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Supreme Court of Texas.
Maria Cristina Brittingham-Sada De Ayala, Petitioner,
v.
Kevin Michael Mackie, Administrator of the Ancillary Estate of Juan
Roberto
Brittingham-McLean, Deceased, Respondent.
No. 04-0160.

March 22, 2005.

Appearances:
Rosemarie Kanusky, Fulbright & Jaworski L.L.P., San Antonio, TX,
for petitioner.
Shannon H. Ratliff, Ratliff Law Firm, P.L.L.C., Austin, TX, for
respondent.

Before:

Wallace B. Jefferson, Don R. Willett, David M. Medina, Nathan L.
Hecht, Dale Wainwright, Phil Johnson, and Scott Brister, Justices.

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JUDGE: The Court is ready to hear argument in 04-0160, Maria
Cristina Brittingham versus the Ancillary State of Juan Roberto
Brittingham.

COURT ATTENDANT: May it please the Court, Ms. Rosemarie Kanusky
will present argument with the petitioner. The petitioner had reserved
five minutes for rebuttal.

ORAL ARGUMENT OF ROSEMARIE KANUSKY ON BEHALF OF THE PETITIONER

MS. KANUSKY: Mr. Chief Justice. May it please the Court. Rose
Kanusky and -- when the hall does provide for the petitioner. -- The
movement below is not to dismissed this Ancillary Probate Jurisdiction
matter on a basis of lack of subject matter jurisdiction. This case
involves a foreign will and a foreign decedent who was Domisap outside
this State of Texas at the time of his death. In situations like this
the probate cite ...

JUDGE: Is the -- would those still involve with the case?

MS. KANUSKY: No, your Honor. She has settle the standard of
matters and is no longer involve in this case at all. She was initially
a member of this-- on litigation as the representative of the Ancillary
State. There is a current representative who was appointed last month

by the Kang Court, that's Kevin Michael Mackie.

JUDGE: She initiated this proceeding but she's not under it?

MS. KANUSKY: Exactly. Returning to the instruction of the probate code. It provides a variety of mechanism for foreign executor to come to Texas to address any property that may be here that needs to be addressed.

JUDGE: It's not clear to me exactly what your position is. It seems like under 95(B)1 that you can probate the will as just based those administrative act or [inaudible] to do that.

MS. KANUSKY: No, your Honor. What we're saying is that you can perform a variety of functions according to the needs of the state. You can do nothing now or both common law on statutory vehicles to come to Texas to ...

JUDGE: I thought, in one point of your brief. He said that since there's no property, it's your position that there's no property in Texas that can even found the will and the procedures not in 95(B), 95(B).

MS. KANUSKY: 95(B) is an administrative process so they could have just filed it. There's nothing that can be done because it's administrative process. Other than to file a motion to challenge the subject matter jurisdiction under 95 which is what happen here. Our contention is, that there is an escalating level of court intervention for the probate that form wills. Either a sort of activities for which there's no Court intention. Ancillary Jurisdiction under 95 was just a slightly more involved Court process-- excuse me-- I, I forgot the name on the [inaudible] ...

JUDGE: On his I'm-- okay. Is this really a question of jurisdiction or that the statutory probate court -

MS. KANUSKY: No.

JUDGE: - or the probate Court just to exceed this powers.

MS. KANUSKY: It isn't a question that subject matter jurisdiction because under Section 95, "Ancillary probate jurisdiction is limited to certain level of activity which shouldn't happened perhaps in this case." This activation of Section 13 of the probate code, that's significant for this case.

JUDGE: So why she get-- if someone goes back in files? So if 103 action then what would you're position be?

MS. KANUSKY: My position at this point would be such an action would be barred on limitations under the probate code.

JUDGE: If it had been filed timely what could your position be?

MS. KANUSKY: My position would be that it might be possible to pursue the types of claims that are add issue here which have primarily causes of action. Also some dispute over whether or not there's assets in the decedents name. Those would be viable under Section 103 by operation modified act. The distinction ...

JUDGE: Well, to be clear, your position is that this case could've been brought under 95 or 103 or not?

MS. KANUSKY: It could've been brought under 95 or 103 but if brought under 95, it was subject to challenge-- the lack of a subject matter jurisdiction because 95 is a limited jurisdictional provision for the Ancillary probate, for this position of property and the State and for protection of local creditors. This dispute really is a, a dispute about the difference between Section 95 Ancillary jurisdiction and 103 provision of probate jurisdiction. The primary difference is one functionality. So understand that function, we need to return to overall, the chapter on the probate of foreign wills and understand that there is an escalating level of Court involvement that it could

means to the parties and for the application use of judicial resources as well.

JUDGE: Why isn't it convenient for the parties here when this will was filed in Webb County, Texas?

MS. KANUSKY: It's inconvenient because the primary jurisdiction, the first Court involve is the one in Mexico and whether or not it's actually viable under 103, it's not an issue here. The only statutory provision under the probate code that was articulated in the application for probate is Section no. 5, Ancillary Probate Jurisdiction. It was then subject to challenged to determined whether or not there were local creditors to protect or whether there was any local asset to distribute. The difference between 95 and 103 is really pertinent in connection with the overall structure of the probate code. Under Section 5 app-- we know that Courts exercising original probate jurisdiction in here matters incident to or appertaining to in a state. That's a functional difference. It's a significant functional difference here because the real dispute is over a cause of action which was identified by the Fourth Court of Appeals. There also some procedural differences between 95 and 103. The highlight to distinctions where the limitation in a subject matter of jurisdiction. Significantly 95 is administerial, the case all says that any of the Court nor the Court has any discretion to accept a 95 application of probate. There's no need for service, of process, no need for notice. The same is not true for Section 103. There also some differences on language between the two sections. The highlight, the purpose of Section 95 as the vehicle purpose disposing of property, of protecting of the creditors. Under Section 103 you can addressed additional matters via operation of section 5 app. The incident to or appertaining to jurisdiction.

JUDGE: So you're saying that if this had been brought under 103 it wouldn't had any objection?

MS. KANUSKY: Well, we have a variety objections we just want to have the ones that we have today.

JUDGE: And why can't you just treated case file under section 95 is one filed under 103. There's not a whole lot of difference in some respects. Some respects the [inaudible].

MS. KANUSKY: Exactly because the probate code does not contain a mechanism for converting one type of application to another.

JUDGE: Well, that-- sort of -- you've wanted on the paddle that the-- there's no difference, no reason to convert. Is not like different bankruptcy proceedings, it's just more of the sentence that you-- different forms of probate.

MS. KANUSKY: There are more-- foreign's are the same in the state but there are reasons for those differences. Convenience of the parties of course, if we don't need to spend as much money to go under 103 then don't go under 103.

JUDGE: In, in your view could you file on the both sections of the same kind?

MS. KANUSKY: I think out of an abundance of caution if you didn't know which proceeding to invoke, you could do that.

JUDGE: See it could effect.

MS. KANUSKY: It is normal but welcome to the world of probate. As this Court has ten minutes prior opinions is very complex and it's acculturative.

JUDGE: But all of it-- were all the requirements otherwise set forth of 103 math except for citing 103, in which there was notice, there was service.

MS. KANUSKY: Well, there was notice and service of the original petition. The application for probate which was filed in early August of 2000, had notice in the sense that it was posted at the Court House historical write up. Our question whether that sufficient under the other provisions on the probate Court called to satisfy one of plea. Eventually the original provision was served although there's question of whether it was served correctly but that doesn't really matter for purposes of this discussion. The operative document was not the original petition or the clean intervention which is file much later in time. The operative document that triggered the county court jurisdiction was the application for foreign probate of the will. This-- the historical purpose of 95, we know from the case law is that-- is to protect local creditors and to distribute assets. Even the work in Ancillary connote something that is subordinate secondary and adjunct to the main proper proceeding which was initiated two years earlier in Mexico. There is a new appeal pending in your report recently file an involving personal jurisdiction matters. And in that case the current representative of this Ancillary State admits that the purpose of Ancillary jurisdiction is want to compliment and coordinate with the main jurisdiction. In this case that's the Court in Mexico. There are two components to this dispute; one, is equip of causes of action that's what the Fourth Court of Appeals identified as a potential cause of action to recover property that may have been in the state and may have been wrongfully removed at some point after the decedents staff. This cause of action is admittedly by all the parties incident to or appertaining to this state. That's only viable under section 103 by operation bypass, it is not liable under section 95.

JUDGE: Let me ask you about the appellate jurisdiction. How does this fit under Crowson?

MS. KANUSKY: The fourth Court of Appeals now that the motion to dismissed the lack of subject matter jurisdiction concluded a phase of the probate proceeding. It also address the removal of Anna Maria, the wife as the original representative of the State but that issue is no longer operative. The Fourth Court found that ...

JUDGE: How, how did they conclude the facts to set a case to keep going?

MS. KANUSKY: It could keep them, but for subject matter of jurisdiction that's the threshold for keep-- for continuing. The structured prosimious set up to give the Appellate Courts the opportunity to intervene in probate matters which sometimes can take years, centuries -

JUDGE: Of a brain.

MS. KANUSKY: - perhaps to confront ...

JUDGE: In intervening in this for a lot of the last year. So that's what word-- that's what worries me is that the-- if the jurisdiction here assume you think there was jurisdiction-- Appellate jurisdiction under Mackie. And there the trial court just denied the, Mr. Tijerina's application for purpose except for administry, right?

MS. KANUSKY: And this case is all at [inaudible] panel. As your Honor we know there are 13 found the appellant matters that have sprang out of this one Ancillary jurisdiction with the possible 14 opponents way. So subject matter jurisdiction is a critical issue to this Ancillary probate. I seat on my time, it's coming to occur ...

JUDGE: If, if there's jurisdiction under Crowson will. It's because we consider the order appeal found to be filed.

MS. KANUSKY: Exactly, your Honor and if it's final for purposes of the Court of Appeals and the brace in this Court admit that it was

final for that purpose, it must also be final for appeal to this Court as well. The First Court of Appeals do not go beyond this potential cause of action. It effectively found there was no other property. It's my contention that the operative point in time is the date of application and not the date of debt. And that's significant if the Court goes beyond the Fourth Courts holding to look at the Trial Court's finding. The County Court found that there was a property in the State of Texas at the time of death and IBC account. We know that it cannot be at the time of death because the probate code section 2 requires a man-- the case sought requires property to be an indispensable party, it did not exist here. As for the other accounts that were not in the decedents name, they two were dispersed by the time the application was filed. Additionally there's the problem of jumping pass the hurdle that it was-- those assets want operations. Further more the stocks of those cooperation belongs to the executors and not the decedents. There should have been allegations to either pierce of Court prevail alleged alter ego, something about nature. None of that is in this case but if those allegations have been properly made they would be incident to or appertaining to mistake and not viable under section 95 only viable under section 103. There's the additional problem that there would be viable as a means of seeking the constructive trust and we know from the section 5(A). A constructive trust is only a remedy available in a statutory probate court or District Court. At this Court that's handling probate matter is a statutory 24th and in therefore has no jurisdiction. It's also last jurisdiction because its amount of controversy has been exceeded substantial.

JUDGE: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondents.

COURT ATTENDANT: May it please the Court, Mr. Shannon Ratliff will present argument for the respondent.

ORAL ARGUMENT OF SHANNON H. RATLIFF ON BEHALF OF THE RESPONDENT

MR. RATLIFF: Mr. Chief Justice, May it please the Court. I think that the, the note of this controversy is basically the petitioner takes the position that the USC's owned a promissory note, payable by a Mexican National indecisive in Mexico. Has only a remedy available of filing their claimed in the probate Court in Mexico. At first I want to address the issues of that Justice Hecht for, for a-- in an easy question of how this case is in this Court. The petitioner and filing the petition did not assert that there was any conflict and instead relied on the Court questions of law. Despite the fact that this is even according to a petitioner, an appeal from interlocutory order enured by the probate rule. Unlike there are two significant problems with jurisdiction. The first is, is that as Justice exceed in. The question is what does the denial of a motion to dismiss what phase of the case? Does that complete? It is unlike rosin or a question, "Was-- whether the, whether the heirship should-- whether she should have been declared an heir as the common law life of the decedent." The determination to make that she was not common law rock, unless, that terminated error. Ability to participate in the proceeding and therefore under Crowson that, that was unavailable interlocutory order at least as it, as it was opt entered there because as I recalled there

was also a service after that determination. So I think there's the initial threshold question of the difficulty of appeal of actually having jurisdiction and I felt difficult.

JUDGE: Do you think Crowson would come out differently if the situation have been flipped so that the Judge have decided the-- that she loss a common law of life and then the other side trial to appeal.

MR. RATLIFF: I'm worried about that and the reason I worry about it is, is because that determination inclusive would have meant that as the common law life she would be entitled to participate in the distribution of the state and if that were an error then error would provide the record from start to finish. So I, I'm not trying to, I'm not trying to dodge the question I just have to can be admit. I don't know but I would say that even a message was there would be a stronger argument that, that completed a phase of the case. As long as that order was a, a segregate order and the only reason I saw you that is-- is that there is now a determination that if wrong means that all of the subsequent actions in marshalling and distributing the state could be subject to that error. But in this instance what do you have I think is exactly what and if you said your Honor, what if all that is happened here is, is that Guar has say, "You may proceed." It seems to me this is much more obtained to something such as a determination that -- then you exist or that then you -- that, that there's a transfer and of course there the litigations appeared to be clear that, that would not be arise to an appeal below order under Crowson at least. So we-- I mean that's a, that's a problem. The second problem I think is, is that they did not assert conflict but then respondent and said the conflict was with the case goes Saint Louise South Russian Railway versus Smitten in 1921 Texas case. Smitten was about an FE allied, FE aleck that was allowed and represented and allowed to be appointed in Louie County Texas to you. Pursue that if the allied claim after the peti-- after the railway corporate that in California irrevocable, quote: I, I failed to see that, that is a, that is a distinction and as a matter of fact it occurs to me that is exactly in line of what we're talking about here. Everyone recognize this and I don't think petitioner's denies that if there is property located in Texas. That the Mexican exactly acting as injunctive under Mexican Law. Cannot transfer make any determination with regard to property located in Texas. Now, there's a, there's a argument about petitioner that only addressed to property on hand at the time the application is filed. I would submit to you that, that argument would render sub of section 6 in probate code which is of any provision it would render a variation that sense under the venue provision. If there are no can in this, this state then the canning were is to transfer stable situated at the time of his death. I also submit to you ...

JUDGE: And there was money here at the time of his death?

MR. RATLIFF: There was money and one of the things I know his condition with argument is that saying, "Well, the Court of Appeals only held there was this cause of action." The fact, the matter is the Court of Appeals did not engage in any, any of the factual or legal sufficiency with regard to the findings of fact and conclusions of law filed in a probate code and in the probate code they found that the existence of the bank account that IBC in the name of Don Hong Renegade.

JUDGE: That an asset \$27,000?

MR. RATLIFF: That was about to 27 at one time. I think there's some-- it's late in the record as to but there was some money of there and, and the exact amount I don't know. I did notice in reviewing the

record also but I'm not relied on by the, by the probate rule. If you look at respondent exhibit 4 that is a, that is a statement of account from Maryland for accounts standing in the name of Joe Brico. The elements-- the finding about the probate code of laws. Is that grout assets were held in the name of those corporations that they were in affect nominate for Don Juan Brittingham.

JUDGE: And those funds were still on deposit in Texas when this respon-- when this proceedings stop.

MR. RATLIFF: That's correct and ...

JUDGE: But in the name of the corporation.

MR. RATLIFF: In the name and those were still standing in Joe Brico's name and as you knows to the record there was a transfer by the gentleman who was originally name this executor under the Mexican but one of the executors on the Mexican's will. But he testified, he transferred about \$15 million that have been located in Rico and Sunufarry accounts in Texas. Transferred those to a corporation called O'Kent that was owned by the children and grandchildren-- some of the children and grandchildren of Don Juan Brittingham. But significantly even if he were acting at a time when you still held the position of executor. He would have no power in the State of Texas to effectuate a legal transfer of property that was subject at least to the possibility of jurisdiction in a Texas-- in a Texas probate code. Up-- I handed to the Court some handouts that really I don't want to spend in right period of time but I think that they really kind of I hope it crystalize some of this issues. There's no question he had probate that, that Don Juan had property at the time of his death. And we continue in the fact this critical determination otherwise the probate code would allow errors to spirit property away between the time of probate's filed in the date of death. If will was admitted to probate in Mexico and the reason that significant is 95 allows you in that situation where the Don Ancillary jurisdiction, he submit the will to probate. It allows you to simply filed in Texas but it has a very significant probation as it relates to that and it says once it is filed that the, the administrator has all of the power of, of an administerial administrate in Texas. That would be all of the power under Sections 5 and 5(A). So it seems to me that this idea, that 95 somehow is restricts the administrator is simply unsupportive by the statutory language.

JUDGE: Section 95 says that there can be a proceeding of probate over a will, quote, which would affect any real or personal property in this state.

MR. RATLIFF: Correct.

JUDGE: How about it-- how does the will affect the son's cause of action?

MR. RATLIFF: The way that it affects it, your Honor is that the will provides that before distributions are made to the there deceased and legates under the will that all debts be paid. The claim by my client is that they hold a note-- a death of Don Juan Brittingham, you know, therefore entitled to have the assets of this date martial and then both deaths paid. So ...

JUDGE: Is that-- would that be a Mexican law irrespective of the will. That doesn't isn't, usually states that's have been paid before distribution for that.

MR. RATLIFF: I believe that's true but I'm adjoin to his ground when I start trying to tell you about what the law of Mexico is. I did know that both the will and in this instance the note upon which my client seeks to recover. Both specifically refer to the legislator

desire with that-- that the debts be paid including specifically this note. The-- this is not a case unlike there's something in the breach in my legion believe otherwise, this is not a case where they're competing administrations. The Mexican and the probate has proceed it. The Mexican probate, I believe, has, has in fact found my clients debt and has determined the amount-- the probate has determined that the will is, is properly fared. This is a proceeding to assert jurisdiction over assets in Texas that are beyond the reach of the executor in Mexico.

JUDGE: That's correct.

JUDGE: There be no termination of Mexico that, that the debt had been paid, and that had been speci-- had been discharged by transfer of funds to litigants.

MR. RATLIFF: Well, I think that argument was made but I did not believe that position was sustained. I, I project that in thousand but I think maybe there was also an allegation about another note in payment but, but my, my information I think it's, is that in the final on appeal over judgment, it had been found to have a value of debt in the amount of that debt has been determined. I will certainly object that there were your Honor, I make a few that I have spoke but this is not a battle-- I would say there even in fact weren't a case. The proper place to determined that would be in a Court where the claim was this is now raised to you the cock but that is, I believed, to the merits not a plea to the jurisdiction and it's also I think indisputable that the, the State in Mexico has insufficient funds to pay the claim of my client.

JUDGE: That there-- because of the distributions. We did it-- why don't you think it-- is it, is at your position that it had the money one time?

MR. RATLIFF: Well, I think it had money at one time if you took him to the account that said be \$200 million worth of assets in United States that were owned by Don Juan Brittingham. The United did not ...

JUDGE: Through this to companies.

MR. RATLIFF: That this two companies and all those companies I want to say it seems to me is what the, what the probate Court found on the basis of the evidence that the people have held up is that those companies really were nominees that even though they held up that those companies that the monies in those docket and the security funds that belong to Don Juan Brittingham individually not the corporation. Under table two I also just tried to lay out what I think the probate code requires and what I think the Trial Court's finding of factual and as I, as I pointed out a moment ago under item four there section 95 exist is that the probate under that section shall have the same force in the fact for all purposes as if the will have been probated by order of a Texas code which would tell me that the-- this oppose in distinction between the powers of the administrator under 103 and 95 is a matter of fact is-- I, I would say not on the question but it is not supported by the plaintiff language of the statute. They've also-- I don't mean to go through them all but we had also attached the finding of fact and conclusions of law entered by the probate code in this matter. Now at one point in [inaudible] they say that he had not been able to cite to a single case in which section 95 allowed the administrator to performed acts such as we say or letter. If the Court will look at Chambelum versus Witz which is a Dallas Court of Appeals would refuse in arries. That was a case specifically draw under 95 in which an accounting result and the Court sustained the jurisdiction in fact I think reversed probate court but you do that jurisdiction and you have

jurisdiction to entertain the suit for an accounting. So we would submit that the plain language to the statute, the long held view-- I think the inverted in the United States that a foreign executor or administrator has no power over Texas property. Dictates that the probate Court in this case properly had jurisdiction and that the-- if this Court determines that it has jurisdiction to consider this matter that the Court of Appeals payment be affirmed. There any-- not any further questions? [inaudible]

JUDGE: Thank you, Counsel. Ms. Kanusky, do you agree that this assets belong to Don Juan or there or they assets of this companies-- two companies?

REBUTTAL ARGUMENT OF ROSEMARIE KANUSKY ON BEHALF OF PETITIONER

MS. KANUSKY: There was one bank account IBC in the name of Mr. Brittingham's decedent.

JUDGE: Right, I understand that.

MS. KANUSKY: The corporate assets were not in his name.

JUDGE: Well, with your response to Mr. Ratliff's position that they were simply nominees.

MS. KANUSKY: That may be true but it takes a cause of action asserted which was not made in this case and even if it had improperly asserted in this case there would be one of the causes of action would be incident to what opportunity form the state and viable under section 103 which is not invoke here.

JUDGE: What's the-- that's what I'm-- that section 95(B)1 just once have filed and reported shall be deem admitted to have been-- just for all purposes as if it residual will had been probate by order of the Court and in 103 lash you probate, so what's the difference, once you get it probated is probate for all purposes, isn't it?

MS. KANUSKY: No, your Honor. Really what we're talking about is the pre 1973 code situation before that time probate Courts did not have what is now section 5 incident to jurisdiction. They have to transferred those claims and causes of action to a District Court for hearing. There are a number of activities such as an accounting that are traditional probate activities and which are permissible under section 95. 95 is not an empty shell, it does provide a probate Court with certain jurisdiction. It doesn't go on ...

JUDGE: Yeah but your position is wholly over left to 103.

MS. KANUSKY: That section 95 is a subset of 103.

JUDGE: And there's nothing that you can do under 95 that you can't do under 103.

MS. KANUSKY: Well, there you cannot ...

JUDGE: Except that you just-- there's a short circuit in procedure.

MS. KANUSKY: You cannot bring causes of action incident to his state under 95 that you could bring under 103.

JUDGE: It were of that-- where did you get the statutory language of that?

MS. KANUSKY: 5F. All Courts exercising original jurisdiction had the power to entertained incident to or appertaining to. It's also not correct to say that the Mexican executors have no authority in this State, absent Court intervention. We know from the instruction of probate code itself, section 107(A) gives a form executor the power to

come to Texas and collect debts without Court intervention. We also know can case all, sudden of briefs , error from Nelson in similar cases. Other states have similar cases of that say foreign executors do have limited powers within the state.

JUDGE: I-- going back to 95(B)1 says if you do it that way it says, "Shall have to say enforcement debt for all purposes as if the original real have been probate that order of the Court" What does it that felt clean 5F?

MS. KANUSKY: Because it's only Ancillary jurisdiction.

JUDGE: But it says as if the original will had been probated for all purposes and had that seems to me like late-- that seems to say be treated just like you as probated under 103.

MS. KANUSKY: If there's an impaired complex then what we need to do is look at the structure of the code where escalating levels of involvement and if we treat 95 the same way as 103. We obliterate any difference, why have 103 with tightened procedural mechanisms for the due process rights of the parties. If there isn't a different between the two of them. There is a difference, it's a functional difference between this extra causes of action -

JUDGE: And what [inaudible] -

MS. KANUSKY: [inaudible].

JUDGE: - would have been it's defined the due process rights that in having the 103 that you don't have under 95.

MS. KANUSKY: When you invoke 103 when the other provisions regarding notice etc., the remaining portions of the probate court can replied. 95 is administrative only. It's also incorrect to say that in ca-- in this case I'm arguing that the only remedy is in Mexico, that's not true. It certainly the most in logical places of the remedy because all of the parties now before the Court are in the Court in Mexico whether there is a first in time probate proceeding, an open probate proceeding that is are going today and Justice O'Neill as we talked about earlier, it could have been possible to bring a section 103 case and specifically regarding your question-- by the way Justice O'Neill, there is evidence in the record that similar assets that issued were transferred to company called Senator and those went to Mr. Aguirre, the son.

JUDGE: But is every determination in the Mexico Court that, that satisfied the promissory note?

MS. KANUSKY: I do not know. I do know that there has been litigation in Mexico regarding the property of this-- of the different debts, there had been opportunities to bring this claims in Mexico and then were never brought in Mexico.

JUDGE: Thank you, Counsel. This case is submitted and the Courts found the [inaudible].

2005 WL 6185936 (Tex.)