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CHOICE OF LAW IN THE MISSOURI COURTS: HOW HAVE THE MISSOURI COURTS EMPLOYED THE SECOND RESTATEMENT OF CONFLICTS TO TORTIOUS AND CONTRACTUAL ISSUES?

RICHARD J. ANSSON, JR.*

I. INTRODUCTION

The jurisprudence of conflicts of law¹ yields a legal discipline fraught with uncertainty and instability.² Despite over fifty years of scholarly commentary and analysis, courts have been unable to develop practical mechanisms to resolve conflicts of law problems leading many to characterize this discipline of law as a “reign of chaos”³ and a “judicial nightmare.”⁴ Indeed, even William Prosser, the legendary torts scholar, once stated that the “realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in strange incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”⁵

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1. The discipline of “conflicts of laws” covers a wide range of issues including choice of substantive law, jurisdictional and forum selection questions, and full faith and credit problems. Choice-of-law, in contrast, is ordinarily considered to be a subset of conflicts of laws. Choice-of-law issues revolve around questions concerning which jurisdiction’s law should be applied by a particular state to determine the rights and liabilities of the parties resulting from an occurrence involving foreign elements. These rules are commonly referred to as choice-of-law rules, because they do not themselves determine the rights and liabilities of the parties, but rather guide decision as to which local law rule will be applied to determine these rights and duties. *See infra* note 6 and accompanying text.

2. *See, e.g.*, Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991). Kramer argued, after evaluating the conflicts decisions authored in 1990, that conflicts analysis was “unsophisticated, unthoughtful, and often unreasoned.” *Id.*

3. *In re Paris Air Crash of Mar. 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

4. *Forsythia v. Cesna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975).

5. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1952-53).

Perhaps much of the bewilderment is attributable to the fact that there are approximately seven separate choice of law theories.⁶ Further aggravating this problem is the fact that many of these theoretical approaches have arisen from differing theoretical foundations.⁷ Finally, compounding this problem is the fact that six of the seven theoretical approaches have arisen only over the last forty-five years.⁸

Because of these difficulties, conflicts of law issues have probably caused more trepidation and mystification among the bench and bar than any other discipline.⁹ Not surprisingly, most courts have been unable to adeptly apply

6. The seven main approaches used to examine choice of law problems include: 1) The First Restatement of Conflicts; 2) the significant contacts approach, 3) interest analysis; 4) the Second Restatement of Conflicts; 5) *ex for*; 6) better law; and 7) New York Approach. For the latest review of which jurisdictions apply what approaches in torts and contracts, see SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 286-88 (1998). See also Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447 (1997) This article details changes in conflicts approaches employed by the various jurisdictions in 1996. For a comprehensive list of articles detailing changes in conflicts, see Symeonides, *Choice of Law in the American Courts in 1996*, *supra* at 448 n.1.

Within this set of jurisdictions, a handful of jurisdictions have adopted specific tests to resolve "true conflicts." True conflicts result when two states each have a policy interest in seeing that their laws are followed. For an example of a true conflicts case, see, e.g., *Lilienthal v. Kaufman*, 395 P.2d 543 (1964). The above mentioned approaches address true conflicts, but several jurisdictions have adopted specific tests to address this issue. The three main approaches used to examine true conflicts choice of law problems include: 1) comparative impairment, 2) overt weighing of interest, and 3) principled territorialism. For more on comparative impairment, see Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980). The overt weighing of interest test is used in Wisconsin. For more on Wisconsin choice of law, see Shirley A. Wiegand, *Officious Intermeddling, Interloping Chauvinism, Restatement (Second), and Leflar: Wisconsin's Choice of Law Melting Pot*, 81 MARQ. L. REV. 761 (1998). For more on principled territorialism, see Aaron D. Tweaks, *Enlightened Territorialism and Professor Caverns - The Pennsylvania Method*, 9 DU. L. REV. 373 (1971); James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407, 460 (1975).

7. See, e.g., Stuart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 950 (1994) ("Choice of law theorists differ not only about the method but also about the very foundations of choice of law theory."). See also James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Laws: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 90 (1991) (McLaughlin, explaining the different modern approaches to choice-of-law issues, noted that some scholars are "positivists, some realists, some neo-naturalists. Further, overlapping those general categories are formalist/conceptualist and instrumentalist/functionalist").

8. See, e.g., Wiegand, *supra* note 6, at 763-67 (discussing the various methodologies that have arisen over the last forty-five years).

9. No one article or case can accurately describe or explain this trepidation and mystification, but for cases mentioning the inability to comprehend, see *supra* notes 3-5 and accompanying text. For articles describing this trepidation, see *supra* note 6 and accompanying

various modern choice of law theories set forth by conflicts scholars.¹⁰ Furthermore, when applying a particular test, most courts not only fail to identify which test they are using but also fail to distinguish their test from others.¹¹ These two factors have led to decisions that are often undeniably, if not wildly, inconsistent.¹² This uncertainty has been complicated by the fact that published conflicts decisions are quite rare - even though conflicts cases arise at the trial level fairly often.¹³ In other states, matters have been further complicated by the fact that state supreme courts have failed to address the issue.¹⁴ Thus, with little written precedent, judges have been left to struggle with a handful of irreconcilable and sometimes incomprehensible precedents.¹⁵ As a result, it is no small wonder that many judges have been apprehensive when confronted with choice of law cases on their dockets.

Missouri courts have fared much better than most over the last thirty-five years. However, many inconsistencies remain.¹⁶ This article reviews how the Missouri courts have employed conflicts analysis with regard to tortious¹⁷ and contractual issues,¹⁸ and recommends a formula for Missouri courts to use when reviewing conflict issues. These recommendations will, at the very least, guarantee a higher level of consistency, uniformity, and certainty in conflicts cases.¹⁹ Such guarantees are important in conflicts cases because a conflicts decision will likely determine the success or failure of a lawsuit. As a result, it

text. For articles discussing the conflicts landscape, see Symeonides, *Choice of Law in American Courts in 1996*, *supra* note 6, at 448 n.1.

10. Again, no one article can adequately highlight this difficulty. For articles discussing conflicts decisions, see Symeonides, *Choice of Law in American Courts in 1996*, *supra* note 6, at 448 n.1.

11. *See, e.g.*, Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1261 (1997) (Symeonides, for example, states that “the precedents from North Carolina, Oklahoma, West Virginia, and Wyoming are susceptible to different interpretations and thus raise legitimate doubts as to whether these states properly belong in the Restatement (Second) column.”).

12. *See, e.g., id.* Symeonides stated that “In some choice of law cases, the existing precedents are equivocal or even irreconcilable.” *Id.*

13. *See, e.g.*, Symeonides, *Choice of Law in the American Courts in 1996*, *supra* note 6, at 448 n.2 (finding that there were a little over 1,000 conflicts cases decided in 1996). In Missouri, there have been approximately fifty noteworthy conflicts cases decided over the last thirty-five years. *See infra* Sections III and IV.

14. *See, e.g.*, Symeonides, *The Judicial Acceptance of the Second Restatement: A Mixed Blessing*, *supra* note 11, at 1261. For example, Symeonides noted that the supreme courts of Illinois and Missouri have not decided a conflicts contract opinion after having adopted the Second Restatement approach for tortious issues. *Id.*

15. *See supra* note 11 and accompanying text.

16. *See infra* Parts III and IV.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Parts III, IV, V.

is imperative that judges pen decisions which are discernible and reflective of a core set of principles specifically employed to decide conflicts cases.

This article examines how Missouri courts have employed conflicts analysis to tortious and contractual issues. Part II reviews the dominant choice of law theories. Part III examines and critiques tortious decisions authored by Missouri courts. Part IV discusses and analyzes contractual decisions. Finally, Part V concludes with a simple proposal designed to bring certainty and order to tortious and contractual choice-of-law litigation brought in Missouri.

II. CHOICE-OF-LAW JURISPRUDENCE: A BRIEF HISTORY

In the United States, the First Restatement on Conflicts of Law represented the first organized collection of theories on conflicts of laws.²⁰ The First Restatement, which was authored by Joseph Beale and published in 1934, relied upon the concept of territoriality and the vested rights philosophies of early twentieth century theorists.²¹ Beale's approach held that the rights of parties vested in the place where they were created.²² Beale's First Restatement contained inflexible rules providing that the law of the vesting state must be applied, regardless of the jurisdiction where the claim was filed.²³ In tortious claims, the First Restatement directed courts to apply the law of the jurisdiction where the injury occurred.²⁴ For contractual claims, the First Restatement instructed courts to apply either the law of the jurisdiction where the contract was made or where the contract was to be performed.²⁵ Under this approach, parties were not allowed to choose which jurisdiction could control contractual provisions.²⁶

Even at the height of its popularity, the First Restatement was fiercely criticized for elevating the principles of predictability and certainty over the principle of fairness.²⁷ To avoid the harsh results often obtained from the application of the First Restatement, many courts developed a vast array of escape devices.²⁸ Nevertheless, even with escape devices in place, many still

20. For a discussion of conflicts law prior to the First Restatement, see Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 365-67 (1945).

21. See, e.g., James Audley McLaughlin, *Conflict of Laws: The Choice of Law Lex Loci Doctrine, The Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 960-61 (1991).

22. *Id.* For a historical account and critique of Professor Beale's theory, see Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

23. See, e.g., McLaughlin, *supra* note 21, at 960-61.

24. RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 377 (1934).

25. *Id.* §§ 332 & 358.

26. *Id.* § 62.

27. See *infra* note 28.

28. The most prevalent escape devices include topics such as characterization, renvoi, substance/procedure distinction, and public policy. For a good discussion of these issues, see

condemned the First Restatement.²⁹ For example, Professor Cavers condemned the First Restatement approach as early as 1933, arguing that if courts found that an unfair judgment would result, many courts would ignore the principles set forth in the First Restatement.³⁰ Despite the critics, however, the rules of the First Restatement sustained almost unanimous acceptance for close to thirty years.

After this thirty-year period, a revolution occurred in conflicts of laws thinking.³¹ Beginning in 1954 with *Auten v. Auten*,³² jurisdictions began to discard the First Restatement in favor of new methods promoting fairness by evaluating policy issues underlying conflicts claims. In *Auten*, Justice Fuld determined that New York would adopt the center of gravity test, which looked not to the place of making nor the place of performance nor the place of the wrong, but rather looked to the law of the place which had “the most significant contacts with the matter in dispute.”³³ Justice Fuld maintained that under this approach courts would be able to focus on the relative interests involved, thereby enabling a court to apply the policy of the jurisdiction with the most significant contacts to the case.³⁴

During the late 1950s, Brainerd Currie developed another method for evaluating conflict of laws problems known as governmental interest analysis.³⁵ Under Currie’s approach, a court should assess the policy interests

WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 151-61 (1996).

29. *Id.*

30. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). Two other early writers criticized the vested rights approach prior to Professor Cavers but none of them proffered a new approach. See Walter W. Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931) (arguing that the territorialist system may be in accord with the realities of modern political and legal organization but is nonetheless high ambiguous); Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1923-24) (arguing that the vested rights theory is circular); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1923-24) (arguing general common law principles may not be derived from notions of territoriality); Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflicts of Laws*, 30 YALE L.J. 565, 565 (1920-21) (“There is no topic in the conflict of laws in regard to which there is greater uncertainty than that of contracts. In this country there is no agreement even regarding the fundamental principles that should govern.”).

31. For articles discussing the choice-of law revolution, see Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); and Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 722 (1983).

32. 124 N.E.2d 99 (N.Y. 1954).

33. *Id.* at 101-02.

34. *Id.*

35. See Brainerd Currie, *Married Women’s Contracts: A Study in Choice-of-Law Method*, 25 U. CHI. L. REV. 227, 246-47 (1958); see also Brainerd Currie, *Notes on Methods and Objectives in the Conflicts of Laws* 1959 DUKE L.J. 171 (1959).

of each affected jurisdiction in an effort to determine whose laws should be applied.³⁶ If only one jurisdiction has an interest, then a false conflict exists, and the court should apply the law of the interested jurisdiction.³⁷ If, however, more than one jurisdiction has an interest, then the “sensible and clearly constitutional thing for any court to do . . . is to apply its own law.”³⁸ Later, Professor Currie advocated that before applying forum law in a true conflicts case, courts should try to reevaluate their policies when confronted with a true conflict.³⁹

Shortly after publication of Currie’s interest analysis, Justice Fuld, abandoning the significant contacts approach he had adopted in *Auten*, applied interest analysis to a conflicts case in *Babcock v. Jackson*.⁴⁰ In *Babcock*, he evaluated the policy interests of the involved jurisdictions and found that a false conflict existed.⁴¹ In so finding, Justice Fuld decided to apply the law of the interested jurisdiction.⁴²

Other conflicts theories emerged as part of the conflicts revolution. For instance, in the 1960s, Professor Robert Leflar championed a theory known as the better law doctrine.⁴³ This doctrine espoused a five-step test which in effect directed courts to apply the better law - usually meaning that the court would apply the law of the forum.⁴⁴ Also, in the 1960s, Professor Albert

36. Currie, *Married Women’s Contracts*, *supra* note 35, at 246-47.

37. See generally Comment, Peter K. Westen *False Conflicts*, 55 CAL. L. REV. 74 (1967). See also Rong Yao Zhou v. Jennifer Mall Restaurant, Inc., 534 A.2d 1268 (D.C. Cir. 1987).

38. Currie, *Married Women’s Contracts*, *supra* note 35, at 261. See also Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964). Currie also provided that if no state has an interest that state should apply its own law. This final category has been denoted by Currie as the unprovided-for case. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963).

39. Currie, *The Disinterested Third State*, *supra* note 38, at 757. In so doing, Currie noted that a court may turn an “apparent true conflict” into a false conflict. For a case illustrating Currie’s reevaluation approach, see, e.g., *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961).

40. 191 N.E.2d 279 (N.Y. 1963). *Babcock* is a legendary conflicts decision. For a detailed discussion of *Babcock*, see Friedrich K. Juenger, *Babcock v. Jackson Revisited: Judge Fuld’s Contribution to American Conflicts Law*, 56 ALB. L. REV. 727 (1993); Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993). *Babcock* is not expressly an interest analysis case but has been claimed to be one by interest analysis proponents.

41. *Babcock*, 191 N.E.2d at 284.

42. *Id.* at 284-85.

43. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295-304 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966).

44. The five considerations that need to be addressed are: 1) predictability of result; 2) maintenance of interstate and international order; 3) simplification of the judicial task; 4) advancement of the forum’s governmental interests; and 5) the better rule of law. For a case employing this approach, see *Milkovich v. Saari*, 203 N.W.2d 408 (1973).

Ehrenzweig developed the *lex fori* doctrine.⁴⁵ This doctrine stated that courts are to look to true rules, and if no true rules exist, then the court is to apply its own law.⁴⁶

Finally, in 1971, the Second Restatement of Conflicts was completed, and it combined the significant contacts approach of *Auten* with the interest analysis approach of *Babcock*. Section 6, which incorporates the *Babcock* interest analysis approach into the Second Restatement, lists seven factors to be analyzed in all substantive areas. Under section 6, the seven factors include: a) the needs of the interstate and international systems; b) the relevant policies of the forum; c) the relevant policies of interested states and the relative interest of those states in the determination of a particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.⁴⁷ When applying this section, courts are free to give varied weight to particular factors;⁴⁸ however, courts that have wanted to employ *Babcock*-type interest analysis have focused on sections (b), (c) and (e).⁴⁹

45. See generally Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A Restatement of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965).

46. RICHMAN, *supra* note 28, at 232-33. Under Ehrenzweig's approach, the following principles were considered true rules "in family law, courts adopt rules which uphold a marriage . . . and legitimacy . . .; contract questions are controlled by party autonomy if the parties have chosen a law and, if not, by a 'validating law' that would uphold the contract; the 'lex situs' controls most land transactions as well as successions to immovables." *Id.*

In torts, Ehrenzweig did not really identify any true rules. *Id.* To date, the courts of only three states have adopted this approach, and these courts - Nevada, Michigan, and Kentucky - have done so specifically in the field of torts. SYMEONIDES, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL, *supra* note 6, at 286-88. The Nevada Supreme Court adopted this approach in *Motenko v. MGM Dist., Inc.*, 921 P.2d 933 (Nev. 1996). Under this approach, the *Motenko* Court stated that "the law of the forum . . . governs in a tort case, unless another state has an overwhelming interest." *Id.* at 935. The court determined that another state would have an overwhelming interest in the matter if two or more of the following contacts occurred in said state: (a) it is the place where the conduct giving rise to the injury occurred; (b) it is the place where the injury is suffered; (c) it is the place where the parties have their common domicile, residence, nationality, place of incorporation, or place of business; and (d) it is the place where the relationship, if any, between the parties is centered. *Id.*

47. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(2) (1971) [hereinafter RESTATEMENT].

48. *Id.* cmt. c. Specifically, section c stated that "[v]arying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law." *Id.*

49. See, e.g., *O'Connor v. O'Connor*, 510 A.2d 13 (Conn. 1986) (applying sections (b) (c) and (e) in an effort to weigh each jurisdiction's relative policy interests). See also *Bryant v. Silverman*, 703 P.2d 1190 (Ariz. 1985) (discussing all seven factors in section 6 but primarily focusing on each jurisdiction's relative policy interest).

It is important to remember that courts using *Babcock*-type interest analysis have done so to shed light on false conflicts. When a true conflict arises, the pure interest analysis of Professor

Other Second Restatement sections address particular subject areas - such as torts and contracts - and specify a presumptive rule along with a list of factors that are to be considered when evaluating said subject matter area.⁵⁰ This approach utilizes a multi-factored test patterned, in part, after the significant contacts approach of *Auten*.⁵¹ For instance, when determining a tortious issue, it is presumed that the law of the place of injury will control “unless, with respect to some particular issue, some other state has a more significant relationship under the principles stated in section six.”⁵² In torts, the relevant factors to be considered in connection with the factors listed in section six are: (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 the parties, and (d) the place where the relationship, if any, between the parties is centered.⁵³

Likewise, in contracts, if the parties have not designated a choice-of-law to govern their dispute,⁵⁴ the court is instructed to determine if the contract is covered by a series of presumptive references.⁵⁵ The presumptive provisions detail rules for specific contracts,⁵⁶ contractual issues,⁵⁷ and contractual situations.⁵⁸ If the contract does not fall within one of the presumptive provisions, then the court is directed to apply the most significant contacts test to determine which jurisdiction has the most significant relationship to the issue. In contracts, the relevant factors to be considered in connection with section six are: (a) the place of contracting, (b) the place of negotiation of the

Currie, which directs a court to apply forum law, has not been embraced by the Second Restatement. Instead, when a true conflict arises, a court must determine which jurisdiction’s law applies in accordance with the other applicable factors of the Second Restatement. *See McBride v. Whiting-Turner Contracting Co.*, 625 A.2d 279 (Del. Super. 1993), *aff’d*, 645 A.2d 568 (Del. 1994) (court finding true conflict under section 6 but applying and determining outcome of litigation based on application of section 145. For a discussion of section 145, see *infra* note 54 and accompanying text.).

50. *See, e.g.*, RESTATEMENT, § 145 (torts) and § 188 (contracts).

51. *See* Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 552-62 (1983).

52. RESTATEMENT, *supra* note 47 § note 146.

53. RESTATEMENT, *supra* note 47, § 145(2).

54. *See infra* notes 61-62 and accompanying text.

55. RESTATEMENT, *supra* note 47, §§ 189-212.

56. For instance, the Restatement provides for specific rules with regard to land contracts, sale of chattels, insurance contracts, contracts of surety, contracts for repayment of money lent, transportation contracts, and usurious contracts. *Id.* §§ 189-198.

57. For example, the Restatement provides for specific rules with regard to capacity, contractual formalities, consideration, fraud, duress, mistake, assignment, and discharge. *Id.* §§ 199-212.

58. For example, under the Restatement, if the place of negotiation and performance are the same, then the law of that jurisdiction will be applied. *Id.* § 188(3). Additionally, if the performance is illegal in the place of performance, the contract will not be enforced. *Id.* § 202(2).

contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.⁵⁹

In the field of contracts, the Second Restatement partially embraces the concept of party choice and permits parties to specify the applicable governing law as to any item that could validly be contained in a contract clause.⁶⁰ Under the Second Restatement, courts are directed to respect the parties' choice-of-law even if the parties could not have resolved the issue with an explicit contractual provision, unless one of the following applies: (1) the chosen state has no substantial relationship to the parties and there is no other reasonable basis for the parties' choice, or (2) the application of the law of the chosen state is contrary to a fundamental policy of the state that has a materially greater interest in the transaction, and under the Second Restatement would be the state whose law would apply in the absence of party choice.⁶¹ Despite the complexity of this approach, modern courts employ this doctrine and normally uphold the parties' plenary choice-of-law.⁶²

Numerous states, including Missouri,⁶³ now employ the Second Restatement approach; application of this approach has been wildly inconsistent, however, and has been roundly criticized by scholars.⁶⁴ Indeed, one scholar explained:

[T]he Second Restatement is something of an unsatisfactory document when viewed as a whole. Part of the problem is the curious combination of broad and open-ended policy considerations with the quite specific jurisdiction-selecting presumptions. Many courts apparently treat the presumptions as virtual mandates; others almost completely ignore them. Part of the problem is that the Restatement does not really illuminate the interplay between policy and presumptions; another difficulty is that the policy considerations themselves appear amorphous.⁶⁵

These respective problems have allowed courts to seemingly dispense with justice as they have deemed appropriate. Not surprisingly, this situation has presented a mind-boggling lack of uniformity in case law, and unfortunately,

59. RESTATEMENT, *supra* note 47, § 188.

60. *Id.* § 187.

61. *Id.*

62. For cases upholding contractual choice-of-law agreements, see, e.g., *Tele-Save Merchandising Co. v. Consumers Distrib. Co.*, 814 F.2d 1120 (6th Cir. 1987); *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.2d 1148 (Cal. 1992). For cases voiding contractual choice of law agreements, see, e.g., *DeSantis v. Wackenhut*, 793 S.W.2d 670 (Tex. 1990); *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124 (N.J. 1992).

63. *See infra* Parts III, IV.

64. RICHMAN, *supra* note 29, at 211 (citing Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465 1991) (lamenting that decisions using the Second Restatement are noticeably worse than other jurisdictions).

65. *Id.*

Missouri courts have not fared any better when applying the Second Restatement to tortious and contractual conflicts issues.

III CHOICE-OF-LAW, TORTS, AND THE MISSOURI COURTS

A. *The Missouri Supreme Court*

1. False Conflicts

The Missouri Supreme Court expressly adopted the Second Restatement in *Kennedy v. Dixon*.⁶⁶ In *Dixon*, several Missouri residents were involved in a car accident in Indiana.⁶⁷ The plaintiff was traveling in an automobile that had been licensed and garaged in Missouri.⁶⁸ The driver of the vehicle was killed, and the plaintiff was severely injured.⁶⁹ The plaintiff subsequently sued the driver's estate for damages. In its defense, the estate argued that the Indiana guest statute should be applied.⁷⁰ After a detailed discussion of several choice-of-law decisions, and a review of *Schwartz v. Schwartz*,⁷¹ the Arizona case which was the first to apply the Second Restatement to a tort case, the Missouri Supreme Court announced that it, too, was adopting the Second Restatement.⁷²

In applying the Second Restatement, the Missouri court first mentioned the principles listed in section 145 and discussed the relevant facts in light of section 145.⁷³ The court stated:

Of course, the injuries occurred in Indiana and that is the place where the negligent conduct occurred On the other hand, Missouri has a real interest therein. The parties are residents of Missouri, made arrangements for the trip in Missouri, and traveled in a car licensed and garaged in Missouri. The whole relationship of the parties is centered in Missouri.⁷⁴

After noting these facts, the *Kennedy* court, without anymore evaluation, stated that it was clear that Missouri had the most significant relationship to the involved parties.⁷⁵

Next, in determining whether Indiana's guest statute should be applied, the *Kennedy* court evaluated the varying interests of Missouri and Indiana.⁷⁶ In so

66. 439 S.W.2d 173 (Mo. 1984).

67. *Id.* at 175.

68. *Id.*

69. *Id.*

70. *Id.* at 175-76. Indiana had a guest statute which was enacted to prevent insurance fraud. *Id.* Missouri did not have a guest statute, and state policy encouraged compensating victims of automobile accidents. *Id.* at 175, 185.

71. 447 P.2d 254 (Ariz. 1968).

72. *Kennedy*, 439 S.W.2d at 184-85.

73. *Id.* at 181.

74. *Id.* at 184-85.

75. *Id.* at 184.

evaluating, the Missouri court discussed interest analysis in light of *Babcock*,⁷⁷ not section six.⁷⁸ The *Kennedy* court found that applying Indiana's guest statute would not serve any interest of that state because the parties involved were Missouri parties.⁷⁹ Therefore, the court found a false conflict, and applied Missouri law since Missouri had a real interest in ensuring that its citizens were compensated.⁸⁰

In deciding *Kennedy*, the Missouri Supreme Court applied all four principles of section 145 and applied the interest component principles of section six. With regard to section 145, the court failed to label each component in its discussion, but the court did discuss each component. Indeed, the court stated: (a) the injury occurred in Indiana; (b) the conduct causing the injury occurred in Indiana; (c) the domicile and residence of the parties was Missouri; (d) the relationship was centered was Missouri.⁸¹ With respect to section six, the court specifically addressed the interests of Missouri and Indiana - subsections (b) relevant interest of forum and (c) relevant interest of interested states.⁸² Therefore, in light of *Kennedy*'s analysis, Missouri courts, when applying sections 145 and six to false conflicts cases, should analyze all four factors listed in section 145 and the two interest analysis factors of section six.

2. True Conflicts

Since *Kennedy*, the Missouri Supreme Court has failed to address any other false conflict claims. Indeed, the only other tort conflicts claims the court has addressed have involved true conflicts.⁸³ For instance, several years after the *Kennedy* decision, the Missouri Supreme Court was faced with a true conflict in *Broglin v. Nangle*.⁸⁴ In this action, Broglin was killed when a St.

76. *Id.* at 184-85. The court noted that it must apply interest analysis because it did not "engage in the mere counting of the number of contacts but must evaluate them in order to determine what state has the most significant contacts." *Id.* at 184.

77. *Kennedy*, 439 S.W.2d at 182-83. The *Kennedy* court also cited several other cases employing interest analysis. *Id.* at 183-85.

78. For a detailed discussion of section 6, see *supra* note 48 and accompanying text.

79. *Kennedy*, 439 S.W.2d at 185.

80. *Id.*

81. *Id.* at 184-85. For a discussion of section 145, see *supra* notes 73-75 and accompanying text.

82. *Id.* at 184-85. For a discussion of section 6, see *supra* notes 76-80 and accompanying text.

83. The Missouri Supreme Court specifically stated that it was addressing a true conflict in *Broglin v. Nangle*, 510 S.W.2d 699, 703 (Mo. 1974). The court failed to state, however, that it was addressing a true conflict in *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434 (Mo. 1984) and *Thompson v. Crawford*, 833 S.W.2d 868 (Mo. 1992).

84. 510 S.W.2d 699 (Mo. 1974).

Louis Southwestern Railway train struck his tractor-trailer.⁸⁵ Broglin had lived in Missouri but had regularly worked full time on a route between Missouri and Texas.⁸⁶ The railroad was a Missouri corporation with its principle place of business in Texas.⁸⁷ Broglin's survivors brought a wrongful death suit in Missouri.⁸⁸ Under Missouri law, damages were limited to \$50,000, while under Texas law there were no limits on the amount of damages recoverable.⁸⁹

The *Broglin* court first addressed all four section 145 principles. In applying section 145, the court found: (a) Texas was the place of the accident; (b) Texas was the place where the conduct giving rise to the accident occurred; (c) Texas was the railroad's principal place of operations while Missouri is the widow's residence, the descendant's residence, and defendant's place of incorporation; and (d) there was no relationship between the parties prior to the accident.⁹⁰

Next, the court assessed the interest of each jurisdiction under the section 6 interest analysis factors and found that Texas had the most interest in having its laws applied.⁹¹ The court explained:

Here we are confronted with a true conflict of both laws and state policies. Defendant is incorporated in Missouri, and this state limits damages for wrongful death to a maximum of \$50,000, indicating a policy protecting defendants from larger judgments; . . . but, defendant is also a Texas domiciliary under the laws of that state. While the Texas statute is silent on the measure of damages recoverable, the silence does indicate a state policy of allowing unrestricted judgments for wrongful death Texas would therefore seem to have some interest in the admonitory effect an unrestricted judgment would have on a corporation domiciled in that state. More importantly, Texas has a definite interest in having the full extent of its laws control the activities within its borders of corporations which locate their principle place of business in that state.⁹²

The *Broglin* court echoed the *Kennedy* decision by applying the four factors of section 145 and the two interest analysis factors of section six. The decision departed from the tenets of the Second Restatement, however. Under the Second Restatement, when a court is confronted with a true conflict, courts should first apply the principles of section 145 and section six.⁹³ Next, if the

85. *Id.* at 700.

86. *Id.*

87. *Id.* at 703.

88. *Id.* at 700.

89. *Broglin*, 510 S.W.2d at 700.

90. *Id.* at 702.

91. *Id.* at 703.

92. *Id.*

93. *See, e.g.,* McBride v. Whiting-Turner Contracting Co., 1993 WL 489487, at *2-*5 (Del. Super. Ct.), *aff'd*, 645 A.2d 568 (Del. 1994).

interest analysis prong of section six reveals a true conflict exists, then a court should employ the law of the jurisdiction where the accident occurred.⁹⁴

In *Broglin*, the Missouri Supreme Court applied Texas law - the law of the jurisdiction where the accident occurred - but did so only after it reevaluated each states' respected interest. In so doing, the *Broglin* court determined that Texas had a greater interest in the matter, and by evaluating which jurisdiction had a greater interest, the *Broglin* court employed analysis more akin to pure interest analysis.⁹⁵ Indeed, under pure interest analysis, many courts will reevaluate each states respective interests to determine which jurisdiction's laws should be applied.⁹⁶ As a result of the analysis set forth in *Broglin*, the Missouri Supreme Court's analysis directed future courts to employ interest analysis when evaluating which jurisdiction's laws should be applied in a true conflicts case.

Ten years after the *Broglin* decision, the Missouri Supreme Court, in *Elmore v. Owens-Illinois, Inc.*,⁹⁷ failed to apply the interest analysis subsections of section six to a true conflict.⁹⁸ Instead, the Missouri Supreme Court relied solely on section 145 in determining which jurisdiction's laws should be given effect.⁹⁹

In *Elmore*, a worker brought suit against Owens-Illinois for illness caused by the employer's long-term exposure to asbestos in the workplace.¹⁰⁰ The worker lived in Kansas, but worked primarily for Missouri employers.¹⁰¹ Owens-Illinois argued that (1) Kansas law should be applied and (2) as such, the employee would have to prove that Owens-Illinois knew or could have known that the product was unreasonably dangerous.¹⁰² The employee wanted Missouri law applied because under Missouri law, Owens-Illinois could be held strictly liable.¹⁰³

94. See, e.g., *McBride*, 1993 WL 489487 at *5.

95. See *infra* note 97 and accompanying text.

96. See, e.g., *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957); *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961). However, a number of courts that employ interest analysis will not reevaluate each interested jurisdiction's laws. Instead, these courts will choose to apply the law of the forum when confronted with a true conflict. *Foster v. Leggett*, 484 S.W.2d 827 (Ky. App. 1972); *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964).

97. 673 S.W.2d 434, 436-37 (Mo. 1984).

98. The court even failed to mention that the conflict it was deciding was a true conflict.

99. *Id.* at 437.

100. *Id.* at 435.

101. See *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 436-37 (Mo. 1984). The employee had also worked for employers from several different states. *Id.* at 437. The court found that "the ratio between social security wages paid to him by Missouri employers and those paid to him by Kansas employers was 17 to 1." *Id.*

102. *Id.* at 436.

103. *Id.* at 437-38.

The Missouri Supreme Court, in evaluating which law to apply, chose to apply section 145 to the matter.¹⁰⁴ In so doing, the court noted that although the employee resided in Kansas, he worked in Missouri.¹⁰⁵ The companies he worked for used the defendant's products and were primarily headquartered in Missouri.¹⁰⁶ The court therefore held that the trial court properly applied Missouri law because the plaintiff's injuries were intertwined with his employment.¹⁰⁷

In reaching its decision, the *Elmore* court, departing from the analysis set forth in *Kennedy* and *Broglin*, failed to apply the interest analysis subsections of section six.¹⁰⁸ If the court had applied section six analysis, it would have found that a true conflict existed.¹⁰⁹ Indeed, in *Elmore*, the worker was a Kansas resident that came into contact with the harmful product primarily through his Missouri workplace.¹¹⁰ Under Kansas law, a worker would not have been able to receive compensation for injuries unless the manufacturer knew the product was harmful.¹¹¹ In contrast, under Missouri law, a worker would have been able to receive compensation because manufacturers are held to a strict liability standard.¹¹² Thus, the worker's state of residence, Kansas, had laws designed to protect the manufacturer, while the worker's place of employment, Missouri, had laws designed to reward the plaintiff.¹¹³ The *Elmore* court held, however, that even though the plaintiff was a Kansas resident, the laws of Missouri were properly applied because Missouri was both the place of employment and the place of injury.¹¹⁴

If the Missouri court had employed the interest analysis of *Broglin*, it would have been able to examine the interests of all involved jurisdictions.¹¹⁵ As such, the court would probably have determined that Missouri had an interest in compensating a party that had been injured while being employed within its state. The result would have been the same, but such a holding would have been more reasoned and logical.

Courts should follow the analysis of *Broglin* when examining true conflicts cases. In *Elmore*, the application of such analysis would probably not have

104. RESTATEMENT, *supra* note 47, § 145 (1971); *Id.* at 437.

105. *See Elmore*, 673 S.W.2d at 437.

106. *Id.* at 435-36.

107. *Id.* at 437.

108. *See Kennedy*, 439 S.W.2d at 173; *Broglin*, 510 S.W.2d at 699; RESTATEMENT, *supra* note 47, § 145 (1971).

109. *See supra* note 47 and accompanying text.

110. *Elmore*, 673 S.W.2d at 435.

111. *See Elmore*, 673 S.W.2d at 436-38.

112. *Id.*

113. *Id.*

114. *Id.* at 437.

115. *See generally Broglin*, 510 S.W.2d at 699.

changed the result,¹¹⁶ but in many instances it would. For instance, if a plaintiff like Elmore is instead a Missouri resident working and injured in Kansas, a court following *Elmore* should apply Kansas law and deny compensation for the Missouri resident. More specifically, a court following *Elmore* should apply Kansas law because the plaintiff's injuries are intertwined with his place of work in Kansas. Such a holding, however, frustrates Missouri's public policy goals of compensating Missouri citizens who have been injured by defective products. In contrast, a court following the interest analysis of *Broglin* could hold that the Missouri resident should receive compensation because of Missouri's interest in justly compensating its residents.

Eight years after *Elmore*, the Missouri Supreme Court again addressed a true conflict in *Thompson v. Crawford*.¹¹⁷ In *Thompson*, the court once again failed to apply interest analysis subsections of section six to a true conflict. *Thompson* involved the death of a passenger, a Tennessee resident, in an automobile crash in Tennessee.¹¹⁸ The driver of the vehicle, also from Tennessee, died in the accident.¹¹⁹ The car was, however, registered, titled, licensed, and insured in Missouri under the driver's mother's name.¹²⁰ The passenger's minor son, who at the time of the accident resided in Tennessee but later moved to Missouri, filed a wrongful death suit against the driver's estate and driver's mother.¹²¹ Under Tennessee law, the action was barred because Tennessee courts do not toll the statute of limitations for minor plaintiffs.¹²² Under Missouri law, however, the plaintiff's claims were tolled because the plaintiff did not need to bring the claim until the age of twenty-one.¹²³ The *Thompson* court, in determining which state had the most significant relationship to the accident, applied section 145 and found:

In the instant case, the negligent conduct of the driver that caused the accident, as well as the resulting injury, occurred in Tennessee. The decedent, the negligent driver and the minor plaintiff were residents of Tennessee at the time of the accident. Applying the above factors to the present case, we conclude the substantive law of Tennessee governs the plaintiff's cause of action. Although the plaintiff now resides in Missouri and the car was registered and

116. See *supra* notes 100-14 and accompanying text.

117. *Thompson v. Crawford*, 833 S.W.2d 868 (Mo. 1992).

118. *Id.* at 869.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Thompson*, 833 S.W.2d at 872.

123. See *id.* The Missouri Supreme Court held in this opinion that it would no longer adhere to its tolling policy when evaluating foreign tolling statutes. Instead, the court argued that the better-reasoned rule would be to borrow the statute of limitations of the foreign state as well as that state's tolling provisions. *Id.*

insured in Missouri, these facts do not create a significant relationship such that Missouri law should control.¹²⁴

In reaching this conclusion, the court failed to apply the interest analysis subsections of section six.¹²⁵ If the court had, it would have found that a true conflict existed for the following reasons. First, Missouri had a substantial interest in allowing a minor child, now domiciled in Missouri, to recover from a defendant that was domiciled in Missouri and whose car was registered, titled, and insured in Missouri.¹²⁶ Tennessee also had an interest in preventing recovery, however, because the accident victims were domiciled in Tennessee and the injury occurred in Tennessee.¹²⁷ Applying the interest analysis of *Broglin*, the court could have weighed both interests and determined that Missouri had a greater interest in compensating the victim since the plaintiff and defendant resided in Missouri, and the defendant's car was registered, licensed, and titled in Missouri.

B. *The Missouri Court of Appeals*

1. False Conflicts

Since *Kennedy*, all of the recent conflicts cases decided by the Missouri appellate courts have followed the Second Restatement approach.¹²⁸ Some Missouri courts have specifically followed the analytical approach of *Kennedy* and have applied section 145 and the interest analysis subsections of section six.¹²⁹ For instance, in *Young v. Fulton Iron Works Co.*,¹³⁰ the plaintiff brought a products liability action against a successor corporation for an injury he alleged was caused by a defective product made by the prior New Jersey manufacturer.¹³¹ Fulton Iron Works, a Delaware corporation which had its sole place of business in Missouri, purchased most assets of the New Jersey company and moved all of the purchased assets, including production

124. *Id.* at 870.

125. *See generally Thompson*, 833 S.W.2d at 868.

126. *See supra* notes 114-15 and accompanying text.

127. *See supra* notes 112-15 and accompanying text.

128. *See, e.g.*, *D.L.C. v. Walsh*, 908 S.W.2d 791, 794-95 (Mo. Ct. App. 1995); *Dunaway v. Fellous*, 842 S.W.2d 166, 168-69 (Mo. Ct. App. 1992); *Nelson v. Hall*, 684 S.W.2d 350, 351-52 (Mo. Ct. App. 1984); *Carver v. Schafer*, 647 S.W.2d 570, 576 n.6 (Mo. Ct. App. 1983); *Huff v. LaSieur*, 571 S.W.2d 654, 655 (Mo. Ct. App. 1978); *Byrn v. American Universal Ins. Co.*, 548 S.W.2d 186, 188-89 (Mo. Ct. App. 1977).

129. *See, e.g.*, *Young v. Fulton Iron Works Co.*, 709 S.W.2d 927 (Mo. Ct. App. 1986); *Byrn v. American Universal Insurance*, 548 S.W.2d 186 (Mo. Ct. App. 1977); *Griggs v. Riley*, 489 S.W.2d 469 (Mo. Ct. App. 1972).

130. *Young*, 709 S.W.2d at 927.

131. *Id.* at 928.

machinery, to Missouri.¹³² The plaintiff claimed that the court should apply the law of New Jersey to the successor corporation even though the company was incorporated under the laws of Delaware and did business solely in Missouri.¹³³ Under New Jersey corporate successor law, the successor corporation could be held strictly liable.¹³⁴ Under Missouri corporate successor law, however, the successor corporation could not “be held liable under the traditional Missouri rule because the threshold requirement of that rule is that the purchasing corporation acquire all of the assets of the selling corporation.”¹³⁵

The *Young* court painstakingly addressed each factor in section 145 and the interest analysis subsections of section six.¹³⁶ As to section 145, the court found: (a) the injury occurred in Missouri, (b) the conduct causing the injury occurred in Missouri, (c) the plaintiffs were Missouri residents, but defendant did business in Missouri and was incorporated in Delaware, and (d) the parties had no relationship prior to the accident.¹³⁷

Next, the court addressed the interest analysis subsections of section six.¹³⁸ The *Young* court found that Missouri’s interest in applying its own laws was great because Fulton solely did business in Missouri and Missouri had specifically adopted a judicial policy with regard to successor liability.¹³⁹ With respect to New Jersey’s interest, the court determined that the Missouri company did not have any ties with New Jersey, and as a result, New Jersey did not have any interest in having its successor corporation liability laws applied to a Missouri company.¹⁴⁰ Therefore, the *Young* court held that since Missouri had a judicially adopted policy with regard to successor liability, and the successor company had business operations in no other state than Missouri, Missouri had a greater interest than New Jersey in determining liability of the Missouri corporate successor.¹⁴¹

In contrast to *Young v. Fulton Iron Works Company*, a number of Missouri appellate decisions have cited but not actually followed *Kennedy*. Instead, these courts have evaluated conflicts claims only in light of section 145 and

132. *See id.* at 929-30.

133. *Id.* at 930-31.

134. *Id.*

135. *Young*, 709 S.W.2d at 940.

136. *Id.* at 936-37.

137. *Id.* at 936.

138. *Id.* at 936-37.

139. *Id.* at 936-37.

140. *Young*, 709 S.W.2d at 937.

141. *Id.* at 936. The court also stated that applying Missouri law would protect party expectations (section 6(d)); promote certainty, predictability, and uniformity of result (section 6(f)); and provide ease in the determination and application of the law (section 6(g)). *Id.* at 937.

have failed to apply section six interest analysis.¹⁴² For example, in *Galvin v. McGilley Memorial Chapels*,¹⁴³ the plaintiffs brought an action against McGilley Memorial Chapels for the negligent infliction of emotional distress for interference with a dead body.¹⁴⁴ The plaintiffs, who lived in Kansas, Iowa, Florida, and Colorado, had made funeral arrangements for the deceased in Kansas with McGilley Memorial Chapels of Overland Park.¹⁴⁵ At the same time, the plaintiffs signed a contract with McGilley, a Texas corporation that also operated a chapel in Kansas City, Missouri, for the purchase of funeral goods and for preparing the body for air transportation from Kansas City, Missouri to Sioux Falls, South Dakota.¹⁴⁶

After the funeral in Kansas, McGilley transported the deceased's body to the Kansas City, Missouri chapel for air shipment preparation, and then to Kansas City International Airport.¹⁴⁷ At some time during this period, however, McGilley misidentified the deceased's body and sent the wrong body to Sioux Falls.¹⁴⁸ Prior to a visitation period in Sioux Falls, the plaintiffs were notified that McGilley had sent the wrong body to Sioux Falls.¹⁴⁹

Plaintiffs subsequently alleged mental anguish and suffering for mishandling of the dead body.¹⁵⁰ The plaintiffs argued that Missouri law should apply so that they would not have to prove that McGilley had intentionally or maliciously, but only negligently, failed to deliver the proper body.¹⁵¹ In evaluating the plaintiffs' claim, the *Galvin* court applied section 145 and determined: (a) the injury occurred in South Dakota; (b) the place of conduct causing the injury occurred in either Kansas or Missouri; (c) the place of residency of the decedent was Kansas and the defendant was a Texas company who had been doing business in Kansas and Missouri; and (d) the business relationship between the respective parties was established in Kansas.¹⁵² After noting these factors, the *Galvin* court concluded that the law of South Dakota, the place of the injury, should govern. Although the bodies

142. See, e.g., *Harter v. Ozark-Kenworth, Inc.*, 904 S.W.2d 317, 320 (Mo. Ct. App. 1995); *Brown v. Westinghouse Elec. Corp.*, 803 S.W.2d 610 (Mo. Ct. App. 1990); *Galvin v. McGilley Mem. Chapels*, 746 S.W.2d 588 (Mo. Ct. App. 1987).

143. *Galvin*, 746 S.W.2d at 588.

144. *Id.* at 589.

145. *Id.*

146. *Id.*

147. *Id.* at 589-90.

148. *Galvin*, 746 S.W.2d at 589-90.

149. *Id.* at 590.

150. *Id.* at 589.

151. *Id.* at 591-92.

152. See *id.* at 589-91. The trial court held Kansas law should be applied because under 145(d) the contractual relationship was in Kansas. *Galvin*, 746 S.W.2d at 590.

were, in all probability, switched in Missouri, “the distress suffered by the plaintiffs was a product of the discovery of the mistake in South Dakota.”¹⁵³

The *Galvin* court failed to address the interest analysis factors of section six. If it had, the court may have reasoned that neither the plaintiffs nor the defendant was from Missouri; therefore, the only interest Missouri had was that the defendant did business in Missouri and that the bodies were probably switched in Missouri. To recover in Missouri for the negligent infliction of emotional distress for interference with a dead body, prior case law had established that the cause of action only arose upon “sight or knowledge of the trespass on the body.”¹⁵⁴ Because the plaintiffs suffered mental anguish in South Dakota, the court could have concluded that South Dakota had the greatest interest in having its laws applied to the plaintiffs’ claim.

It is important that courts consistently apply section six interest analysis to conflicts claims for several reasons. First, interest analysis is established precedent under *Kennedy*.¹⁵⁵ Second, interest analysis gives courts an opportunity to discuss each respective jurisdiction’s interests in the claim. Third, consistently following interest produces better reasoned opinions, and establishes a coherent body of precedent. Finally, inconsistent application of interest analysis may lead to differing results in factually similar cases, thereby causing further confusion and instability in the application of conflicts laws.¹⁵⁶

2. True Conflicts

Hicks v. Graves Truck Lines Inc. is the only case in which a Missouri appellate court has addressed a true conflicts issue, but the *Hicks* court failed to mention prior Missouri Supreme Court precedent.¹⁵⁷ Although the court recognized that the Missouri Supreme Court had adopted the Second Restatement in *Kennedy v. Dixon*, the court distinguished *Kennedy* as not involving a true conflict of laws. Therefore, the court reasoned that *Kennedy* was not controlling authority within the context of a true conflict.¹⁵⁸ Instead,

153. *Id.* at 591.

154. *Id.*

155. *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969) (en banc).

156. Although an interest analysis in *Elmore v. Owens-Illinois* would not have produced a different result, interest analysis in certain circumstances can produce a different outcome than using a straight section 145 analysis. RESTATEMENT, *supra* note 47, § 145(1971). *See supra* notes 109-12 and accompanying text.

157. *Hicks v. Graves Truck Lines, Inc.*, 707 S.W.2d 439 (Mo. Ct. App. 1986). *See e.g.*, *Broglin v. Nangle*, 510 S.W.2d 699 (Mo. 1974). *See also supra* notes 84-96 and accompanying text (discussing *Broglin* and application of interest analysis); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969) (en banc) (applying interest analysis).

158. *Id.*; *Kennedy*, 439 S.W.2d at 173.

the court held that in cases implicating a true conflict, the forum should generally apply its own law.¹⁵⁹

After so holding, the court allowed a Missouri plaintiff to recover against a Kansas defendant for injuries sustained in an accident in Kansas.¹⁶⁰ The court decided to apply Missouri's system of comparative fault and ignored a jury ruling that found that the plaintiff was sixty percent at fault and, therefore, ineligible to recover under Kansas' system of comparative fault.¹⁶¹ In so finding, the court reasoned "that the doctrine of comparative impairment should be adopted to resolve choice of law cases in which the facts indicate significant contacts with Missouri and another state under the Restatement 145 test in which both states have legitimate interests in the law choice."¹⁶²

The *Hicks* court failed to evaluate the case in light of *Broglin v. Nangle*.¹⁶³ If the court had followed the analysis of *Broglin*, however, it would have probably reached the same result. Indeed, the *Hicks* court applied the section 145 factors to the case and then employed interest analysis. The *Hicks* court stated:

The legitimate state interest of Missouri in application of Missouri comparative fault rule arises from a policy of compensating Missouri residents in the courts of this state in the manner which this state's laws have declared. The policy is particularly applicable where, as here, the Kansas accident location was fortuitous and unrelated to any other relationship of the parties. The Kansas state interest, however, must also be recognized. That interest is the entitlement of Kansas to shield its residents from the effects of torts committed in the state if the claimant is found to have been the more at fault.¹⁶⁴

After so finding, the *Hicks* court applied forum law because it stated that in cases involving true conflicts forum law should be applied.¹⁶⁵ The *Hicks* court, however, would have been better served had it employed *Broglin's* interest analysis. Indeed, following *Broglin*, the *Hicks* court would have reached the same result, but the court would have arrived at it by concluding that Missouri had a greater interest in the conflict due to Missouri's long-established policy of compensating Missouri citizens. Even though the results would be the same

159. *Id.* (citing *Foster v. Leggett*, 484 S.W.2d 827 (Ky. App. 1972)). For more on *Foster* and true conflicts, see *supra* note 96.

160. *Id.* at 444.

161. *Id.* at 441.

162. *Hicks*, 707 S.W.2d at 441.

163. See *supra* notes 84-96 and accompanying text.

164. *Hicks*, 707 S.W.2d at 442-43.

165. See *supra* notes 39-40 and accompanying text. The *Hicks* court followed Currie's first method for resolving true conflicts. This approach held that courts should adopt forum law when confronted with true conflicts. In contrast, *Broglin* followed Currie's second method for resolving true conflicts. This approach held that courts should reevaluate their policies when confronted with a true conflict.

in *Hicks* under either analytical approach, such may not occur in all situations,¹⁶⁶ and if differing approaches are applied, a vexing myriad of case law will emerge in time.

C. Federal Courts

Federal courts sitting in diversity are required to follow the conflicts law of the state in which they sit.¹⁶⁷ Federal courts, much like the appellate courts in Missouri, have followed the Second Restatement, and in doing so, some federal courts have only applied section 145¹⁶⁸ and others have applied sections 145 and six.¹⁶⁹ Once again, this commentator would encourage federal courts to apply both section 145 and the interest analysis subsections of section six to conflicts questions. Such uniform application should not only prevent wildly divergent results but should also yield a set of coherent decisions.

In *Columbia Petroleum, Inc. v. Waddell*, for instance, the federal district court failed to apply interest analysis to the conflict issues before it.¹⁷⁰ In *Waddell*, the plaintiff had been injured in Missouri while the conduct causing the injury had occurred in Kansas.¹⁷¹ Additionally, the court noted that the defendant's place of business was in Kansas, although Missouri was the state in which the agreement was made with the defendant.¹⁷²

In *Waddell*, the decision before the court was whether Missouri's or Kansas' statute of limitations should be applied to the action. If Kansas law applied, the suit would be barred under Missouri's borrowing statute.¹⁷³ The *Waddell* court concluded that since the agreement and injury both occurred in

166. See *supra* notes 109-12 and accompanying text.

167. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

168. See *Columbia Petroleum, Inc. v. Waddell*, 680 F. Supp. 1348, 1350 (W.D. Mo. 1987); *Ewing v. St. Louis-Clayton Orthopedic Group*, 790 F.2d 682, 684 (8th Cir. 1986); *Institutional Food Ass'n, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 454 n.5 (8th Cir. 1986); and *St. Louis Union Trust Co. v. Merrill, Lynch, Fenner, & Smith, Inc.*, 562 F.2d 1040, 1054 n.20 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

169. See *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354 (8th Cir. 1994); *Nika Corp. v. City of Kansas City*, 582 F. Supp. 343, 354 n.5 (W.D. Mo. 1984) (citing *Daniel Hamm Drayage Co. v. Waldinger Corp.* 508 F. Supp. 390, 394-95 (E.D. Mo. 1981), *aff'd in part, modified in part*, 666 F.2d 1213 (8th Cir. 1981)); *Hansen v. Sears, Roebuck & Co.*, 574 F. Supp. 641, 644 (E.D. Mo. 1983); *Daniel Hamm Drayage Co. v. Waldinger Corp.*, 508 F. Supp. 390, 395, *modified on other grounds*, 666 F.2d 1213; and *Potter v. St. Louis-San Francisco Ry.*, 622 F.2d 979, 983 (8th Cir. 1980).

170. *Waddell*, 680 F. Supp. at 1350.

171. *Id.* at 1349. The defendant fraudulently prepared oil and gas reports in Kansas and sent them to the Missouri plaintiff. *Id.* The Missouri plaintiff suffered damages after relying upon the fraudulent reports. *Id.*

172. *Id.* at 1350.

173. *Id.*

Missouri, Missouri statute of limitations period would apply and the suit would not be barred.¹⁷⁴

If the court had applied the interest analysis portion of section six, the *Waddell* court may have reached the same result, but would have done so only after finding that a true conflict existed. In *Waddell*, Kansas had an interest in regulating the conduct of the Kansas defendant, and Kansas law would bar the suit, thereby signifying Kansas' lack of interest in punishing the defendant, or in the alternative, rewarding the plaintiff.¹⁷⁵ On the other hand, Missouri had an interest in compensating the plaintiff, and the plaintiff resided in Missouri.¹⁷⁶ Hence, a true conflict existed because Kansas had an interest in preventing the plaintiff from recovering from the Kansas defendant, and likewise, Missouri had an interest in compensating the Missouri plaintiff. If the court had followed *Broglin*,¹⁷⁷ it may have concluded that Missouri had a greater interest in the conflict due to the fact that the injury occurred in Missouri and Missouri has a policy of compensating injured Missouri citizens.

IV. CHOICE-OF-LAW, CONTRACTS, AND THE MISSOURI COURTS

A. *Choice-of-Law Clauses and Party Autonomy*

The Second Restatement allows contracting parties to stipulate which state's laws they want to govern their contract.¹⁷⁸ Such provisions will be upheld unless they violate the public policy of the state which has a materially greater interest in the transaction, or the state chosen has no substantial relationship to the parties.¹⁷⁹ For instance, in *State ex rel. Geil v. Corcoran*,¹⁸⁰ the plaintiffs had entered into an agreement with Paine, Webber, Jackson and Curtis, Inc. ("Paine") for the purchase and sale of securities.¹⁸¹ The agreement

174. *Waddell*, 680 F. Supp. at 1350.

175. *Id.*

176. *Id.*

177. *Broglin*, 510 S.W.2d at 699.

178. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 (1969). The first Missouri court to follow the Second Restatement was *American Institute of Marketing Systems, Inc. v. Brooks*, 469 S.W.2d 932, 936 (Mo. App. 1971). In *Brooks*, the court referred to section 186 and held that under 186:

Issues in contract are to be determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of s 188. Since the parties have chosen the law of Missouri by their expression of intent in the contract and by their completion of the contract in Missouri, there is no need to consider following § 188 to determine by secondary rule that which has already been decided by a first principle.

Id. at 936.

179. RESTATEMENT SECOND CONFLICTS OF LAW § 187 (1961).

180. 623 S.W.2d 555 (Mo. Ct. App. 1981).

181. *Id.* at 555.

stated that New York law would apply.¹⁸² The plaintiffs brought suit in Missouri under Missouri Blue Sky laws for damages arising out of the purchase and sale of securities from Paine.¹⁸³

The *Geil* court refused to enforce the choice-of-law provision because it was contrary to a fundamental policy of Missouri law.¹⁸⁴ The court reasoned that Missouri had a “very strong policy in favor of providing a judicial forum for the claims of investors under the blue-sky laws”¹⁸⁵ and, therefore, held that the application of New York law would run counter to Missouri’s statutory policy of protecting investors in securities transactions.¹⁸⁶ Consequently, the court determined that the arbitration agreement must be voided.¹⁸⁷

B. *Choice-of-Law, Contracts, and Section 188*

Under the Second Restatement, a court will employ a section 188/6 analysis only if the parties to the contract have not stipulated to the state whose law shall govern the interpretation of their contractual rights and duties.¹⁸⁸ After the Missouri Supreme Court applied the Second Restatement to a tortious conflicts issue, the question left to the lower courts in Missouri was whether the Second Restatement was also to be applied to contractual conflicts issues.

In *American Institute of Marketing Systems, Inc. v. Brooks*,¹⁸⁹ a Missouri appellate court discussed the potential applicability of section 188/6 to contracts claims.¹⁹⁰ In *Brooks*, the defendant argued that *Kennedy v. Dixon* stood for the proposition that the Missouri courts had abandoned the vested rights approach as a whole.¹⁹¹ Indeed, the *Brooks* court noted that the *Kennedy* court had stated that the adoption of the Second Restatement signaled an end to

182. *Id.*

183. *Id.* at 556.

184. *Id.*

185. *Geil*, 623 S.W.2d at 556. The statute provides that violation of the state’s blue-sky laws creates a private cause of action before a state tribunal. *Id.* Furthermore, the statute states that “any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of the act . . . is void.” *Id.*

186. *Id.* at 557.

187. *Id.*

188. *See, e.g.*, *National Starch and Chem. Corp. v. Newman*, 577 S.W.2d 99, 103 (Mo. Ct. App. 1978); *Nakao v. Nakao*, 602 S.W.2d 223, 226 (Mo. Ct. App. 1980); *Bigham v. McCall Serv. Stations*, 637 S.W.2d 227, 231 (Mo. Ct. App. 1982); *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co. of N.C.*, 716 S.W.2d 348, 357-58 (Mo. Ct. App. 1986); and *Dillard v. Shaughnessy, Fickel and Scott Architects, Inc.*, 943 S.W.2d 711, 715 (Mo. Ct. App. 1997).

189. 469 S.W.2d at 932-36.

190. *Id.* at 936. The defendant in the case had argued that the Second Restatement should be applied to contractual claims in light of *Kennedy v. Dixon*. *Id.*

191. *Id.* The defendant also argued that the *Kennedy* court intended the Second Restatement to apply to contractual conflicts claims because the *Kennedy* court had made reference to a contractual conflicts claim that had been adjudicated in accordance with the modern conflicts principles. *Id.*

“the harsh and inflexible provisions of the *lex loci delicti* rule.”¹⁹² Nonetheless, the *Brooks* court determined that it did not need to decide the potential application of section 188/6 to contractual conflicts claims because the parties had stipulated to the choice of law they wanted to govern the case.¹⁹³

Although the *Brooks* court did not apply the Second Restatement to contracts,¹⁹⁴ several federal courts applied the Second Restatement to Missouri conflicts contract claims because these courts readily anticipated that the Missouri Supreme Court would do so as soon as it addressed the issue.¹⁹⁵ Other federal courts, such as the Eighth Circuit in *Havenfield Corporation v. H & R Block*,¹⁹⁶ relied on *American Institute of Marketing Systems, Inc. v. Brooks* and held that the *Brooks* court specifically applied the Second Restatement to contractual conflicts claims.¹⁹⁷ Nonetheless, despite the federal courts anticipation that the Missouri Supreme Court would adopt the Second Restatement to conflicts contract claims, the Missouri Supreme court failed to address the issue until 1980.

192. *Brooks*, 469 S.W.2d at 936.

193. *Id.*

194. In *Havenfield Corp. v. H. & R. Block*, 509 F.2d 1263 (8th Cir. 1975), the Eighth Circuit claimed that *Brooks* “held that the contract rules of the Restatement are also to be followed in Missouri.” *Id.* at 1267.

195. See *Brinkley Co. v. Teledyne Mid-Am. Corp.*, 333 F. Supp. 1183, 1185 (E.D. Mo. 1971); *Nelson v. Aetna Life Ins. Co.* 359 F. Supp. 271, 284 (W.D. Mo. 1973) (life insurance contract); and *Foam-Tex Indus., Inc. v. Relax-away Corp.*, 358 F. Supp. 8, 13 (E.D. Mo. 1973); *Moss v. Nat’l Life and Accident Ins. Co.*, 358 F. Supp. 1291, 1295-96 (W.D. Mo. 1974); *Havenfield Corp. v. H & R Block, Inc.*, 509 F. Supp. 1263, 1267 (8th Cir. 1975); *Am. Inst. of Mktg. Sys. v. Brooks*, 469 S.W.2d 932 (Mo. Ct. App. 1971) for the proposition that the Second Restatement applied to contractual situations in Missouri. This case did not reference the federal court decisions noted *supra*; *Citizens & S. Nat’l Bank v. Bruce*, 420 F. Supp. 795, 798 (E.D. Mo. 1976) (services contract).

Federal courts quite often “anticipate” what a state court might do even though federal courts are directed to apply the law of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 491 (1941). This often leads to development of separate and confusing precedents. For example, federal courts sitting in Vermont were divided for over thirty years on whether the Second Restatement or First Restatement applied to contractual and tortious matters. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1151-53 (1987). This was primarily because the Vermont Supreme Court has not decided a conflicts issue in thirty years. *Id.* When such non-action occurs, many federal courts are all too eager to play the devil’s advocate and “anticipate” what a state court might do. Indeed, this is what happened in Missouri because Missouri had not addressed whether the Second Restatement applied to contractual situations.

196. 509 F.2d 1263 (8th Cir. 1975).

197. *Id.* at 1267. It should be noted that the *Brooks* court did not specifically apply section 188 to a contractual claim because the parties had stipulated to the choice of law they wanted to govern the case. See *Brooks*, 469 S.W.2d at 936.

Throughout the 1970s, only one Missouri appellate court, in *National Starch and Chemical Corporation v. Newman*,¹⁹⁸ addressed the issue, and the *Newman* court applied the Second Restatement to a contractual claim.¹⁹⁹ In so holding, the *Newman* court relied on *Kennedy*, *Brooks*, and *Havenfield* for the proposition that the Second Restatement “applies in Missouri to both tort and contract actions.”²⁰⁰

In 1980, the Missouri Supreme Court, in *Miller v. Home Insurance Co.*,²⁰¹ was presented with an opportunity to apply section 188 of the Second Restatement to a dispute over the interpretation of an insurance contract, but specifically declined to do so.²⁰² With regard to insurance contracts, the *Miller* court held that Missouri had consistently adhered to *lex loci contractus* analysis in determining what laws to apply to insurance contracts.²⁰³ Additionally, the court stated that the Missouri courts had “never adopted the most significant relationship test for contract cases”²⁰⁴

After *Miller* was penned, however, the lower state courts continued to apply the Second Restatement to contract cases.²⁰⁵ Four years after *Miller*, the Missouri Supreme Court once again addressed an insurance contract issue in *State Farm Mutual Automobile Insurance Co. v. MFA Mutual Insurance Co.*²⁰⁶ The *State Farm* court held that the law of the place where the policies were issued would govern.²⁰⁷ Significantly, however, the *State Farm* court neither addressed whether the *lex loci contractus* doctrine applied to all contract cases nor condemned the lower courts use of the Second Restatement.²⁰⁸

Since *State Farm*, the Missouri Supreme Court has failed to address a contractual conflicts claim. During this time, the lower courts have continued to employ the Second Restatement to contractual conflicts claims.²⁰⁹

198. 577 S.W.2d 99 (Mo. Ct. App. 1978). For more on *Newman*, see *infra* notes 271-80 and accompanying text.

199. *Id.* at 102.

200. *Id.*

201. 605 S.W.2d at 778.

202. *Id.* at 780.

203. *Id.* at 779.

204. *Id.*

205. See *State ex rel Geil v. Corcoran*, 623 S.W.2d 555, 556 (Mo. Ct. App. 1981); *Bigham v. McCall Serv. Stations, Inc.*, 637 S.W.2d 227, 231 (Mo. Ct. App. 1982); *Brown v. Brown*, 678 S.W.2d 831, 833 (Mo. Ct. App. 1984).

206. 671 S.W.2d 276 (Mo. 1984).

207. *Id.* at 277 n.2.

208. See *Miller*, 605 S.W.2d at 780; *State Farm*, 671 S.W.2d at 277-78. See *supra* notes 182-83 for cases holding that the Second Restatement applied to contractual matters prior to *Miller*. See *supra* note 193 for cases holding that the Second Restatement applied to contractual matters after *Miller* but prior to *State Farm*.

209. See, e.g., *Dillard v. Shaughnessy, Fickel & Scott Architects, Inc.*, 943 S.W.2d 711, 715 (Mo. Ct. App. 1997); *Ranch Hand Foods, Inc. v. Polar Pak Foods, Inc.*, 690 S.W.2d 437, 441 (Mo. Ct. App. 1985); *Nooter Corp. v. Todd*, 687 S.W.2d 695, 696 (Mo. Ct. App. 1982).

In applying the Second Restatement to contractual conflicts claims, some Missouri appellate courts have only applied section 188 and have failed to apply the interest analysis subsections of section six.²¹⁰ For instance, in *Dillard v. Shaughnessy, Fickel & Scott Architects*,²¹¹ the Archbishop of Kansas City, Kansas hired Huber as the general contractor for the construction of a church and a school in Leawood, Kansas.²¹² The Archbishop also hired Shaughnessy, Fickel & Scott Architects for the construction project.²¹³ The contract contained an indemnity provision that required Huber to indemnify the Archdiocese and Shaughnessy “for any claims and expenses, including attorney’s fees, caused in whole or in part by the negligence of Huber or its subcontractors.”²¹⁴

Huber then subcontracted with P/S Masonry of Lenexa, Kansas. The subcontract contained an indemnity provision requiring P/S Masonry to indemnify Huber for any expenses resulting from P/S Masonry’s negligence.²¹⁵ Subsequently, Lee Dillard, an employee of P/S Masonry, was injured when a masonry wall fell on him.²¹⁶ Dillard sued Huber, and Huber brought suit

210. See, e.g., *Dillard*, 943 S.W.2d at 715-16; *Ranch Hand Foods*, 690 S.W.2d at 440; *Bigham v. McCall Serv. Stations, Inc.*, 637 S.W.2d 227, 231 (Mo. Ct. App. 1982); *Nakao v. Nakao*, 602 S.W.2d 223, 226-27 (Mo. Ct. App. 1980).

Notwithstanding a failure to apply the interest analysis of section 6, *Bigham* also failed to employ section 188 to a conflicts contract issue. In *Bigham*, the plaintiff sued his employer to recover deductions from his wages made by his employer. *Bigham*, 637 S.W.2d at 229. The employer was a Kansas corporation that was licensed to do business in Missouri and had its principle place of business in Missouri. *Id.* at 228. The employee, a Missouri resident, worked for the employer at a Kansas business establishment for 10 weeks in 1971 and worked at various Missouri business establishments from late-1971 through 1974. *Id.*

The employee brought suit in Missouri claiming he was entitled to relief under a Kansas statute which set forth permissible and impermissible deductions an employer could make from his employee’s wages. *Id.* at 230. The suit involved wages deducted from the employee’s salary only after he had been promoted to manager in 1974. *Id.* at 229.

The *Bigham* court held that the Kansas statute should not be given extra-territorial effect and reasoned that this ruling comported with general choice of law principles. *Bigham*, 637 S.W.2d at 231. The court first asserted that the parties had not stipulated to a choice of law. Therefore, the court stated that it would apply the laws of the state having the most significant relationship to the transaction and the parties. *Id.* Next, the court noted that Missouri had the most contacts with the parties because the employment was centered in Missouri, the employer had its home office in Missouri, and the employee filed suit in Missouri. *Id.*

Additionally, the court acknowledged that “[t]he only contacts connecting the case to Kansas are quite remote and lack[ed] any real materiality.” *Id.* at 232. As a result, the *Bigham* court held that Missouri law should be applied to the contractual dispute. *Id.*

211. *Dillard*, 943 S.W. 2d at 711.

212. *Id.* at 713.

213. *Id.*

214. *Id.*

215. *Id.* at 713.

216. *Dillard*, 943 S.W.2d at 713.

against P/S Masonry seeking indemnification for expenses and attorney's fees.²¹⁷ Huber claimed that Missouri law applied to this issue. However, P/S Masonry argued that Kansas law applied because Huber would be unable to receive attorney's fees under Kansas law.²¹⁸

In deciding which law to apply, the *Dillard* court stated that because the parties had not agreed to a general choice of law provision,²¹⁹ it would apply the five factors of section 188. In applying the section 188 factors, the court found: (a) the place of contracting was in Missouri, (b) the negotiating occurred in both Missouri and Kansas (c) the place of performance was in Kansas (d) the subject matter of the contract was in Kansas; and (e) Huber and P/S Masonry were both incorporated in Missouri, P/S Masonry's primary place of business was in Kansas, and Dillard was a resident of Missouri.²²⁰

After evaluating these factors, the court decided to apply Kansas law to the matter.²²¹ The court reasoned that the first factor favored neither state primarily because P/S Masonry began work forty days before the contract was signed. Therefore, the court argued that the technical formation of the contract was of little importance.²²² Further, the court asserted that the second factor did not favor either party, the third and fourth factors favored Kansas, and the fifth factor slightly favored Missouri.²²³ In light of these factors, the court stated that Kansas law would govern,²²⁴ and under Kansas law, the author of the contract has all of the contractual ambiguities, including those regarding

217. *Id.* Dillard also sued the Archdiocese and the architects. *Id.* at 713. As to the Archdiocese, Huber's insurer indemnified the Archdiocese. *Id.* The architects also sought indemnification for attorney's fees and other expenses incurred. *Id.* at 714. Huber failed to indemnify the architects, and the architects brought suit. The appellate court held that Huber had to indemnify the architects. *Dillard*, 943 S.W.2d at 714.

218. *Id.* at 719.

219. *Id.* at 714 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)).

The court did note that the contract between Huber and P/S Masonry incorporated certain portions of the general contract which did contain a choice of law contract indicated that Kansas law would apply. *Id.* at 716. Consequently, the court held that any portion of the contract between Huber and P/S Masonry which incorporated provisions of the general contract by reference would be interpreted under Kansas law if subjected to litigation. *Id.*

220. *Id.* at 716-17.

221. *Dillard*, 943 S.W.2d at 718.

222. *Id.* at 716-17.

223. *Id.* at 718.

224. *Id.* The court also stated that the contract between Huber and P/S Masonry incorporated a portion of the contract between Huber and the Archbishop which had stipulated that Kansas law would govern the contract. *Id.* at 718. Finally, the court noted, without explanation, that subsections (d), (e) and (f) of section 6, that is, the principles of certainty, predictability, and uniformity of result; ease in determination and application of the law to be applied; and the protection of the justified expectations of the parties - weighed in favor of applying Kansas law. *Id.* at 717-18.

attorney fees, construed against him.²²⁵ Therefore, since Huber authored the contract, the *Dillard* court concluded that Huber would not be able to collect attorney's fees from P/S Masonry.²²⁶

In reaching its decision, the *Dillard* court failed to apply the interest analysis subsections of section six.²²⁷ If the court had applied section 6 interest analysis, it would have found that a true conflict existed. Indeed, in *Dillard*, Huber and P/S Masonry were both Missouri corporations that had signed a contract in Missouri to perform contractual duties in Kansas.²²⁸ Under Missouri law, Huber would have been able to collect attorney's fees from P/S Masonry. In contrast, under Kansas law, Huber would not have been able to collect attorney's fees. Missouri has a substantial interest in regulating relations between Missouri corporations. The only interest Kansas has is that P/S Masonry's principle place of business was in Kansas and the contractual duties were to be performed in Kansas.²²⁹

If the Missouri court had employed the analysis of *Broglie v. Nangle*, it would have been able to reexamine the interests of the involved jurisdictions.²³⁰ As a result, the *Dillard* court could have determined that Missouri had a greater interest than Kansas in interpreting a contract between two Missouri corporations signed in Missouri. Under such a holding, P/S Masonry would have had to pay Huber's attorney's fees.

Unlike *Dillard*, several Missouri appellate courts have evaluated conflicts claims in light of section 188 and section six interest analysis.²³¹ For instance, in *Brown v. Brown*,²³² a mother obtained a decree from a circuit court in St. Louis in 1979 regarding custody and child support.²³³ Under the agreement,

225. *Id.* at 719-20.

226. *Dillard*, 943 S.W.2d at 719-20.

227. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6 (1971). The court did discuss subsections (d), (e), and (f) of section 6. These sections are discussed more often in contractual claims because courts want to give legal effect to contracts. *Dillard*, 943 S.W.2d at 716.

228. *Dillard*, 943 S.W.2d at 712.

229. *Id.*

230. *See supra* notes 84-96 and accompanying text.

231. *See, e.g.*, *Brown v. Brown*, 678 S.W.2d 831, 833 (Mo. Ct. App. 1984); *National Starch and Chemical Corp. v. Newman*, 577 S.W.2d 99, 103 (Mo. Ct. App. 1978).

232. 678 S.W.2d at 831.

233. *Id.* at 832. *Brown* relied on *Nakao v. Nakao*, 602 S.W.2d 223 (Mo. Ct. App. 1980). In *Nakao*, a husband and wife entered into a separation agreement while living in New York. *Id.* at 224. The husband later moved to Missouri and his former wife remained in New York. *Id.* at 225. Under the agreement, the husband was required to pay his former wife \$600 per month. *Id.* at 226. After being laid off from work, the husband sought to have the monthly payments lowered and brought suit in Missouri. *Id.* at 225. The court, in determining whether to apply Missouri law, stated that the five factors of section 188 must be evaluated. *Nakao*, 602 S.W.2d at 226-27, (citing *National Starch and Chemical Corp. v. Newman*, 577 S.W.2d 99, 102 (Mo. Ct. App. 1978)).

the father promised to pay \$250 per month for each child, and the parents agreed that the “Circuit Court of St. Louis County would retain jurisdiction to change or modify the provisions in the agreement respecting the care, custody, and support of the minor children.”²³⁴ In 1982, the mother filed a motion seeking to increase the amount of child support.²³⁵ Shortly thereafter, the mother and children moved to North Carolina, while the mother’s ex-husband had taken up residency in Maryland.²³⁶

The father claimed that North Carolina law should be employed in determining his obligation to pay child support.²³⁷ Under North Carolina law the age of majority is eighteen for all purposes. Since both children were eighteen or older, the father claimed that his obligations under the Missouri decree should be terminated.²³⁸ On the other hand, the mother urged that Missouri law should be applied because under Missouri law the father would be obligated until the child was twenty-one.²³⁹

The court then held that the issues at hand should be governed by Missouri law, which would not allow the court to modify the agreement. *Nakao*, 602 S.W.2d at 227. If the court had found that New York law applied, the court could have modified the agreement. *Id.* at 226. The *Nakao* court, however, in determining that Second Restatement factors should be employed, did not analyze those factors in regard to this case nor did the court engage in section 6 analysis. The only facts that the court mentioned was that the agreement had been entered into in New York, the decree was enforceable in Missouri, and the husband was a resident of Missouri. If the court had properly applied interest analysis subsections of section 6, New York law should have governed.

This case presents a classic unprovided-for-case. *See supra* note 39. In this situation, the policy of neither state would be advanced by the application of its law. Indeed, in *Nakao*, the husband, a resident of Missouri, wanted to avail himself of New York law so that the decree can be changed. The wife, a resident of New York, wanted to avail herself of Missouri law so that the decree would not be changed. *See id.* at 226.

To resolve this dispute Currie’s interest analysis approach would recommend the forum apply its own law. *See supra* note 36. However, this author would advocate that before applying forum law, the court should attempt to reevaluate each state’s interests to determine if one jurisdiction has a greater interest in having its laws applied to the issue. Such an analysis could follow the analysis used by *Broglin v. Nangle*. Indeed, following the *Broglin* analysis, the *Nakao* court could have found that New York had a substantial interest in having its own laws applied to a separation agreement that had been entered into in its state. Furthermore, the court could have also noted that one of the parties to the agreement still resided in New York. Finally, the court could have found that the only interest Missouri had in the matter was that one of the parties to the agreement had fortuitously taken up residency in Missouri. Therefore, the *Nakao* court could have applied the laws of New York.

234. *Brown*, 678 S.W.2d at 833.

235. *Id.* The mother stated that her former husband had enjoyed a substantial increase in salary, and that she needed the additional funds to help support the oldest child who was in college. *Id.*

236. *Id.*

237. *Id.*

238. *Brown*, 678 S.W.2d at 833.

239. *Id.*

In determining whether Missouri or North Carolina law applied, the *Brown* court first applied the five factors set out in section 188.²⁴⁰ In applying the section 188 factors, the court found: (a) that the contract was entered into in Missouri; (b) that the place of negotiation was uncertain because the father had resided in Florida at the time the agreement was reached; (c) that the place of performance occurred when the father sent a check to the Circuit Court; (d) that the subject matter of the contract, the children, had been residing in Missouri, but now reside in North Carolina; and (e) that the father was domiciled in Maryland, and the mother and children in North Carolina.²⁴¹ After evaluating these findings, the court determined that the only significant contact Missouri possessed was “in preserving the integrity of a Missouri decree in a Missouri court.”²⁴²

As such, the court next applied section six interest analysis. In so doing, the court decided that Missouri possessed a strong interest in protecting children that resided within their borders, but since none of the parties resided in Missouri, North Carolina law should be applied.²⁴³ However, “[a]ccording to North Carolina law, the validity and construction of a contract, including separation agreements, is determined by the law of the state where it is executed.”²⁴⁴ Since the separation agreement was entered into in Missouri, the court found that Missouri law should be applied to the case. Therefore, the father was bound to pay child support under the agreement.²⁴⁵

C. Choice of Law, Contracts, and Presumptive Provisions

If the contractual dispute falls within one of the presumptive provisions, then the Restatement provides detailed rules for how to handle that dispute.²⁴⁶ The Restatement furnishes rules for specific types of contracts²⁴⁷ and for specific contract issues.²⁴⁸ However, even where the Restatement sets forth a presumption concerning a specific issue, it maintains the most significant relationship test in reserve.²⁴⁹ The interplay between these sections is

240. *Id.*

241. *Id.*

242. *Id.*

243. *Brown*, 678 S.W.2d at 833.

244. *Id.* at 834.

245. *Id.* at 832.

246. *See supra* notes 55-57 and accompanying text.

247. The Restatement provides for specific rules with regard to land contracts, sale of chattels, insurance contracts, contracts of surety, contracts for repayment of money lent, transportation contracts, and usurious contracts. RESTATEMENT (SECOND) CONFLICTS OF LAW §§ 189-198.

248. The Restatement provides for specific rules with regard to capacity, contractual formalities, consideration, fraud, duress, mistake, assignment, and discharge. *Id.* §§ 199-212.

249. *See infra* notes 249-55 and accompanying text.

articulated very well by the Missouri appellate court's decision in *National Starch & Chemical Corporation v. Newman*.²⁵⁰

In *Newman*, the defendant worked for a New York company as a sales agent for industrial adhesives.²⁵¹ The defendant first signed an agreement with the plaintiff when he serviced the Mid-Atlantic states, and later, he signed a second agreement when servicing the Southeastern states.²⁵² Under the agreements, if the defendant left his employment he could not compete with the plaintiff for two years.²⁵³ The defendant was subsequently promoted and assigned to service the Midwest in Kansas City, Missouri.²⁵⁴ When the defendant was transferred he did not sign another contract with the plaintiff.²⁵⁵ Several years later, the plaintiff was conducting an audit and realized that a number of employees in sensitive positions had access to trade secrets.²⁵⁶ Thereafter, the company sought to have the defendant and others sign a new trade protection agreement.²⁵⁷ Newman refused to sign the new agreement, formed his own partnership in Kansas City, Missouri, and began competing against his former employer.²⁵⁸ His former employer then brought suit against the defendant for breach of the agreement that the defendant had signed when working in Atlanta, Georgia.²⁵⁹

The *Newman* court first evaluated section 196.²⁶⁰ Under section 196, a court is instructed to apply the law of the state where the major portions of the contract services are to be performed unless another state has more significant contacts.²⁶¹ In evaluating section 196, the court found that comment A stated that section 196 applied only if services or a major portion of the services were performed in one state.²⁶² Here, however, the defendant serviced a number of states throughout the Southeast; therefore, the *Newman* court found that section 196 did not apply.²⁶³

250. 577 S.W.2d 99 (Mo. Ct. App. 1979).

251. *Id.* at 101.

252. *Id.*

253. *Id.* Restrictive agreements arise quite often. See *Ranch Hand Foods*, 690 S.W.2d at 439-40; *Nooter*, 687 S.W.2d at 696.

254. *Newman*, 577 S.W.2d at 101.

255. *Id.* at 102.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Newman*, 577 S.W.2d at 102.

260. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §196 (1971).

261. *Newman*, 577 S.W.2d at 103. For an example of another case discussing service contracts, see generally *Citizens & Southern Nat'l Bank v. Bruce*, 420 F. Supp. 795 (E.D. Mo. 1976).

262. *Id.*

263. *Id.*

Next, the *Newman* court utilized sections 188 and six to determine whether the law of Missouri, Georgia, or New York should be applied to the contractual dispute. Under Missouri law, the restrictive covenant would be enforced while under Georgia and New York law the covenant would not be enforced.²⁶⁴ In applying section 188, the *Newman* court found: (a) that the place of contract may have been in Georgia where the employee resided or in New York where the employer conducted its business; (b) that the place of negotiation was unknown; (c) that the place of performance was in the southeastern states in which he operated; (d) that the location of the subject matter of the contract was in the southeastern states; and (e) that the defendant resided in Atlanta at the time the agreement was signed and that he currently lives in Kansas City, Missouri while the plaintiff's principle place of business is in New York.²⁶⁵ After evaluating these factors, the court attempted to assess the interests of the involved states.²⁶⁶

The *Newman* court found that Missouri's interest in applying its laws was great because the defendant currently resides in Missouri and is operating a business in Missouri which is directly competing against the plaintiff's Missouri businesses.²⁶⁷ Additionally, the court noted that Missouri laws encourage the enforcement of reasonably restrictive covenants if they protect Missouri businesses from unfair competition by former employees.²⁶⁸ On the other hand, the court found that "[t]he relative interest of Georgia and New York [wa]s slight, if existent at all; the competition in question bears no relation to Georgia or New York."²⁶⁹ Consequently, the *Newman* court applied Missouri law to the dispute, and upheld the restrictive covenant agreement.²⁷⁰

Unlike *National Starch and Chemical Corporation v. Newman*, a number of Missouri appellate decisions have not specifically followed the exact provisions set forth by the Second Restatement.²⁷¹ For instance, in *Ranch Hand Foods v. Polar Pak Foods, Inc.*,²⁷² a Kansas employee signed an agreement with his Kansas employer which contained a restrictive covenant.²⁷³ The Kansas employer's company was incorporated in Missouri.²⁷⁴ The Kansas employee left the company and began competing against it.²⁷⁵ Thereafter, the

264. *Id.* at 103-04.

265. *Id.* at 104.

266. *Newman*, 577 S.W.2d at 104.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 104-05.

271. See *Ranch Hand Foods v. Polar Pak Foods, Inc.*, 690 S.W.2d 437 (Mo. Ct. App. 1985); *Nooter Corp. v. Todd*, 687 S.W.2d 437 (Mo. Ct. App. 1985).

272. 690 S.W.2d 437 (Mo. Ct. App. 1985).

273. *Id.* at 441.

274. *Id.*

275. *Id.*

company brought suit in Missouri seeking to have its two-year restrictive covenant enforced.²⁷⁶

The *Ranch Hand Foods* court next had to determine whether to apply Kansas or Missouri law to the contractual issue. The court, following *Newman*, applied the five factors of section 188 and concluded that the contacts weighed heavily in favor of applying Kansas law. Specifically, the court found:

The Ranch Hand place of business was in Kansas, Lumianski was a Kansas resident and the services were to be performed in Kansas. Although no direct evidence on the subject was presented, there is no reasonable ground to infer that the contract was signed in Kansas. The only factors associated with Missouri were Ranch Hand's incorporation in Missouri, use of a Missouri lawyer to draw up the contract and the fact that Missouri customers were diverted by appellants from Ranch Hand to Polar Pak.²⁷⁷

The *Ranch Hand Foods* court also noted that section 196 was relevant because that section "directs the local law of the state where the major portions of the contract services are performed will determine contract validity in conflicting relationship situations."²⁷⁸ Applying section 196, the court decided that the main services were to be performed in Kansas; therefore, the court held that Kansas law should be applied to determine whether the restrictive covenant should be enforced.²⁷⁹

Unfortunately, the analysis employed by the *Ranch Hand Foods* court did not follow the exact procedures set forth by the Second Restatement.²⁸⁰ Under

276. *Id.*

277. *Ranch Hand Foods*, 690 S.W.2d at 441.

278. *Id.* at 440 n.2.

279. *Id.*

280. Other Missouri courts have also failed to follow the exact procedures set forth by the Second Restatement. For example, in *Nooter Corp. v. Todd*, 687 S.W.2d 695 (Mo. Ct. App. 1985), a Pennsylvania employee signed an agreement with his Pennsylvania employer which contained a restrictive covenant. *Id.* at 696. The restrictive covenant prevented him from working for any of his employer's competitors whom operated east of the Rocky Mountains for three years after leaving employment with said employer. *Id.* The employee left his job and began working for a competitor that was incorporated in Missouri with offices in Illinois. *Id.* The Pennsylvania employer then brought suit in Missouri seeking to have its restrictive covenant enforced. *Id.* at 695.

In deciding whether to apply Missouri law or Pennsylvania law, the *Nooter* court recognized that under section 188 "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied." *Id.* at 696. The court stated that the contract was signed, negotiated, and performed in Pennsylvania and, therefore, following section 188 held that Pennsylvania law should be applied. *Id.*

In so finding, the *Nooter* court failed to apply section 196. Section 196 directs a court to apply the law of the state where the major portions of contract services are to be performed, which in *Nooter* would be Pennsylvania. *Id.* The *Nooter* court attained the same result by

the Second Restatement, a court should first employ section 196, and then, if needed, utilize sections 188 and six.²⁸¹ If the *Ranch Hand Foods* court had correctly employed the analysis of *Newman*, it would have properly followed the tenets of the Second Restatement. The end result would have been the same, but such a holding would have been better reasoned and logical.

D. Choice of Law, Insurance Contracts, and Presumptive Provisions

Under the First Restatement, insurance contracts are interpreted according to the place where the agreement had been made.²⁸² By contrast, the Second Restatement provided that insurance contracts are to be interpreted according to several specific presumptive provisions. The presumptive provisions of the Second Restatement state: that life insurance contracts are almost always construed according to the law of the insured's domicile;²⁸³ that casualty insurance contracts are almost always construed according to the principal location of the insured risk;²⁸⁴ and that liability insurance contracts are governed by the law applicable to tort liability, but compliance with contractual terms are governed by general choice of law principles.²⁸⁵

The federal courts in Missouri were the first courts to embrace the Second Restatement position with regards to insurance conflicts.²⁸⁶ For instance, in *Nelson v. Aetna Life Insurance Co.*,²⁸⁷ the federal court determined that Missouri followed the Second Restatement with regards to insurance contracts.²⁸⁸ The *Aetna* court did so only after holding that *Kennedy v. Dixon*²⁸⁹ signaled the "deliberate rejection of the discredited vested rights doctrine."²⁹⁰

Under section 192 of the Second Restatement, the validity of a life insurance contract is decided by the local law of the state where the insured was domiciled at the time he applied for the policy.²⁹¹ In *Nelson*, the company that issued the policy had been doing business in Missouri and the insured had

applying section 188; nevertheless, if the court had properly followed the Second Restatement, it would have applied section 196 to the issue at hand.

281. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 (1971).

282. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332 (1934).

283. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192 (1971).

284. *Id.* § 193.

285. *Id.* § 194.

286. See *Nelson v. Aetna Life Ins. Co.*, 359 F. Supp. 271 (W.D. Mo. 1973); *Foam-Tex Industries Inc. v. Relaxaway Corporation*, 358 F. Supp. 8 (E.D. Mo. 1973); *Moss v. National Life and Accident Ins. Co.*, 385 F. Supp. 1291 (W.D. Mo. 1974). Of these three cases, *Nelson* is the most often cited.

287. 359 F. Supp. 271, 284 (W.D. Mo. 1973).

288. *Id.* at 284-96.

289. 439 S.W.2d 173 (Mo. 1969).

290. *Id.* at 286.

291. *Id.* at 290-91.

been domiciled at all times in Missouri.²⁹² The insurance company claimed that the policy had been delivered to his employer in Tulsa, Oklahoma, and that the policy contained a provision stating that the policy should be construed according to the laws of the jurisdiction where it was delivered.²⁹³

The insurance company sought to have Oklahoma law applied because under Oklahoma law it would not have to pay benefits to the beneficiary of the policy because the beneficiary's death resulted from suicide.²⁹⁴ The beneficiary claimed that the insured was insane at the time he committed suicide and argued that Missouri law should be applied because the insured had been domiciled in Missouri when he applied for the life insurance policy.²⁹⁵ Under Missouri law, "in all suits upon life insurance policies issued by any company doing business in Missouri to a citizen of Missouri 'it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void.'"²⁹⁶ The *Nelson* court, following the Second Restatement, agreed with the beneficiary and applied Missouri law.²⁹⁷

Federal courts continued to apply the Second Restatement to insurance contracts throughout the 1970s. Then in 1980, the Missouri Supreme Court finally addressed whether Missouri followed the Second Restatement with regard to insurance contracts. In *Miller v. Home Insurance Co.*,²⁹⁸ a widow was attempting to collect a \$50,000 death benefit as designated beneficiary of an insurance policy issued by the Home Insurance Company to her husband's long time employer.²⁹⁹ The decedent had resided in Alabama and died, by suicide, in Alabama.³⁰⁰ He had worked as the Southeastern Regional Sales Manager for A.P. Green Refractories Company ("A.P. Green").³⁰¹ A.P. Green was headquartered in Mexico, Missouri "and it is undisputed that the policy was issued and apparently delivered to the company as the group policyholder at its home office in Mexico."³⁰² The policy excluded from coverage "intentionally self-inflicted injuries suicide or any attempt threat, while sane or insane (in Missouri, while sane)."³⁰³ Under Alabama law, suicide

292. *Id.* at 273, 290, 296.

293. *Id.* at 273.

294. *Kennedy*, 439 S.W.2d at 274.

295. *Id.* at 290.

296. *Id.*

297. *Id.* at 296.

298. 605 S.W.2d 778 (Mo. 1980).

299. *Id.* at 779.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Miller*, 605 S.W.2d at 779.

exclusions were valid; however, under Missouri law the court would have to decide whether suicide while sane fell within the meanings of the issued policy.³⁰⁴

In determining which law to employ, the Missouri Supreme Court stated that it had consistently adhered to the *lex loci contractus* analysis in determining which law to apply to contracts of insurance.³⁰⁵ The court specifically rejected employing significant contacts analysis of the Second Restatement.³⁰⁶ Applying the law of the First Restatement, the court held that Missouri law controls because that was where the master policy was delivered.³⁰⁷ The court then concluded that under Missouri law suicide while sane was not a covered risk within the group insurance policy at issue.³⁰⁸

The very next year, in *Ryder Truck Rental, Inc. v. United States Fidelity and Guaranty Co.*,³⁰⁹ a federal district court held that Missouri courts employ the Second Restatement for resolving choice of law issues in insurance contract cases.³¹⁰ Several years later, the Missouri Supreme Court once again addressed whether it applied the First or Second Restatement to insurance contracts in *State Farm Mutual Automobile Insurance Co. v. MFA Mutual Insurance Co.*³¹¹

In *State Farm*, a Missouri resident was a passenger in a vehicle being driven by another Missouri resident.³¹² The passenger and driver were both injured in a collision with an uninsured motorist in Illinois.³¹³ The passenger had MFA insurance and the driver had State Farm insurance.³¹⁴ Each of the policies contained uninsured motorist coverage in the amount of \$10,000 as was required by Missouri law at that time.³¹⁵ State Farm settled with the passenger and brought suit against MFA seeking a declaration that MFA,

304. *Id.*

305. *Id.* (citing *Whited v. National Western Life Ins. Co.*, 526 S.W.2d 364, 368 (Mo. Ct. App. 1975); *Bearup v. Equitable Life Assurance Soc'y*, 172 S.W.2d 942, 946 (1943); *Fields v. Equitable Life Assurance Soc'y*, 118 S.W.2d 521, 523 (Mo. Ct. App. 1938); *Lukens v. International Life Ins. Co.*, 191 S.W. 418, 419 (1917), *appeal dismissed* 248 U.S. 596 (1919)).

306. *Id.* at 780.

307. *Id.*

308. *Miller*, 605 S.W.2d at 780. *But cf.* *Buck v. American States Life Ins. Co.*, 723 F. Supp 155, 158 n.1 (E.D. Mo 1989) (the federal court limits *Miller's* holding to group insurance contracts); *Baxter Int'l, Inc. v. American States Ins. Co.*, 976 F.2d 1189, 1195 (8th Cir. 1992) (holding the 8th Circuit will apply the Restatement in contract cases).

309. 527 F. Supp. 666 (E.D. Mo. 1981).

310. *Id.* at 670-71 (citing *Havenfield Corp. v. H. & R. Block*, 509 F.2d 1263 (8th Cir. 1975)).

311. 671 S.W.2d 276 (Mo. 1984). *Cf.* *Brown v. Home Ins. Co.*, 176 F.3d 1102, 1107-08 (8th Cir. 1999).

312. *State Farm Mutual Auto. Ins. Co.*, 671 S.W.2d at 277.

313. *Id.*

314. *Id.*

315. *Id.*

under Missouri case law, was required to contribute two-thirds of the settlement.³¹⁶ MFA claimed that Illinois law should apply because “the accident occurred in Illinois, the uninsured motorist resided in Illinois, and the uninsured vehicle was registered in Illinois.”³¹⁷ The Missouri court held that Missouri law should apply and the court reasoned:

Missouri law, rather than Illinois law, clearly applies. The respondent, MFA, argues that the more “significant contacts” are found in Illinois. Even if this analysis is appropriate, however, the question is not so much one of the number of contacts but rather of their relative significance. This case involves contractual provisions mandated by Missouri statute. The public policy underlying the statute is strong.³¹⁸

This explanation seems to lack clarity, but the court clearly did not apply the Second Restatement, thereby seemingly validating *Miller*.

In *Perkins v. Philadelphia Life Insurance Co.*,³¹⁹ the court evaluated whether an insurer had to pay the beneficiary of the life insurance policy after the insured committed suicide.³²⁰ In so deciding, the *Perkins* court stated that Missouri utilizes *lex loci contractus* analysis when determining which law applies in insurance contract suits.³²¹ Hence, the court concluded that since the policy was executed in Missouri and the insured was a resident of Missouri that the insured’s alleged suicide was no defense to payment under state statute.³²²

Even in light of *Miller*, *State Farm* and *Perkins*, Missouri appellate courts have continued to apply the Second Restatement to insurance contract conflicts issues.³²³ The first Missouri appellate court to do so hold was *Crown Center*

316. *Id.* (citing *Midwest Mutual Ins. Co. v. Aetna Cas. & Surety Co.*, 565 S.W.2d 711 (Mo. Ct. App. 1978).

317. *State Farm Mutual Auto. Ins. Co.*, 671 S.W.2d at 277.

318. *Id.* (citation omitted).

319. 586 F. Supp. 296 (W.D. Mo. 1984), *aff’d*, 755 F.2d 632 (8th Cir. 1984).

320. *Id.*

321. *Id.*

322. *Id.* The Missouri state statute addressing this is section 376.620 of the Missouri Revised Statutes. Section 376.620 provides:

In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide . . . and any stipulation in the policy to the contrary shall be void.

R.S.Mo. § 376.620.

323. *See, e.g.*, *Crown Center Redevelopment Corp. v. Occidental Fire & Cas. Co. of North Carolina*, 716 S.W.2d 348, 357 (Mo. Ct. App. 1986); *Protective Cas. Ins. Co. v. Cook*, 734 S.W.2d 898, 905 (Mo. Ct. App. 1987); *Frost v. Liberty Mut. Ins. Co.*, 828 S.W.2d 915, 920 (Mo. Ct. App. 1992); *Hartzler v. American Family Mut. Ins. Co.*, 881 S.W.2d 653 (Mo. Ct. App. 1994). For federal courts applying the Second Restatement to insurance contracts, *see, e.g.*, *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 177-78 (W.D. Mo. 1986); *Davidson & Schaaff, Inc. v. Liberty Nat’l Fire Ins. Co.*, 69 F.3d 868, 869 (8th Cir. 1995).

Redevelopment Corp. v. Occidental Fire & Casualty Co. of North Carolina.³²⁴ In this case, Crown Center, a wholly owned subsidiary of Hallmark, entered into an agreement with Hyatt Corporation for the construction of a hotel.³²⁵ The agreement provided that Crown Center would design, construct, and finance the hotel on property owned by it while Hyatt would manage the hotel upon its completion in exchange for a share of the hotel's gross receipts.³²⁶ Pursuant to the agreement, Crown Center was to maintain comprehensive general liability insurance on the hotel from its opening date and continuing for thirty years.³²⁷ Crown Center obtained a line of insurance with various insurance agencies.³²⁸ Hallmark, Crown Center, and Hyatt were covered under the various insurance policies.³²⁹

In 1981, two elevated skywalls in the lobby of the Hyatt Regency Hotel collapsed, and over 100 people were killed and over 200 others injured.³³⁰ Numerous claims were subsequently filed against Hallmark, Crown Center, and Hyatt, and these companies notified their insurers.³³¹ Two of the insurance companies argued that Illinois law, not Missouri law, should be applied because Hyatt and one of the insurance companies were Illinois companies and the contract was made in Illinois.³³²

The *Crown Center* court, in addressing this argument, first stated that the parties did not stipulate whose laws would apply and, therefore, found that sections six, 188, and 193 of the Second Restatement should be applied to the insurance contract conflicts issue. In so finding, the court noted that courts in Missouri have followed the Second Restatement in contracts conflicts actions,³³³ and, therefore, held that "[i]f section 188 is not adopted by

324. 716 S.W.2d 348 (Mo. Ct. App. 1986). This decision was handed down in July of 1986. In *United States v. Conservation Chemical Co.*, 653 F. Supp. 152 (W.D. Mo. 1986), the federal district court held that Missouri courts followed the Second Restatement with respect to insurance contracts. *Id.* at 175. The *Conservation Chemical Co.* court completely ignored *Miller, State Farm*, and *Perkins*. Instead, to support its proposition, the court cited to *Havenfield v. H. & R. Block*, 509 F.2d 1263, 1267 (8th Cir. 1975); *Ryder Truck Rental v. Fidelity & Guar. Co.*, 527 F. Supp. 666, 670-71 (E.D. Mo. 1981); *Young v. Fulton Iron Works Co.*, 709 S.W.2d 927 (Mo. Ct. App. 1986); *Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 102 (Mo. Ct. App. 1978); *Conservation Chemical*, 653 F. Supp. at 175.

325. *Crown Center*, 716 S.W.2d at 350.

326. *Id.*

327. *Id.*

328. *Id.* at 350-51.

329. *Id.*

330. *Crown Center*, 716 S.W.2d at 352.

331. *Id.*

332. *Id.* at 357-58.

333. *Id.* at 358 (citing *Brown v. Brown*, 678 S.W.2d 831, 833 (Mo. Ct. App. 1984) ("Missouri employs the criteria found in section 188"). *Nakao v. Nakao*, 602 S.W. 2d 223, 226 (Mo. Ct. App. 1980) ("Missouri uses the criteria found in section 188"); *Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1267 (8th Cir. 1975); *National Starch and Chem. Corp. v. Newman*, 577

implication, this court now adopts sections 188 and 193 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS in casualty insurance cases.”³³⁴ Next, the *Crown Center* court, applying section 193, stated that a court must apply the law of the location of the insured risk.³³⁵ In this case, the location of the insured risk was the Kansas City Hyatt Regency located in Missouri.³³⁶ Therefore, the *Crown Center* court concluded that Missouri law should be applied.³³⁷

Numerous other courts have followed *Crown Center* and have applied the Second Restatement to insurance contract conflicts issues.³³⁸ For instance, in *Hartzler v. American Family Mutual Insurance Company*,³³⁹ the plaintiff, a Kansas resident, contracted in Missouri to insure a vehicle that was registered and garaged in Kansas.³⁴⁰ The contract included an anti-stacking provision.³⁴¹ The plaintiff was later involved in an accident with a negligent Kansas driver.³⁴² When the plaintiff filed a claim under her policy’s uninsured motorist provision, the insurer deducted sums already paid by negligent driver’s insurance company; and therefore, the Kansas resident was not fully compensated.³⁴³

The Kansas resident subsequently claimed that she could stack her policy’s uninsured motorist coverage with another American Family uninsured motorist policy that the plaintiff carried on another vehicle.³⁴⁴ If Missouri law was applied, the plaintiff could recover;³⁴⁵ however, if Kansas law was applied, the plaintiff could not recover due to Kansas’ anti-stacking provision.³⁴⁶ Following the Second Restatement, the *Hartzler* court concluded that Kansas law would control because it was the principle location of the insured risk; and, as a result, the plaintiff lost.³⁴⁷

S.W.2d 99, 102 (Mo. Ct. App. 1978); *Am. Inst. of Mktg. Sys., Inc. v. Brooks*, 469 S.W.2d 932, 936 (Mo. Ct. App. 1971)).

334. *Id.* The *Crown Center* court failed to mention *Miller* or *State Farm*.

335. *Crown Center*, 716 S.W.2d at 358-59 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 193 cmt. b (1971)). The court also noted that comment f to section 193 of the Second Restatement on Conflicts provides that when an insured is covered in numerous states the Restatement would treat each insured risk separately and would apply the law of the state where the risk is located. *Id.*

336. *Id.* at 359.

337. *Id.*

338. *See supra* note 310.

339. 881 S.W.2d 653 (Mo. Ct. App. 1994).

340. *Id.* at 654.

341. *Id.* at 654 n.1.

342. *Id.*

343. *Id.*

344. *Hartzler*, 881 S.W.2d at 654 n.1.

345. *Id.*

346. *Id.*

347. *Id.* at 656.

Missouri appellate courts and federal courts sitting in diversity in Missouri, save one, have consistently applied the Second Restatement to insurance contract conflicts. The Missouri Supreme Court failed to apply the Second Restatement to insurance contract conflicts in the early 1980s, and the court has since declined to address the issue. This commentator encourages Missouri courts to continue applying the Second Restatement to insurance contract conflicts because the First Restatement is not flexible enough to accommodate the practical realities of modern commercial business enterprises. Indeed, the Missouri Supreme Court, in *Kennedy v. Dixon*, recognized that the First Restatement's tort conflicts rules were not flexible enough to accommodate the mobility of modern society, and it is hoped that the court will soon recognize that the First Restatement's insurance contract rules are not flexible enough to accommodate modern business practices.

V. CONCLUSION

Missouri courts, while declaring that they adhere to the Second Restatement in tortious and contractual conflicts cases, have failed to fully follow its dictates. When courts do not adhere to established tests, their decisions create precedent that is seemingly illogical and unwieldy. In today's legal world, this lack of coherent precedent heightens the probability that an unpredictable result might ensue when litigating a conflicts issue. It is imperative that courts adhere to a set of well- documented tests, and if such occurs, predictability of result will follow. Without predictability, a lawyer's ability to plan strategically for litigation will be impaired. Moreover, the cost and time of litigation will substantially increase.³⁴⁸ This article advocates that Missouri courts should follow the dictates of the Second Restatement where possible and established precedent where not.

When applying the Second Restatement to tortious issues, Missouri courts should follow the Missouri Supreme Court's decision in *Kennedy v. Dixon*,³⁴⁹ and apply section 145 and the interest analysis subsections of section six.³⁵⁰ It is important that Missouri courts apply the interest analysis subsections of section six because it gives courts an opportunity to apply the law of the jurisdiction that has the greatest interest in the conflict. If, when employing interest analysis, a court finds that a true conflict exists, Missouri courts should follow the Missouri Supreme Court's decision in *Broglin v. Nangle*³⁵¹ and

348. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16-17 (1984) (discussing how certainty of outcome can decrease the costs of litigation); Larry Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 253-54 (1992) (arguing that uncertainty about choice-of-law increases costs and frequency of litigation and may increase a party's gains from litigating rather than settling).

349. 439 S.W.2d 173 (Mo. 1969) (en banc).

350. *Id.* at 180-81, 184.

351. 510 S.W.2d 699 (Mo. 1974) (en banc).

reevaluate the conflict to determine whose laws should be applied. In reevaluating the laws, courts are once again given the opportunity to apply the laws of the jurisdiction that has the greatest interest in the conflict.

When applying the Second Restatement to contractual issues, Missouri courts should uphold contracting parties choice of forum provisions unless the forum chosen has no substantial relationship to the parties or unless the designation is contrary to the public policy of a jurisdiction which has a materially greater interest in the transaction. Then, if a presumptive measure of the Restatement is implicated, the court should follow the rules set forth by the Restatement unless another state has a substantially greater interest. In determining whether another state has a substantially greater interest, Missouri courts should employ section 188 and the interest analysis subsections of section six. Finally, if the contract does not fall within one the courts presumptive measures, then a court should apply section 188 and the interest analysis subsections of section six. The application of interest analysis for conflicts should follow *Kennedy* and for true conflicts should follow *Broglin*. Such application should allow courts the room to evaluate each state's respective policies and should give them the opportunity to apply the law of the jurisdiction that has the greatest interest in the conflict.

If Missouri courts follow these rules, there will be a higher level of uniformity, consistency, and certainty in conflicts cases. This will create the sound and logical precedent that is tantamount to establishing predictability in conflicts. In Missouri, at least, if the courts follow these guidelines, judges should be able to develop a set of decisions which are discernible and reflective of a core set of conflicts principles. As a result, judges will gradually become less apprehensive when confronted with conflicts issues, and lawyers will have to spend less time and money confronting conflicts issues.

