law is chosen.

This choice of law question is of critical importance because it can result in one state, which has jurisdiction, choosing to apply Mexican law under that forum's choice of law system while the court of a different state with jurisdiction could have a different set of choice of law rules

37. See U.S. Const. art. I, § 8, cl. 3 and cl. 18.
that led it to apply its own internal law in preference to that of Mexico. Still a third state with jurisdiction might choose to apply neither its own law nor Mexican law, but, instead, the law of a different state.

The existence of different choice of law systems for different states adds a new level of complexity in forum selection. In addition to determining which courts have jurisdiction and which court with jurisdiction has the most favorable law, the plaintiffs' lawyer must also consider the choice of law system of each court with jurisdiction. Throughout this analysis, the goal of plaintiff's counsel is to find a court that has jurisdiction which has a choice of law system that will direct it to apply the substantive law of the state whose law is most favorable to the plaintiffs.

g. Procedural Advantages of Each Forum that has Jurisdiction

If several courts have jurisdiction and each has a choice of law system that directs the court to apply favorable substantive law, counsel might choose where to sue based upon consideration of which forum has procedural rules most favorable to the plaintiffs. The procedural rules of each state can differ significantly, so that there may be important procedural advantages in one forum that are absent in another.

The search for favorable procedural law is simplified by a basic proposition of U.S. choice of law. The forum almost always applies its own procedural rules.1 This is so even when the forum's choice of law rules direct it to apply the substantive law of another state. Thus, if the suit is brought in Texas state court, Texas procedure rules will apply even if the Texas court chooses to apply Mexican tort law or the Delaware wrongful death statute.2 So too, if suit is brought in any United States federal court, the Federal Rules of Civil Procedure will apply even though the state law of torts or wrongful death will apply.3

Procedural differences that may produce the most favorable procedural system for the litigation might depend on the resolution of the following questions: Is there a right to a jury in the forum? Is the pool of available jurors in a particular forum likely to be favorably disposed to the plaintiffs? Which forum has rules allowing the broadest pre-trial discovery? Which forum has the most liberal rules of joinder, including a rule authorizing class actions? What is the scope of the subpoena power of this jurisdiction? Can witnesses from other jurisdictions be subpoenaed to appear in this forum?

h. Enforceability of Judgments

It would be most unfortunate for a plaintiff to sue in a forum which has jurisdiction, has a choice of law system that directs it to apply

favorable substantive law, and has procedural advantages for the clients
if the resulting judgment of that court would not be enforceable.

If GrowFast is to be the sole defendant, enforceability is not a significant
problem if the lawsuit is brought in a court in the United States. The
United States Constitution requires that every state give "full faith and
credit" to the judgments of every other state. A federal statute imple-
menting this constitutional requirement provides that, generally, once a
judgment is entered in the court of one U.S. state, every other U.S.
state asked to do so shall enforce that judgment against any assets of
the judgment debtor which are present in the state asked to enforce the
judgment. Full Faith and Credit is given by federal courts and received
by federal courts as well.

As a result, whether this case is brought in a federal or state court
in Kansas, Delaware, or Texas, any judgment obtained almost certainly
will be enforced against GrowFast's assets anywhere in the United States.
Because GrowFast is an U.S. corporation with most of its assets in the
United States, there should be no trouble enforcing a judgment of a
U.S. court against GrowFast.

If GrowFast had sufficient assets located in Mexico to pay the large
judgment plaintiffs seek, a judgment against GrowFast in a Mexican court
presumably could be enforced in Mexico without the need to consider
whether U.S. courts would enforce the Mexican judgment. Problems of
judgment enforcement might make Mexico's courts a poor choice of
forum for the plaintiff, however, if GrowFast's assets are mostly located
in the United States.

Foreign country judgments are not entitled to full faith and credit in
U.S. courts because the Constitution compels U.S. courts to give full
faith and credit only to judgment of U.S. courts. The right to mandatory
enforcement of a Mexican judgment in courts in the United States could
be established by treaty between Mexico and the United States but there
is no such treaty. Absent a treaty, each state is free to choose its own
rules to determine the level of deference to be given to a judgment of
a foreign country which is sought to be enforced in that state's court.
Some states follow the common law rule of "comity" which provides
for discretionary deference to foreign country judgments but provides
great flexibility to decline to enforce the judgments. More than half

44. U.S. Const. art. IV, §1.
46. E.g., Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 736
(9th Cir.), cert. denied, 474 U.S. 919 (1985).
48. E.g., Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204 (Wash. 1992).
49. See Rendering and Enforcing Foreign Judgments in Mexico and the United States: A Panel
50. "In general, the principle of 'comity' is that the courts of one state or jurisdiction will give
effect to the... judicial decisions of another state or jurisdiction, not as a matter of obligation,
Ct. App. 1977); see generally Hilton v. Guyot, 159 U.S. 113 (1895).
the states voluntarily have adopted the Uniform Foreign Country Money-Judgment Recognition Act which requires deference to foreign country judgments but provides several situations in which the judgment will not or need not be enforced.\textsuperscript{51}

\textbf{B. Impact of Use of a Subsidiary Corporation by GrowFast}

If GrowFast had chosen to distribute Sollate\textsuperscript{TM} in Mexico using a wholly-owned U.S. subsidiary or a wholly-owned Mexican subsidiary of GrowFast this would not affect the analysis of the jurisdiction of U.S. courts over GrowFast. The issues of subject matter jurisdiction, personal jurisdiction and venue in U.S. courts are not dependent upon whether GrowFast acted in Mexico directly, indirectly or through an independent agent. Rather, the jurisdictional focus is on GrowFast's connections with the states in the United States in which plaintiffs might seek to assert jurisdiction.

Whether Mexican courts have jurisdiction over GrowFast might vary depending upon the manner in which GrowFast chose to operate in Mexico. That would be a matter for resolution in accordance with the laws of Mexico.

For the purpose of determining liability rather than jurisdiction, the manner of distribution of Sollate\textsuperscript{TM} could have some impact under U.S. law. The hypothetical problem states that the explosion occurred during packaging and dilution of Sollate\textsuperscript{TM} which was being supervised by "both Agricolas employees and two technicians 'on loan' from GrowFast." If the explosion occurred because of the wrongdoing of the supervisors in Mexico rather than because of any defect in the product when it was made in Texas, the liability of GrowFast might depend in part upon the manner of distribution of the product.

Whatever the distribution system, GrowFast normally would be liable for the wrongdoing of its own employees under the principle of "respondeat superior."\textsuperscript{52} There is a possible exception known as the "borrowed servant doctrine" which might apply to the GrowFast employees "loaned" to Agricolas, thereby excusing GrowFast from liability for the torts of the GrowFast employees.\textsuperscript{53} A choice of law question could arise as to whether the law of Mexico or that of a U.S. state would apply to determine the vicarious liability of GrowFast for the wrongdoing if its servants were on loan to Agricolas and working in Mexico at the time of the explosion.\textsuperscript{54}


\textsuperscript{52} "[U]nder the doctrine of respondeat superior, master and servant are one and the same. The principal is liable for the act of his servant or agent performed within the scope of employment. It is derivative liability." White v. Dennison, 752 S.W.2d 714, 717 (Tex. Ct. App. 1988).

\textsuperscript{53} See, e.g., 53 Am. Jur. 2d Master and Servant § 415 at 425 (1970) (an employer is not liable for injury negligently caused by a servant if the latter is not at the time in the service of that employer, but in the special service of another...).

\textsuperscript{54} See Restatement (Second) of Conflict of Laws § 174 (1971) (Court applies the respondeat superior law of the jurisdiction having the most significant relationship to the occurrence and to the parties).
GrowFast would not be liable for the torts of Agricolas' employees, however, because most U.S. jurisdictions follow the rule that one who hires an independent contractor generally is not liable for the torts of the independent contractor. If, in contrast, Agricolas were a subsidiary of GrowFast, whether incorporated in the United States or Mexico, there is a greater chance that GrowFast could be liable for Agricolas' torts, though most U.S. states follow the rule that protects the parent corporation from liability for torts of subsidiaries absent a compelling reason to "pierce the corporate veil" of the parent. One choice of law question that would arise is whether the law of a U.S. state or the law of Mexico would determine the scope of the liability of a U.S. corporation for the torts of its U.S. or Mexican subsidiaries doing business in Mexico.

If the explosion occurred because of a defect in the product manufactured by GrowFast rather than in the manner of its handling in Mexico, U.S. products liability law might make GrowFast liable for the explosion and harm no matter how the product was distributed in Mexico. It would then be unnecessary to consider the issue of liability of GrowFast for negligence in handling the product at the time of the explosion.

II. LITIGATION IN TEXAS

A. State Court

1. Jurisdiction

The state courts of Texas would have jurisdiction. Texas courts have subject matter jurisdiction of tort actions wherever the tort might occur. If GrowFast manufactured the defective Sollate™ in Texas, personal jurisdiction over GrowFast in Texas is virtually certain to exist. Even if the Sollate™ was not manufactured in Texas, the presence of a GrowFast factory in Texas is sufficient to give Texas jurisdiction over GrowFast: "General jurisdiction may be asserted when the cause of action does not arise from or relate to the nonresident defendant's purposeful conduct within the forum state but there are continuous and systematic contacts between the nonresident defendant and the forum state."

56. See, e.g., Trailways, Inc. v. Clark, 794 S.W.2d 479, 489 (Tex. Ct. App. 1990) (court will disregard separate nature of subsidiary if subsidiary "is being used as a sham...to avoid liability").
59. Lutheran Brotherhood v. Kidder Peabody & Co., 829 S.W.2d 300, 307 (Tex. Ct. App. 1990), vacated, 840 S.W.2d 384 (Tex. 1992) ("Tort actions are transitory in nature and can be instituted and tried in any court which has jurisdiction in personam of the defendant.").
60. See e.g., Bd. of County Comm’rs of County of Beaver, Oklahoma v. Amarillo Hosp. Dist., 835 S.W.2d 115, 121 (Tex. Ct. App. 1992) (Systematic and continuous contacts are not necessarily required for Texas to exercise jurisdiction...if the cause of action arises from, or is connected with, a purposeful act or transaction done or consummated in Texas.).
2. Forum Non Conveniens

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized. . ." 62 Texas once barred its courts from applying the doctrine of forum non conveniens to wrongful death and personal injury actions brought in a Texas court but, in 1993, the Texas legislature adopted a statute authorizing Texas courts to dismiss such actions on the ground of forum non conveniens. 63 The current statute permits a Texas state court to dismiss an action brought by a claimant who is not a legal resident of the United States whenever the court "finds that in the interest of justice an action to which this section applies would be more properly heard in a forum outside [Texas]. . ." 64

When a plaintiff is a legal resident of the United States, but not a resident of Texas, the Texas court also can dismiss on the ground of forum non conveniens, but the court must first find that: 1) there is an alternative forum with jurisdiction; 2) which, after balancing "the private interests of all the parties and the public interest of the state," is a more convenient forum for the litigation; 3) which "offers a remedy for the causes of action brought by a party. . ."; and 4) the act or omission causing the injury or death did not occur in Texas. 65 If the plaintiff is a legal resident of Texas, a Texas court cannot dismiss the case based on the doctrine of forum non conveniens. 66

In short, a Texas state court has the power to dismiss for forum non conveniens when the plaintiffs are foreign nationals 67 and can do so more easily than it could if the plaintiffs were U.S. citizens. If the two injured U.S. citizens in the GrowFast hypothetical are from Texas, however, the Texas court cannot dismiss their claims on the ground of forum non conveniens.

These considerations might lead the plaintiffs' lawyer to join in a single lawsuit the two U.S. citizens with the foreign nationals as co-plaintiffs. This would decrease the likelihood that the Texas court would dismiss based on forum non conveniens, but would not assure that the Texas court would keep the case. The court would be barred from applying forum non conveniens only if at least one of the joined U.S. citizens is a resident of Texas. 68

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68. The statute bars the application of forum non conveniens to "an action" whenever "a claimant in the action who is properly joined is a legal resident of this state."
B. Federal Court

1. Jurisdiction

A federal court has subject matter jurisdiction of a suit in which foreign nationals are plaintiffs, a U.S. corporation is a defendant and more than $50,000 is in controversy. Even if the two U.S. citizens were made co-plaintiffs, the federal court would have subject matter jurisdiction so long as the U.S. citizens were not citizens of the same state as GrowFast.

Personal jurisdiction over GrowFast in federal court in Texas also exists because federal courts in diversity actions have personal jurisdiction over defendants when the state court in which the federal court is sitting would have personal jurisdiction over the defendant and the Texas state court does have personal jurisdiction over GrowFast.

2. Forum Non Conveniens

The federal court has the power to dismiss for forum non conveniens, but whether it would exercise its discretion to do so is not certain: "The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application. . . make uniformity and predictability of outcome almost impossible."

Federal courts apply their own version of the doctrine of forum non conveniens to actions brought in federal court rather than applying the version of the state in which they sit. The Texas forum non conveniens statute, therefore, is not relevant to the application of the doctrine in the Texas federal court.

Federal courts apply the doctrine of forum non conveniens when the plaintiff's choice of a federal forum is correct but there is another non-federal forum available where the action could have been brought and which is a much more convenient place to try the lawsuit. The application of the federal doctrine of forum non conveniens to this case, if brought in federal court, depends upon the following:

   a. Existence of Available Alternative Forum

   The doctrine applies only when there is an alternative forum in which the action can be brought if the current forum dismisses the action: "In

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70. Id.; Camper & Nicholson Int'l, Ltd. v. Blonder Marine & Charter, Inc., 793 F. Supp. 318, 320 (S.D. Fla. 1992) (§ 1332(a)(3) provides a court with federal jurisdiction where aliens are additional parties to a controversy, so long as a citizen of a different American states is present on each side of the controversy and there is a legitimate dispute between those American citizens of diverse citizenship.)
72. See supra discussion § III(A)(1).
74. Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd., 2 F.3d 990, 992 (10th Cir. 1993).
all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them. The defendant, GrowFast, would have to establish that a Mexican court would have jurisdiction to hear the case against GrowFast as a precondition to getting a *forum non conveniens* dismissal in the federal court on the ground that a Mexican court would be more convenient. Because GrowFast wants the case to be tried in Mexico, GrowFast might stipulate that it would submit to the jurisdiction of a Mexican court, accept service of process and even waive any possible defense of the statute of limitations in order to demonstrate that a Mexican court provides an alternative forum.

That the alternative Mexican forum might apply a body of law less favorable to the plaintiff than the law that would be applied in the United States federal court is not a reason to declare that the alternative forum is not available: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." The foreign forum can be an available alternative even though it has a justice system which differs from that of the United States. For example, *forum non conveniens* can apply even if the foreign forum does not provide for jury trials. To bar the use of *forum non conveniens* on this ground, the plaintiff opposing the motion to dismiss would have to prove that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." 

b. Burden of proof

Only in rare cases should a federal court apply the doctrine; "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Where, however, the plaintiff is not a resident of the United States, the plaintiff's choice of a federal forum is entitled to less deference than if a U.S. citizen chooses a United States federal court.

c. Balance of Private and Public Factors

The court considers two types of factors in determining whether to dismiss the case: 1) the private interests of the litigant; and 2) factors of public interest. Among the private interests, "[i]mportant consid-

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77. Id., at 506-507.
79. Id. at 247.
80. Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cir. 1991).
81. Id. at 254.
82. Supra note 76 at 508.
84. Supra note 76 at 508.
erations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained."

Factors of public interest include the extent to which the forum courts are crowded with cases, the burdens imposed on local persons to sit as jurors for cases having little to do with the geographical area, and the preference for allowing trials of limited public interest to be tried where the public interest is greatest. In addition, "[t]here is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." The factors are too numerous and the discretion too great to firmly predict the result that a Texas federal court would reach. However, a federal court of appeals recently upheld the decision of a federal court in Texas to dismiss a case on forum non conveniens grounds in which Mexican nationals sued a U.S. plane manufacturer for wrongful deaths occurring when the plane crashed in Mexico.

III. CHOICE OF LAW IN COURTS IN TEXAS

The federal district court in Texas will resolve the choice of law question presented in the GrowFast hypothetical by applying the same choice of law rules as would the state courts of Texas.

A. Wrongful Death Law

Texas has a wrongful death statute which allows for the possibility that Texas law might apply even if the death occurs outside of Texas. That statute, however, contains a choice of law directive: "The court shall apply the rules of substantive law that are appropriate under the facts of the case." The courts construe this statute as incorporating Texas' general approach to choice of law into the analysis of the proper wrongful death law to apply. The general approach to choice of law in Texas courts is the "most significant relationship" approach as set forth in the Restatement (Second) of Conflict of Laws. This system

85. Id.
86. Id. at 508-509.
87. Id. at 509.
90. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986).
91. TEX. CIV. PRAC. & REM. CODE ANN. § 71.03(c) (West 1986).
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starts with the presumption that in wrongful death actions the law of "the state where the injury occur[s]" shall apply.\textsuperscript{94} To have the law of another state applied, the proponent of the other law must establish that the "other state has a more significant relationship" in accordance with general principles set forth elsewhere in the Restatement.\textsuperscript{95}

This "significant relationship" approach is notoriously vague, and it is normally difficult to predict the outcome if there is no directly relevant precedent in the jurisdiction. Texas courts have considered the wrongful death/choice of law issue in several cases. Those cases demonstrate Texas state courts and the federal courts sitting in Texas probably would apply the law of Mexico concerning wrongful death to all of the foreign nationals and possibly to the two U.S. citizens as well. Courts applying the Texas choice of law system have concluded that Texas would apply the law of the place of injury and death even when that meant applying the law of another state or country in preference to the law of Texas.\textsuperscript{96}

A recent Texas case, \textit{Trailways, Inc. v. Clark,}\textsuperscript{97} contravened this trend toward the application of the law of the place of the death and applied the wrongful death law of Texas to a bus accident in Mexico causing deaths in Mexico. In \textit{Clark,} however, the deceased persons were Texas citizens, the bus tickets were sold in Texas, the round trip began in Texas and it was scheduled to end in Texas.\textsuperscript{98} Under these circumstances, the Texas court found that Texas had the most significant relationship and applied Texas law both to the U.S. bus company that sold the tickets and provided transportation in Texas, and to the Mexican bus company that accepted the passengers for the portion of the ride taking place in Mexico.\textsuperscript{99}

Despite \textit{Clark,} the Texas federal court probably would apply Mexican law to the GrowFast litigation. The parties and events set forth in the hypothetical problem have far fewer Texas contacts than were present in \textit{Clark.} Therefore, the presumption that the law of the place of the injury will apply\textsuperscript{100} is harder to overcome. Moreover, Texas might conclude that it ought not go out of its way to impose greater liability on a U.S. corporation in order to enhance recovery for the families of Mexican nationals when Mexican law would not provide such liberal liability rules to Mexican nationals. However, one cannot be sure.\textsuperscript{101} As the Texas courts have conceded, there is much room for debate in the application

\begin{footnotesize}
\textsuperscript{94.} \textit{Restatement (Second) of Conflict of Laws} § 175, at 522 (1971).
\textsuperscript{95.} Id. at 522-23; see \textit{Restatement (Second) of Conflict of Laws} §§ 6, 145 (1971).
\textsuperscript{96.} Tennimon \textit{v. Bell Helicopter Textron, Inc.}, 823 F.2d 68, 70-71 (5th Cir. 1987); Rosenberg \textit{v. Celotex Corp.}, 767 F.2d 197, 199 (5th Cir. 1985); Cox \textit{v. McDonnell-Douglas Corp.}, 665 F.2d 566, 569-71 (5th Cir. 1982).
\textsuperscript{98.} Id. at 485.
\textsuperscript{99.} Id. at 486.
\textsuperscript{100.} \textit{Restatement (Second) of Conflict of Laws} § 175 (1971).
\textsuperscript{101.} \textit{See Hurtado v. Superior Court of Sacramento County}, 522 P.2d 666 (Cal. 1974) (California applied California's liberal law of damages in wrongful death actions to a California accident in which Mexican nationals died).
\end{footnotesize}
of the "most significant relationship" test. "There is no set formula for determining the significance of any particular contact, which must generally be weighed on a case-by-case basis and balanced against other such contacts. The trial judge, therefore, should have some latitude in balancing legitimate competing state interests."\textsuperscript{102}

B. Products Liability Law

Texas applies the "most significant relationship" test to determine which state's law of products liability to apply to wrongful death issues. In \textit{Baird v. Bell Helicopter Textron},\textsuperscript{103} the Texas federal court had to determine which products liability applied to a crash in Surinam of a helicopter manufactured in Texas by defendant, Bell Helicopter Textron. The crash injured the Canadian pilot who was employed by a Canadian company and was flying the company's Canadian-registered helicopter. The court first decided that Surinam had no significant relationship to the events even though the crash occurred there.\textsuperscript{104} This decision reduced the alternatives to the law of Canada\textsuperscript{105} or of Texas. Texas had the more liberal products liability law and the Canadian plaintiff sought to have Texas law apply; the Texas manufacturer wanted Canadian law.\textsuperscript{106}

The court chose to apply Texas products liability law. The court decided that Texas adopted a very liberal products liability law in order to assure full compensation to victims of defective products and that Texas "seeks to spread the financial burden of injuries suffered by consumers, regardless of nationality, as widely as possible through the use of liability insurance or through the treatment of liability costs as business expenses by Texas concerns."\textsuperscript{107} The court also found that the liberal strict products liability doctrine of Texas sought to assure the greatest incentive to Texas companies to make safe products.\textsuperscript{108} In contrast, the Texas court decided that the absence of strict products liability law in Canada was designed to protect Canadian companies from large judgments.\textsuperscript{109} Because the defendant was from Texas and not Canada, the court concluded that the Canadian policy of protecting Canadian companies would not be fostered in a case involving a Texas manufacturer.\textsuperscript{110} The court concluded that application of the Texas choice of law approach "clearly mandates the use of Texas products liability law."\textsuperscript{111}

The \textit{Baird} case suggests that if the Sollate\textsuperscript{TM} were manufactured in Texas, the court would probably apply Texas product liability law to

\begin{thebibliography}{111}
\bibitem{102} Supra note 97 at 485.
\bibitem{104} Id. at 1139.
\bibitem{105} Specifically, the court was considering whether to apply the law of British Columbia. Id. at 1141.
\bibitem{106} Id. at 1140.
\bibitem{107} Id. (emphasis added).
\bibitem{108} Id. at 1140-41.
\bibitem{109} Id. at 1141.
\bibitem{110} Id.
\bibitem{111} Id. at 1141.
\end{thebibliography}
benefit Mexican nationals at the expense of the Texas manufacturer. However, such solicitude for the well-being of foreign nationals at the expense of U.S. manufacturers is not inevitable, given the vagaries inherent in the "most significant relationship" test.

C. Damages Law

The question concerning damages which is posed in the hypothetical assumes that Mexico's substantive law applies. If the Texas federal court applied Mexican substantive law, it probably would apply Mexican laws concerning damages as well, especially if those laws are less favorable to the foreign nationals than the damage law of Texas.

The Texas choice of law system follows the Restatement (Second) Conflict of Laws\textsuperscript{112} which provides that the law of damages normally should be the same as the substantive law which the court chooses to apply.\textsuperscript{113} Because the hypothetical assumes that the court chose Mexican substantive law, the Texas choice of law rule probably would point to Mexican law of damages as well.

In Baird,\textsuperscript{114} however, the court did not link the substantive law and the law of damages despite the Restatement's preference for doing so. The federal court in Texas applied the liberal products liability law of Texas to favor a Canadian plaintiff against a Texas defendant but then applied the restrictive damages law of Canada to limit the amount that the Canadian plaintiff could recover against the Texas corporation. The court applied Canadian law capping liability for pain and suffering damages at $100,000 rather than Texas law containing no limits on the amount of recovery. The court reasoned that because Canada does not think it unfair for a Canadian plaintiff to be limited to $100,000 in damages, Texas should not go out of its way to award more, especially when the money would come from a Texas corporation: "Texas has no direct concern about the amount of damages awarded to a Canadian domiciliary" who "will become no burden on the Texas welfare system" if he runs out of funds to care for himself because of the cap on liability under Canadian law.\textsuperscript{115} The court also applied Canadian law barring a right to spousal consortium instead of the Texas law permitting such a right, despite the fact that the court applied the liberal Texas law of products liability to resolve the merits of the dispute: "Texas interests in seeing spouses compensated for loss of consortium are not involved here because no Texas citizen has been injured. Texas' paternalistic desire to protect its domiciliary dependents from excessive liability...would be thwarted if Texas law is applied."\textsuperscript{116}

\textsuperscript{112} Guiterrez v. Collins, 583 S.W.2d 312 (Tex. 1979).
\textsuperscript{113} RESTATEMENT (SECOND) CONFLICT OF LAWS, §§ 171 (damages generally); 178 (wrongful death damages) (1971).
\textsuperscript{114} Supra note 103.
\textsuperscript{115} Id. at 1151.
\textsuperscript{116} Id. at 1152. It is noteworthy that when the court chose to apply Texas' liberal products liability law, it did so to give a right to recovery to injured persons "regardless of nationality";
The rule favoring linkage between the applicable substantive law and the law of damages favors application of Mexican law of damages. In *Baird*, the court broke that link in order to give lower damages to a foreign national. Nothing in *Baird* suggests that Texas would break the linkage in order to provide greater damages to foreign nationals injured in a foreign country by a product manufactured in Texas. If Mexico's substantive law is applied, Mexico's law of damages probably will apply to the foreign nationals who are plaintiffs in the courts in Texas.

IV. ENFORCEMENT OF A JUDGMENT FROM MEXICO IN A COURT OF THE UNITED STATES

The United States Constitution provides that the judgments of one U.S. state are entitled to full faith and credit in every other U.S. state. 117 A federal statute implements the Full Faith and Credit Clause by providing that the courts of a second state must honor and enforce the judgments of a sister state that are presented to it for enforcement. 118

The Full Faith and Credit Clause has no application to judgments of foreign countries because they are not judgments of U.S. states. 119 The federal government could enter into a treaty agreeing to honor judgments of foreign countries. 120 If the federal government did so, the states would be bound to honor the provisions of such a treaty. 121 There is no treaty between the United States and Mexico calling for the mandatory recognition of judgments of Mexico in the United States. 122 Absent compulsion under the Full Faith and Credit Clause and absent a treaty, each state is free to decide for itself whether to honor the judgments of a foreign country. 123 Furthermore, there is no federal doctrine of recognition that is applicable in federal courts. Rather, federal courts asked to recognize the judgments of a foreign country apply the law of recognition of the state in which the federal court sits. 124

Absent a statute, recognition of foreign country judgments is a function of the doctrine of "comity." In *Hilton v. Guyot*, 125 the Court ruled that when a foreign judgment creditor seeks to enforce a foreign country judgment in a U.S. court, the U.S. court need not give the judgment the equivalent of full faith and credit if the foreign country would not

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117. U.S. CONST. art. IV, § 1.
120. U.S. CONST. art. II, § 2, cl. 2.
121. U.S. CONST. art. VI, cl. 2.
125. Supra note 119.
provide equivalent recognition to a U.S. judgment. The requirement of reciprocity has been relaxed and many states no longer insist that recognition of foreign judgments will occur only if the foreign country would honor the judgment of the U.S. state.\textsuperscript{126}

More than half of the American states have adopted a virtually identical statute which details when those states will honor the judgments of foreign countries which order that the defendant pay a money judgment to the plaintiff.\textsuperscript{127} Texas has adopted this "Foreign Money-Judgment Recognition Act."\textsuperscript{128} The Act creates a general rule that the U.S. state will honor a final and conclusive judgment of a foreign state for a sum of money by treating "the foreign judgment. . .in the same manner as the judgment of a sister state which is entitled to full faith and credit."\textsuperscript{129}

The statute provides three occasions when the foreign country money-judgment shall not be treated as conclusive despite the general rule. Judgments for money of a foreign country are not honored when:

1. The foreign country lacks impartial tribunals or procedures compatible with U.S. principles of due process of law;
2. The foreign country tribunal lacked personal jurisdiction over the defendant;
3. The foreign country tribunal lacked subject matter jurisdiction.\textsuperscript{130}

If none of these three disqualifying conditions are present, the U.S. court has discretion to decline to honor the judgment after consideration of six additional factors.\textsuperscript{131} The presence of any one of these factors does not preclude recognition but the court may take them into account in deciding whether it will exercise its discretion to honor the judgment:

1. The defendant did not get notice of the foreign proceeding in time to defend;
2. The judgment was obtained by fraud;
3. The claim underlying the foreign judgment is repugnant to the public policy of the U.S. state;
4. The judgment conflicts with another final and conclusive judgment of a different court;
5. The parties had agreed that they would resolve the dispute elsewhere than in the foreign country court that rendered the judgment;
6. If jurisdiction was based only on personal service upon the defendant, the foreign court was a seriously inconvenient forum.\textsuperscript{132}

Whether Texas would honor a Mexican judgment in accordance with the Foreign Money-Judgments Recognition Act would depend upon the details of the proceedings in the Mexican court. Whether Delaware or

\textsuperscript{127} Supra note 51.
\textsuperscript{129} Supra note 51 at § 3.
\textsuperscript{130} Id. at § 4(a).
\textsuperscript{131} Id. at § 4(b).
\textsuperscript{132} Id.
Kansas would honor such a Mexican judgment would not depend upon the terms of the Act because neither state has adopted the Act.\footnote{133} Both states have indicated that they would follow the lead of the United States Supreme Court opinion in \textit{Hilton v. Guyot}.\footnote{134} The difference between the \textit{Hilton} standard and that of the Foreign Money-Judgments Recognition Act is not great if the largely discredited requirement of reciprocity\footnote{135} is no longer applicable. The Kansas court characterized the \textit{Hilton} approach as follows: "In applying the principles set out in \textit{Hilton}, 'courts will generally recognize the judgments of foreign courts if (1) the foreign court had personal and subject matter jurisdiction; (2) the defendant in the foreign action had adequate notice and opportunity to be heard; (3) the judgment was not obtained by fraud; and (4) enforcement will not contravene public policy.'"\footnote{136}

\section*{V. CONCLUSION}

Commerce between Mexico and the United States inevitably will continue to increase. With more products crossing the border, more international products liability litigation will occur. Existing doctrines of jurisdiction, choice of law and enforcement of judgments are too ambiguous to provide the certainty, predictability and ease of application which are necessary to foster international business transactions. In the short run, clever lawyers, adept at the game of forum shopping, will use the existing rules to gain litigation advantages. In the long run, Mexico and United States must provide stability through international agreements.

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\begin{itemize}
\item \footnote{133}{See 13 U.L.A. 63 (West Supp.1995) (list of states adopting the Act).}
\item \footnote{134}{Phillips USA, Inc. v. Allflex USA, Inc., 150 F.R.D. 198, 201 (D. Kan. 1993); Bata v. Bata, 163 A.2d 493, 505-06 (Del. 1960), cert. denied, 366 U.S. 964 (1961).}
\item \footnote{135}{See 15A C.J.S. 2d, \textit{Conflict of Laws} \S 5 (1967).}
\item \footnote{136}{Phillips, 150 F.R.D. at 201 (citing with approval, South Carolina Nat'l Bank v. Westpac Banking Corp., 678 F. Supp. 596, 598 (D. S.C. 1987)).}
\end{itemize}