



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

7-2004

False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws

James P. George

Texas A&M University School of Law, pgeorge@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law Commons](#)

Recommended Citation

James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 Rev. Litig. 489 (2004).

Available at: <https://scholarship.law.tamu.edu/facscholar/209>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws

James P. George*

I.	INTRODUCTION	490
II.	THE TEXAS STUDY	493
III.	A PUNCTUATED HISTORY OF CONFLICTS LAW IN AMERICA AND IN TEXAS.....	498
	A. <i>Three Distinct Choice-of-Law Systems</i>	502
	1. <i>Lex Locus</i> , Vested Rights, and the First Restatement.....	502
	2. Currie's Governmental-Interest Analysis	511
	3. The Second Restatement of Conflict of Laws	519
	B. <i>Choice of Law in Texas</i>	527
IV.	POST-GUTIERREZ MISUSE OF INTEREST ANALYSIS IN TEXAS ..	531
	A. <i>Texas State Courts</i>	534
	1. The Texas Supreme Court.....	534
	a. <i>Duncan v. Cessna Aircraft Co.</i>	535
	b. <i>Torrington Co. v. Stutzman</i>	543
	2. The Texas Courts of Appeals.....	547
	a. <i>Texas Commerce Bank National Ass'n v.</i> <i>Interpol 80 L.P.</i>	547
	b. <i>American Home Assurance Co. v. Safway</i> <i>Steel Products Co., Inc.</i>	549
	c. <i>Trailways, Inc. v. Clark</i>	552
	d. <i>Vizcarra v. Roldan</i>	554
	e. <i>Ford Motor Co. v. Aguiniga</i>	556
	f. <i>In re Estate of Garcia-Chapa</i>	556
	B. <i>The Federal Courts</i>	557
	1. The Fifth Circuit Court of Appeals.....	558
	a. <i>Transco Leasing Corp. v. United States</i>	558
	b. <i>Coakes v. Arabian American Oil Co.</i>	559

* Professor of Law, Texas Wesleyan University School of Law. The author thanks Professors Anna Teller and Wendy Law, Associate Dean Susan Phillips, and law student Burt Harrison for significant research and editing help; Pat Borchers, Bill Reynolds, Symeon Symeonides, and Ralph Whitten for their listening and direction; and especially Russell Weintraub for his help in a project reaching a conclusion he does not share. The author also thanks Dean Richard Gershon for a generous writing grant and other support.

c.	Mitchell v. Lone Star Ammunition, Inc.....	561
d.	Albany Insurance Co. v. Anh Thi Kieu	562
e.	Pruitt v. Levi Strauss & Co.....	563
f.	Huddy v. Fruehauf Corp.	565
g.	DeAguilar v. Boeing Co.	567
h.	<i>In re</i> Air Disaster at Ramstein Air Base, Germany.....	570
2.	Texas Federal District Courts	572
a.	Baird v. Bell Helicopter Textron	572
b.	Faloon v. Hustler Magazine, Inc.....	574
c.	Tidelands Royalty B Corp. v. Gulf Oil Corp....	576
d.	Abston v. Levi Strauss & Co.	576
e.	Adams v. Gates Learjet Corp.....	578
f.	<i>In re</i> Chanel Financial, Inc.	579
g.	Hefner v. Republic Indemnity Co. of America.	581
h.	Grynberg Production Corp. v. British Gas, P.L.C.....	583
i.	Elvis Presley Enterprises, Inc. v. Capece	584
V.	RECOMMENDATIONS	585
	APPENDIX A	588
	APPENDIX B	602

Moving from puritanic rigidity to psychedelic abandon, the conflict of laws . . . has once again been led into a dead-end alley. The harsh conceptualism that Cardozo described [in the vested rights system] has been replaced by shallow sophistry. Currie's theories and terminology pervade American conflicts jurisprudence to such an extent that it may not be possible to discard them without a change of our legal language.¹

I. INTRODUCTION

The Second Restatement of Conflict of Laws² has the irony of dominating the field while bewildering its users.³ The result is a set of

1. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 50 (1984).

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

3. As of 2003, twenty-four states use the Second Restatement for choice of law in contract cases, and twenty-one use it for torts. See Symeon C. Symeonides, *Choice of*

choice-of-law decisions so lacking in uniformity that the Second Restatement's balancing test has become chimeric, taking on vastly different forms in different courts.⁴ Erratic applications may be partly due to its code-like function, which can require the application of two or more black letter sections, each with multiple analytical steps.⁵ Critics also point to the political and academic compromises that pervaded the American Law Institute's drafting process for this project, leading to ambiguity in some sections.⁶ But a far larger problem in state and federal courts throughout the United States is significant deviation from the Second Restatement's multifactor test to single-factor tests, directly caused by the persistence of two radically different methodologies—the First Restatement's territorially fixed *lex locus* test and Brainerd Currie's governmental-interest analysis. Scholars surveying this phenomenon have reported, on the one hand, cases

Law in the American Courts in 2002: Sixteenth Annual Survey, 52 AM. J. COMP. L. 1, 4 (2004) (noting the continuing accuracy of the choice-of-law tables published in EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 14 (3d ed. Supp. 2001)). None of the other four choice-of-law methods currently adopted in the United States approach this level of acceptance, as the Scoles treatise's pie graphs demonstrate. EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 11-12 (3d ed. Supp. 2001). But these charts measure only official adoptions. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 214 n.3 (3d ed. 2003) (stating that the number of official adoptions understates the Second Restatement's influence as persuasive authority in states using other methods and in federal courts applying federal choice-of-law rules). For discussions of its confounding nature and other criticisms, see generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 7-8, 357-59, 460-64 (4th ed. 2001); Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248 (1997) [hereinafter Symeonides, *Judicial Acceptance*]; Russell J. Weintraub, "At Least, To Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?, 56 MD. L. REV. 1284 (1997) [hereinafter Weintraub, *Hippocratic Standard*]. See also *infra* notes 132-99 and accompanying text.

4. See RICHMAN & REYNOLDS, *supra* note 3, at 238 and sources cited therein (discussing the varied application of the Second Restatement in different courts).

5. See, e.g., *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-80 (Tex. 1990) (applying Second Restatement §§ 187, 188, and 196 in a contract dispute to determine that Texas law would apply because Texas has a materially greater interest in the case at bar than Florida).

6. RICHMAN & REYNOLDS, *supra* note 3, at 205-06 n.4. This is a mild statement of criticism of the Second Restatement. See, e.g., Symeonides, *Judicial Acceptance*, *supra* note 3, at 1249-50 n.3 (citing criticism of the Second Restatement for compromising too much between conflicting philosophers and being "too vague, exceedingly elastic, unpredictable, directionless, and rudderless"). See also *infra* notes 195-218 and accompanying text (discussing the development of choice-of-law analysis in Texas).

limited to contact counting that mimic the First Restatement, and, on the other, cases relying too heavily or even entirely on perceived governmental interests.⁷ But no long-term study has yet measured this error in the controlled setting of a single state.

Second Restatement adoptions necessarily assume different forms in different states, even without aberrational applications. To avoid inappropriate comparisons, a study is best focused on a single state large enough to produce a sample. This Article quantifies the deviations by examining Texas practice in the twenty-four years from Texas's 1979 adoption of the Second Restatement's most-significant-relationship test for tort cases. As the most populous state using the Second Restatement for both tort and contract cases, Texas may be the ideal laboratory.⁸ Because the contact-counting deviation is simply detected and clearly inappropriate under the Second Restatement, those cases in which contact counting is employed are merely listed.⁹ The study accordingly focuses on the more complicated task of isolating the Currie-inspired misapplications.

In spite of drafting compromises and some aberrational applications, the Second Restatement's balancing approach works when properly applied, as the majority of Texas courts have done.¹⁰ This study of misapplications is meant to improve choice-of-law analyses, and, in the longer term, underscore the need for fine tuning the choice-of-law test in the courts, the legislature, or the American Law Institute.

7. See RICHMAN & REYNOLDS, *supra* note 3, at 214-16 and sources cited therein (discussing cases that require only a weighing of state interests and decide by "crude contact counting"); Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997) (mentioning commentators who have noted courts applying the "better rule of law"); Weintraub, *Hippocratic Standard*, *supra* note 3, at 1289-90 (citing cases in which contacts were counted).

8. New York and California use other choice-of-law tests, and Florida uses the Second Restatement only for torts. Illinois and Ohio are the other populous states using the Second Restatement for both torts and contacts. See SCOLES, *supra* note 3, at 85 (listing states and their choice-of-law methodologies).

9. See *infra* note 191 (listing twelve contact-counting cases decided in Texas courts applying the Second Restatement).

10. See *infra* note 160 (listing well-reasoned Texas state and federal decisions applying the Second Restatement). An especially good example is *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53-57 (Tex. 1991), discussed *infra* notes 163-77.

II. THE TEXAS STUDY

Texas state and federal courts apply the wrong choice-of-law test one out of five times. This is not to say that they apply the test wrong—they sometimes do—but that they apply the wrong test. In 21.01% of the civil cases invoking the most-significant-relationship test, Texas courts are applying the Currie governmental-interest analysis or some aspect of it. Some may perceive these tests as eclectic and believe that mixing them to fit the occasion is appropriate. But in chemistry, cooking, and conflicts law, some formulas do not mix.¹¹ Although the Second Restatement is itself eclectic, it is incompatible with the governmental-interest analysis developed by Brainerd Currie and others. The biggest difference is that in Currie's approach, speculative governmental interests drive the analysis, while under the Second Restatement, governmental interests are merely a factor—albeit an important one—to be balanced against several others. In its pure form, Currie's obtuse method is used in only three states, and there only for tort issues.¹²

The best example of their incompatible differences is the *false conflict*. Under Currie's approach, a false conflict occurs when the court determines that only one state has a true interest in the dispute.¹³ That determination ends the analysis; and the interested state's law is

11. Robert Lefflar wrote of the "current American eclecticism." ROBERT LEFLAR, ET AL., *AMERICAN CONFLICTS LAW* 391-93 (4th ed. 1986). But it has been a current phenomenon at least since Beale's time. See generally Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 1, 79 (1909) (setting out the rules of each state regarding what law governs the validity of a contract). See also SCOLES, *supra* note 3, at 79-83, 687 (noting the lack of certainty in the law in many states and citing specific examples). For a criticism of eclecticism, see William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983) (calling most examples of eclecticism deplorable).

12. California, New Jersey, and the District of Columbia currently use interest analysis as their common-law choice-of-law rule for tort cases. SCOLES, *supra* note 3, at 85. In addition, the Scoles treatise reports that nine states follow a "combined approach"—three for contracts only and six for contracts and torts—that can include interest analysis (as a test and not merely as a factor), and some states purporting to use the Second Restatement are in fact applying a "grouping of contacts" approach; others apply a restrained interest analysis. SCOLES, *supra* note 3, at 82. In a separate study, Scoles's co-author, Patrick Borchers, has reported that four states—California, Hawaii, Massachusetts, and New Jersey—use Currie's interest analysis. Patrick J. Borchers, *Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 350, 373 (1992).

13. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107 (1963).

applied.¹⁴ The Second Restatement does not use this term at all and does not recognize the concept of governmental interests as dispositive, except for a few procedural¹⁵ and property¹⁶ issues. In the vast majority of most-significant-relationship applications, a state's lack of interest would merely decrease the likelihood of its law's selection. Currie's false conflict cannot be grafted onto a Second Restatement analysis without defeating the latter's essential function.

A second example of incompatibility relates to the interests themselves. Because Currie's approach turns on interest analysis,¹⁷ it depends on the court's ability to ascertain the applicable governmental interests of its own state and others, and to do so in every conflict-of-laws setting. The Second Restatement, on the other hand, does not require interest analysis when no discernable interests exist; its other factors then provide the solution.

The practice produces as much irony as error. Some courts using the wrong test apply it correctly and produce a fair result, at least to the extent that a pure interest analysis is capable of a fair result. Conversely, some courts applying the right test do it so poorly that the result is bad, or at least doubtful. The Second Restatement is far from perfect and is to blame for some of the misdirection. More blameworthy is Texas's seminal choice-of-law decision—*Duncan v.*

14. *Id.*

15. For most procedural issues, the Second Restatement mandates forum law. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) (stating the general rule of forum law governing procedural issues). One exception is exemption from judgment execution, for which the Second Restatement presumes the application of forum law “unless another state, by reason of such circumstances as the domicile of the creditor and the debtor within its territory, has the dominant interest in the question of exemption.” *Id.* § 132. *See Bergman v. Bergman*, 888 S.W.2d 580, 585 (Tex. App.—El Paso 1994, no writ) (applying this rule and finding that Texas law governs). Similarly, for the issues of burden of proof, the burden of going forward with the evidence, and presumptions, the Second Restatement provides that forum law applies “unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 133-34. Although governmental interest is not identified here, the *primary purpose* wording and the clause's dispositive nature fit it neatly into governmental interest analysis.

16. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223. Comment *b* discusses *dominant interest* as an apparently dispositive factor for the law governing the validity and effect of land conveyances, although the black-letter language does not use that term or mention interest analysis. *See Pellow v. Cade*, 990 S.W.2d 307, 314 (Tex. App.—Texarkana 1999, no pet.) (applying Second Restatement comment *b*'s dominant interest test).

17. CURRIE, *supra* note 13, at 107.

*Cessna Aircraft Co.*¹⁸—one of only two Texas Supreme Court cases employing aspects of Currie’s interest analysis.

This Article examines the phenomenon in twenty-five Texas-based cases using aspects of Currie’s formula, ranging from a pure interest analysis to a lesser borrowing of concepts and vocabulary. By “borrowing of concepts and vocabulary,” I do not mean that every use of governmental interest was counted here as a Currie example. To the contrary, a proper Second Restatement analysis should consider any governmental interests at stake. Rather, this critique is limited to cases that use governmental-interest analysis as the choice-of-law test rather than as a factor, as explained below.¹⁹

Part II defines the scope and methodology of this study. Part III is a brief history of American and Texas conflicts law, highlighting three choice-of-law systems pertinent to current Texas usage—the “traditional” *lex locus* system, Currie’s interest analysis, and the Second Restatement’s most-significant-relationship test. Part IV examines the twenty-five Currie-leaning cases, organized by court system and starting with the Texas Supreme Court. Part V reiterates four points established in this study and recommends a proper use of interest analysis in a Second Restatement framework.

Terminology is important in this discussion. Indeed, the misuse of terminology is endemic to conflicts law and is one of the fallacies committed in some cases discussed here. The following terms and their precise meanings, as I am using them, are central to this article and are arranged here not in alphabetical order, but in conceptual succession.

<u>Term</u>	<u>Meaning</u>
State	refers to a sovereign entity (the United States, Mexico), or subdivision (Texas, Nuevo Leon) with legislative authority. ²⁰
Foreign law	means any law other than forum law. For

18. 665 S.W.2d 414 (Tex. 1984).

19. See *infra* Part IV.A.2.b (discussing *Am. Home Assurance Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693 (Tex. App.—Austin 1987, writ denied)).

20. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (defining *state* as “a territorial unit with a distinct general body of law”). I modified that definition somewhat to emphasize subordinate states in a federal system and to make the point that the conflicting law may come from a co-equal subordinate state (Oklahoma), from another sovereign nation (Canada), or from a subordinate unit of that sovereign (Ontario).

American states, the term *foreign law* does not include federal law because conflicts between state and federal law are governed by different choice-of-law tests not discussed in this Article.

- Choice of law** is used interchangeably in this Article with *conflict of laws* and means the court's act of selecting the applicable law in a given case. It does not refer to choices made by parties, which may not be valid choices from the court's perspective.
- Comity** is a discretionary doctrine of the common law and international law by which one state will honor the substantive laws, judgments, or official requests of another state.²¹
- Lex locus* test** refers to the choice-of-law process promoted by Story²² and Beale²³ that chooses the

21. See, e.g., *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (describing comity as "the voluntary act of the nation by which it is offered" that "contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong"). See also *Hilton v. Guyot*, 159 U.S. 113 (1895) (using comity as the basis for recognition of foreign judgments).

22. Joseph Story—Harvard law professor and Supreme Court justice—wrote what functioned as the First Restatement's precursor. See generally JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed. 1841). Story's treatise was the English language's first comprehensive look at the subject, and it guided American, English, and, to some extent, European courts, with an influence that lends irony to his reduction to a footnote in any history of conflicts. See SCOLES, *supra* note 3, at 18-20 (describing Story's early influence on the subject of conflicts of law). Story's system used *lex locus* concepts, and although it clearly laid the groundwork for vested rights, it instead subscribed to a much less rigid notion of comity as its legal justification. Early Texas cases relied on Story. E.g., *Huff v. Folger, Lamb & Co.*, Dallam 530, 531 (Tex. 1843) (citing Story's commentaries as the rule of decision); *Hays v. Cage*, 2 Tex. 501, 505 (1847) (citing Story throughout).

23. Joseph Beale's vested-rights theories dominated the first half of the twentieth century and remain an influence today. His three-volume conflicts treatise paralleled the First Restatement, for which he was Reporter or chief architect. Beale used Holmes's vested-rights notion to take Story's territorial concepts in a new direction. The premises were that: (1) law is territorial; (2) an obligation breached in one state creates a transitory claim that may be sued on in other states; and (3) law is territorial

governing law by the location of a specific event, such as the place of the injury. It is synonymous with *lex loci*, and intertwined with vested rights, although Story used it with comity.

First Restatement	refers to the RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).
Vested-rights doctrine	is the underlying theory in the First Restatement, holding that a plaintiff's claim arises when and where the last necessary element occurs, thus placing the claim under that territory's law.
Second Restatement	refers to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Judicial quotations also may use <i>Restatement</i> or <i>Restatement (Second)</i> to mean <i>Second Restatement</i> .
Most-significant-relationship test	refers to the Second Restatement's choice-of-law process in the absence of a controlling statute. In court usage, the term sometimes means only the Second Restatement section 6 and sometimes means a collection of sections working together. The latter meaning is more accurate.
Section _____	refers to sections in the Second Restatement.
Interest analysis	is synonymous with <i>state-interest analysis</i> and <i>governmental-interest analysis</i> , but its meaning beyond that is ambiguous and depends on the context. ²⁴ Its simplest meaning is the assessment of a given law's purpose and the extent to which that purpose can be

not in the sense of enforcing the right, but in the sense of creating the right when the operative events occurred. See generally JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAW (1935). See also SCOLES, *supra* note 3, at 20-22.

24. Peter K. Westen, *False Conflicts*, 55 CAL. L. REV. 74, 76-78 (1967) (noting that the term "false conflict" has at least seven meanings).

realized by application to a specific dispute. When used in reference to the Second Restatement, it is most often a factor to be balanced against other policies.²⁵ When used as a choice-of-law test (rather than as a factor), the term *interest* or *state interest* can also be a conclusion flowing from the various contacts in the case.

Other conflicts terms appear in the text and are defined there.

III. A PUNCTUATED HISTORY OF CONFLICTS LAW IN AMERICA AND IN TEXAS

Theoretical justification is a central issue in conflicts law. Why does one state apply another's law? Fairness? Party expectation? Consistency? Forum law's lack of extraterritorial effect? Because the other law is "better"? These questions lead to another: "Must the forum apply another law, and if so, why?" Due process?²⁶ Full faith and credit?²⁷ Comity?²⁸

25. In a few instances, the Second Restatement uses governmental interest as a strongly presumptive factor. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 cmt. b (determining damages for wrongful death). For a few property and procedural issues, governmental interest is a dispositive factor. *See supra* notes 15-16.

26. Due process would not dictate the application of another state's law, but merely the nonapplication of an unconnected state's law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985) (holding that Kansas court had proper jurisdiction over plaintiffs in class action because they were given a chance to opt out, but the court improperly applied Kansas law because state did not have significant contact with each class member).

27. *See id.* (explaining that a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere, and, thus, has no res judicata effect as to that party). On April 23, 2003, the Supreme Court appeared to overrule *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981), and to eliminate full faith and credit as a constitutional limit on choice-of-law analyses: "In light of this experience, we abandon the balancing of interests approach to conflicts of law under the Full Faith and Credit Clause." *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495 (2003). The ruling affirmed a Nevada Supreme Court opinion that allowed a Nevada resident to sue a California state tax agency under Nevada's relaxed immunity standards, rather than under California's complete immunity. Under the former precedent, states faced with choice-of-law questions were constitutionally required to assess the interests of the competing states and, at the very least, weigh

Attempting answers, conflicts law has undergone significant and sometimes volatile theoretical shifts from time to time, both in the

those interests in deciding which law to apply. California urged the Court to retain interest balancing at least where “core sovereignty” interests were at stake. The Court declined, pointing to the inherent difficulties in interest balancing: “Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States’ competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.” *Id.* at 499. The Court left considerable room in its analysis for refining this radical statement later, observing: “States’ sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a ‘policy of hostility to the public Acts’ of a sister State.” *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Of course, *Franchise Tax Board* affects only the Constitution’s role in choice of law and does nothing to undermine states’ continued use of interest analysis as a choice-of-law tool.

28. English scholar Albert Dicey pointed out that comity meant more than courtesy, and that the doctrine implied an obligation:

If on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the French Republic, then the term ‘comity’ is used to cover a view which, if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language. The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign of England or of any other sovereign to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.

A.V. DICEY, *CONFLICTS OF LAWS* 10-11 (5th ed. 1932), *quoted in* HERBERT F. GOODRICH, *CONFLICT OF LAWS* 8-9 (2d ed. 1938).

Times change, and a later version of Dicey reads:

It was at one time supposed that the doctrine of comity was a sufficient basis for the conflict of laws; and even today references to comity are sometimes found in English judgments. But it is clear that English courts apply *e.g.* French law in order to do justice between the parties, and not from any desire to show courtesy to the French Republic, nor even in the hope that if English courts apply French law in appropriate cases, French courts will be encouraged in appropriate cases to apply English law. Moreover, the doctrine of comity is quite irreconcilable with the application of the law of an enemy country in time of war, which is a commonplace when justice between the parties requires it.

A.V. DICEY & J.C.H. MORRIS, *CONFLICT OF LAWS* 6 (11th ed. 1987) (citations omitted).

United States and throughout the world.²⁹ The jurisprudential camps include the statisticians,³⁰ the territorialists,³¹ personal-law advocates,³² and forum-law hardliners who eschew the application of foreign law.³³ Additionally, two overlaying theories raise the issue to one of international law. The first is that choice of law should not be

29. See SCOLES, *supra* note 3, at 4-152 for a thorough historical account of these shifts.

30. SCOLES, *supra* note 3, at 10-18. Statisticians sought to resolve conflicting laws by distinguishing between real statutes that operated locally and personal statutes that had extraterritorial effect, at least for persons owing allegiance to that sovereign. Thus, a forum would apply its own real statutes but would apply the personal statute appropriate to each party. The system did not work. SCOLES, *supra* note 3, at 11 (noting drawbacks to the system).

31. Territorialism emphasizes where key events occurred and tends to be rule oriented rather than policy oriented. It is a feature of many conflicts theories, but vested rights may be its best example. See SCOLES, *supra* note 3, at 20-22 (noting that Beale's vested-rights theory was highly influential, if controversial, until the 1950s). Dutch scholar Ulrich Huber is an earlier example of territorialism without vested rights. See SCOLES, *supra* note 3, at 14-15 (describing Huber's idea of "comity," which was reinforced by Story's commentaries).

32. The personal-law theory is that laws regulating private conduct and relationships, such as spousal immunity or guest-host immunity, should follow the parties and should be applied in other states faced with that issue. See SCOLES, *supra* note 3, at 11-13 ("Real statutes were those that operated only within the territory of the enacting state and not beyond. In contrast, personal statutes operated beyond the territory of the enacting state and bound all persons that owed allegiance to it."). Fourteenth-century European statisticians subscribed to this view. See SCOLES, *supra* note 3, at 11-13 (discussing the significance of this theory and one of its early proponents, Bartolus of Sassoferrato, during the 1300s). But the personal-law concept was conceived long before in the Roman Empire. See STORY, *supra* note 22, at 1-7 (describing the Roman Empire's practice of permitting subjugated groups and cultures to maintain legal systems that applied only to that group). Personal-law advocates apply the theory objectively, both to forum residents and foreigners, but Currie had a special limited view of personal law (sometimes called "Currie's personal law view") that favored forum residents but discriminated against foreigners by not recognizing their personal laws. See SCOLES, *supra* note 3, at 37 nn.56-57 (citing John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 173-78 (1983)).

33. Currie's governmental-interest analysis is the best example of a forum-favoring choice-of-law rule. See SCOLES, *supra* note 3, at 704-09 (noting that Currie's approach leads to findings of false conflicts, in which case forum law will usually be applied, and of true conflicts, in which case forum law should always be applied). Another example is Texas under the dissimilarity doctrine, which allows a court to dismiss a case that would otherwise be governed by a foreign law dissimilar to the forum's law. See, e.g., *Slater v. Mex. Nat'l R.R.*, 194 U.S. 120, 127-30 (1904) (citing to Texas case law that deemed dissimilarities between Texas and Mexico law as too great to permit an action in Texas courts).

determined by each forum but instead by international conflicts rules that would uniformly determine which state's law governs.³⁴ The second dispenses with the need for conflicts rules and holds that matters transcending borders should be governed by laws that transcend borders. Although public international law has not generally concerned itself with private disputes, one exception is *lex mercatoria*, or law merchant, an ancient commercial law tied to no one state. It is used internationally and was used in the United States until the adoption of the Uniform Commercial Code.³⁵

History is important to conflicts practice. Attorneys wishing to challenge a court's choice-of-law approach would do well to begin at the beginning and to learn the lineage of these various choice-of-law methodologies. But that history is a bit too involved and too interwoven for this discussion. To understand the current problem in Texas, only three choice-of-law tests are important. The first is the vested-rights theory, best identified in case law by the *lex locus* terminology and "codified" in the First Restatement; the second is Currie's governmental-interest analysis; and the third is the Second Restatement's most-significant-relationship test. These methods are distinct in their underlying justifications, but they intersect in a few places, and the Second Restatement embraces some aspects of the other two tests. For example, familiarity with the First Restatement sheds light on the intent behind the Second Restatement. Similarly, governmental-interest analysis is the essential element in two of the seven balancing factors found in section 6 of the Second Restatement. On the other hand, the First Restatement and interest analysis have

34. See ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 75-107 (1967) (discussing a priori theory at length). See also SCOLES, *supra* note 3, at 41 & n.19 (citing Ehrenzweig).

35. See generally Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133 (2000) (analyzing the connection, if any, between *lex mercatoria* and private international law). For the point of *lex mercatoria*'s use in the United States until the adoption of the Uniform Commercial Code, see generally LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 97-102 (1983) (proposing that the legal diminution of the freedom to transfer across national boundaries undermines the autonomy of business obligations); Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 *passim* (1987) (discussing how Llewellyn's Sales Act, based in part on the merchant law and used as the initial draft of Articles 1 and 2 of the Uniform Commercial Code, has since been largely ignored); and Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351 *passim* (1983) (tracing the development of American commercial law).

absolutely nothing in common. This section briefly will outline these three methodologies, discussing their similarities, distinctions, and underlying philosophy. It will then illustrate the use of these methodologies in Texas courts up to Texas's adoption of the most-significant-relationship test, providing a foundation for Part IV, which will analyze Texas courts' misuse of interest analysis.

A. *Three Distinct Choice-of-Law Systems*

American courts have used at least three distinct choice-of-law approaches since colonial times, and those three can in turn be sub-categorized into many more.³⁶ Especially since the choice-of-law revolution began in the 1950s, judges and scholars have proposed a variety of choice-of-law approaches—some designed to cure specific ills in a particular predecessor method, and some touted as panaceas that would order the litigation universe and end the need for further discussion. This discussion will examine only the three most influential of those systems: the traditional *lex locus* system, Currie's governmental-interest analysis, and the Second Restatement.

1. *Lex Locus*, Vested Rights, and the First Restatement

As expressed in the First Restatement, the vested rights or *lex locus* system looks like this:

§ 377. The Place of Wrong

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

§ 378. The Law Governing a Plaintiff's Injury

36. The simplest classification of choice-of-law rules includes the territorialist *lex locus* system, the rule-selecting governmental-interest analysis, and the various balancing approaches such as the most-significant-relationship test. The Scoles treatise lists seven currently in use. See SCOLES, *supra* note 3, at 85 (setting out a table that shows the choice-of-law balancing approaches each state uses for both contract and tort law). If Story's more flexible version of *lex locus* is counted separately from Beale's vested-rights system, and if we attempt to catalogue the mix-and-match tendencies of American courts, then the most detailed enumeration of choice-of-law tests would at least be in the teens. See generally SCOLES, *supra* note 3, at 18-22, 79-83.

The law of the place of wrong determines whether a person has sustained a legal injury.

§ 384. Recognition of Foreign Causes of Action

- (1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.
- (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.³⁷

These choice-of-law rules for torts were not published in this form until 1934, but they reflect precedents dating back to 1802 in the United States,³⁸ and to the mid-eighteenth century in England.³⁹ *Alabama Great Southern Railroad Co. v. Carroll*,⁴⁰ a well-known example of the U.S. precedents, held that unfavorable Mississippi law

37. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377-78, 384 (1934). These few sections illustrate the First Restatement's content, but they do not begin to illustrate the detail that critics often ignore. For example, First Restatement § 379 addresses the "Law Governing Liability-Creating Conduct" and provides that "[e]xcept as stated in § 382, the law of the place of wrong determines: (a) whether a person is responsible for harm he has caused only if he intended it, (b) whether a person is responsible for unintended harm he has caused only if he was negligent, (c) whether a person is responsible for harm he has caused irrespective of his intention or the care which he has exercised." Section 382 provides exceptions for persons required by law to act or not to act, and persons who act under privilege. These sections and their comments are but some examples of the First Restatement's clarification not only of detail, but also of a nuance that might have produced better decisions had it been applied more carefully. This is not to say that vested rights is a good theory—only that the First Restatement was capable of better results than courts achieved with it.

38. See *McCandlish v. Cruger*, 2 S.C.L. (2 Bay) 377, 378 (S.C. Constitutional Ct. App. 1802) (applying the rule, drawn from English precedents, that when a contract is to be performed in a different jurisdiction than where it was made, the law of the place of performance governs, and thus applying "Carolina law" to this suit on a bill of exchange made in St. Croix).

39. See PETER M. NORTH & J.J. FAWCETT, *CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW* 17-19 (13th ed. 1999) (discussing England's development of conflicts law later than European countries, and citing to England's first conflicts cases: *Shelling v. Farmer*, 93 Eng. Rep. 756, 1 Stra. 646 (1725) (holding that actions on foreign real property were not litigable in England); *Pipon v. Pipon*, 88 Eng. Rep. 544 (1744) (explaining in dictum that intestate's personal property is distributed under the law of decedent's domicile at death, but resolving the case on other grounds); *Robinson v. Bland*, 96 Eng. Rep. 129, 2 Burr. 1077 (K.B. 1760) (concerning an English action on a French gambling debt)).

40. 11 So. 803 (Ala. 1892).

governed an Alabama railroad worker's crippling, job-related injury even though the employment relationship was centered in Alabama and the underlying negligence in linking rail cars had occurred there.⁴¹ The negligent linking could have failed at any point in the trip, but the fact that it occurred in Mississippi, which did not recognize fellow-servant liability, denied plaintiff's statutory Alabama remedy.⁴² Rejecting Carroll's argument that Alabama law should control as the situs of the negligence,⁴³ the court announced the rule that "there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received."⁴⁴

41. *Id.* at 803-05.

42. *See id.* at 805 (indicating that, because neither party offered any evidence of Mississippi law, the court presumed it to be the same as Alabama's common law, which did not recognize liability for fellow-servant injuries).

43. For a successful example of an argument that the law of the place of the negligent act should govern, see, e.g., *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950) (ruling that the law of the site of negligent aircraft repair governed). *See also* WEINTRAUB, *supra* note 3, at 346 n.2 (listing other cases). This solution may be what Justice Blackmun had in mind in his *Day & Zimmerman, Inc. v. Challoner* concurrence, in which he pointed out that the Supreme Court's per curiam instruction to apply the Texas choice-of-law rule on remand did not necessarily lead to Cambodian law; instead, it could result in the application of the law of Texas, where the malfunctioning ammunition was manufactured. 423 U.S. 3, 4 (Blackmun, J., concurring). On the other hand, Blackmun may have been anticipating the change in the Texas choice-of-law rule that came four years later in *Gutierrez v. Collins*, 583 S.W.2d 312, 312 (Tex. 1979).

44. *Carroll*, 11 So. at 807. In its supporting reasoning, the court offered a classic statement of the vested-rights theory:

Up to the time this train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue, the injury, without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired. Section 2590 of the Code of Alabama had no efficacy beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another state, so as to evolve out of them rights and liabilities which do not exist under the law of that state Where the facts occur in Alabama, and a liability becomes fixed in Alabama, it may be enforced in another state having like enactments, or whose policy is not opposed to the spirit of such enactments; but this is quite a different matter. . . . The negligent infliction of an injury here, under statutory circumstances, creates a right of action here, which,

Alabama Great Southern Railroad v. Carroll—rendered several years before the First Restatement but consistent with its rules—is a popular example of how unfair and absurd the vested-rights doctrine could be. This is not to suggest that all applications of the vested-rights doctrine produced bad results. Many cases were resolved with logical and predictable results.⁴⁵ But in certain fact patterns—such as when all parties were from one state, and the injury occurred in a second state—the vested-rights doctrine often yielded bad results.

California offers another example in 1958, just on the eve of the mid-century conflicts revolution. Plaintiff Rudolph Victor had ridden into Mexico—about twenty-six miles south of Tijuana—as the passenger of another California resident.⁴⁶ Their car collided with one driven by another Californian, John C. Sperry, and owned by yet another Californian, John M. Sperry (John C.’s father).⁴⁷ Victor was a house mover earning \$99 a week, but he had suffered spinal-cord damage and could no longer work.⁴⁸ Using California’s *lex locus* rule, the trial court applied Mexico’s lost-wage rule of \$2.00 a day.⁴⁹ The court rejected the only part of Mexican law that favored plaintiff, strict liability against the other car’s owner, because it violated California

being transitory, may be enforced in any other state or country the comity of which admits of it; but for an injury inflicted elsewhere than in Alabama our statute gives no right of recovery, and the aggrieved party must look to the local law to ascertain what his rights are. Under that law this plaintiff had no cause of action, as we have seen, and hence he has no rights which our courts can enforce, unless it be upon a consideration to be presently adverted to.

Id. at 806-07. The court also rejected the plaintiff’s argument that, because his employment contract with the railroad was made in Alabama between an Alabama citizen and an Alabama company, the Alabama workers’ compensation act became part of the contract, and its benefits applied to injuries suffered in other states. *Id.* at 807-09.

45. *See, e.g.*, *Milliken v. Pratt*, 125 Mass. 374, 383 (1878) (upholding validity of a married woman’s guaranty for her husband’s debts because the law of the place of contracting determines contractual capacity). *See also infra* note 202. A better example of the First Restatement’s occasional accuracy is the Second Restatement’s incorporation of *lex locus* elements as the presumptive choice of law. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971) (providing that, for personal injuries, the law of the place of injury controls unless the law of another state has a more significant relationship to the occurrence and the parties).

46. *Victor v. Sperry*, 329 P.2d 728, 729 (Cal. Ct. App. 1958).

47. *Id.*

48. *Id.*

49. *Id.* at 730.

public policy.⁵⁰ The California Supreme Court declined to hear the case.⁵¹

It could be argued that in spite of the injustice of Victor's being compensated under Mexico's relatively low daily-wage calculations, this decision is more understandable than *Carroll*. *Carroll* involved negligence in Alabama with a Mississippi injury, while in *Victor*, the negligence and the injury both occurred in Mexico—perhaps plaintiff Victor had no right to expect anything other than a Mexican remedy. But there is more to *Victor v. Sperry*. Professor Weintraub points out that both California and Mexico would hold the senior Sperry liable as the car's owner.⁵² Thus, *lex locus* reached a result that would not be reached under either state's law.

In both *Carroll* and *Victor*, all parties were from State A, the injury occurred in State B, and the injured plaintiff sued in the home forum, State A. Vested-rights analysis often produced unfair results in this setting, and Texas had its share of these decisions. *Gutierrez v. Collins*⁵³ is one of the best, but by no means the only, example. Esperanza Gutierrez lived in El Paso, Texas and was injured in Zaragosa, Mexico when the car in which she was riding was struck by a car driven by another El Paso resident, Edward Collins.⁵⁴ Gutierrez sued Collins in a state court in El Paso, and because Texas used *lex locus* rules, she provided ample evidence of her right to recover under the pertinent laws of both Mexico and the state of Chihuahua.⁵⁵ The trial court dismissed Gutierrez's claim because of the dissimilarity doctrine, in spite of Gutierrez's having demonstrated the arguable equivalence of Mexican remedies.⁵⁶ The El Paso Court of Appeals affirmed, but it carefully recited Gutierrez's ample proof of her right to recover and expressed regret at not having the power to adopt a new choice-of-law test that would give a remedy "in particular to this

50. *Id.*

51. *Victor*, 329 P.2d at 733 (noting that the appellant's petition for a hearing by the California Supreme Court was denied Nov. 5, 1958).

52. WEINTRAUB, *supra* note 3, at 364.

53. 570 S.W.2d 101 (Tex. Civ. App.—El Paso 1978), *rev'd*, 583 S.W.2d 312 (Tex. 1979).

54. *Id.* at 102.

55. *Id.*

56. For example, plaintiff Gutierrez proved the content of Mexican federal law on the issue of compensation for lost wages (including the means of computation), as well as the law of Chihuahua on her entitlement to moral reparations as an equivalent to damages for pain and suffering. *Id.* For a definition of the dissimilarity doctrine, see *supra* note 33.

Plaintiff who otherwise will probably be without any relief.”⁵⁷

This fact pattern—plaintiff and defendant from one state, injury in another—occurred in other settings, such as guest-host immunity.⁵⁸ Another problematic variation was where the wrong and the injury were in different states, regardless of the parties’ residency. This variation included claims for loss of consortium where the place of the wrong differed from the place where the loss was suffered,⁵⁹ and dram-shop cases, where the defendant-tavern owner sold the liquor in one state, and the accident occurred in another.⁶⁰ Tort claims with nonphysical injuries presented problems in locating the place of the harm; these included claims of defamation, invasion of privacy, unfair competition, and fraud.⁶¹

Contracts had similar problems under the First Restatement,⁶² and based on *Milliken v. Pratt*,⁶³ the most celebrated problem was married women’s contracts.⁶⁴ A more thorough criticism of Beale’s

57. *Gutierrez*, 570 S.W.2d at 103.

58. See SCOLES, *supra* note 3, at 693-94 (stating that the law of the place of the accident traditionally controlled despite parties’ place of residence).

59. See SCOLES, *supra* note 3, at 692-93 (arguing that the difficulty of loss-of-consortium claims arises from confusion over whether the place of wrong will be considered the site of the accident or the domicile, i.e., the place where the consortium or companionship was lost).

60. See SCOLES, *supra* note 3, at 693 (describing the analysis of dram-shop-act cases where courts select the site of the accident for choice of law).

61. See SCOLES, *supra* note 3, at 695 (criticizing the traditional rule for confusion caused by these types of torts, despite its ease of application).

62. In his treatise devoted to attacking the First Restatement, Professor Cook spent ninety-five pages discussing problems with Beale’s approach to contract choice of law but only thirty-five pages attacking torts. In his chapter on contract formation, Cook concluded that Beale’s place-of-making rule: (1) could “not be derived from a logical application of its alleged ‘territorial’ basis;” (2) was therefore not the coherent and logical theory it purported to be; (3) was inconsistent with judicial practice; (4) became consistent only when the territorial or vested-rights theory was abandoned; (5) did not offer a great degree of certainty; and (6) led to artificial and arbitrary results. WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 387-88 (1942).

63. 125 Mass. 374 (1878).

64. Mrs. Pratt, a Massachusetts resident along with her husband, guaranteed her husband’s account up to \$500 with Deering, Milliken & Co., a store in Portland, Maine. *Id.* at 374. Mr. Pratt obtained goods there from time to time and eventually defaulted, leaving a \$560.12 debt. *Id.* at 375. Milliken sued Mrs. Pratt in Massachusetts on her \$500 guarantee, which faced the conflicts problem of Massachusetts’s deeming married women lacking in contractual capacity; Maine would honor the contract. *Id.* at 376-77. Mrs. Pratt had executed the agreement in Massachusetts, and her husband mailed it to Maine. *Id.* at 374. The Massachusetts

contracts rules is his rejection of *Pritchard v. Norton*'s party-validation rule, under which "a contract is governed by the law with a view to which it was made."⁶⁵ This contract-validating view, quite consistent with the Second Restatement's policy of upholding contracting parties' expectations,⁶⁶ had Beale's disapproval because it "involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract."⁶⁷ Contract law may be the best evidence of the extent of Beale's mechanistic jurisprudence; although the criticism carried through torts, property, family law, and other subjects.⁶⁸

Skeptics may look at these examples and point out, quite correctly, that all choice-of-law approaches are capable of bad results in some cases, either because of unanticipated consequences or the court's poor application of the choice-of-law test. If that were the only criticism of vested rights, it would not have incurred the wrath that it did. The vested-rights tests produced not just occasional bad results but also patterns of bad results. Moreover, because of bad results in certain categories of cases, courts increasingly manipulated the tests to achieve

Supreme Court held that Maine law applied under a place-of-making rule, which upheld the contract. *Pratt*, 125 Mass. at 382. This may seem quite correct, but the case has been rigorously criticized. See, e.g., GEORGE W. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 227-28 (1951) (doubting applicability of Maine statute); WEINTRAUB, *supra* note 3, at 440-44 (noting that the place-of-making rule is open to question); Ernest Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (pts. 1-3), 30 *YALE L.J.* 565, 30 *YALE L.J.* 655, 31 *YALE L.J.* 53 (1921) (criticizing, in a three-part article, the confusion caused by unequal application of choice of law by the courts in contract cases); Walter W. Cook, "*Contracts*" and the *Conflict of Laws*, 31 *U. ILL. L. REV.* 143, 170-71 (1936) (observing inconsistency between conflict-of-laws rules and judicial decisions). One criticism is that a Maine court may well have applied Massachusetts law and invalidated the contract, a fact the court did not consider. See STUMBERG, *supra* note 64, at 227 & n.14. While subject to general criticism from others, the issue of married women's contracts was the beachhead for Currie's attack on the First Restatement. See Brainerd Currie, *Married Women's Contracts: A Study in Conflict of Laws Methods*, 25 *U. CHI. L. REV.* 227 (1958) (isolating the problem with *Milliken v. Pratt* as revealing broader problems with choice-of-law doctrine).

65. *Pritchard v. Norton*, 106 U.S. 124, 136 (1882).

66. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6 cmts. c & g, 188 cmt. b (1971).

67. Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 *HARV. L. REV.* 1, 260 (1909), discussed in RICHMAN & REYNOLDS, *supra* note 3, at 189.

68. For an objective but comprehensive discussion of Beale, see SCOLES, *supra* note 3, at 18-79 (characterizing the shift from "comity" to "vested rights" and beyond as a "scholastic revolution").

results deemed fair, or at least acceptable.⁶⁹ This manipulation, of course, began to erode *lex locus*'s greatest strength—predictability. And although it may be true that most cases fared well under *lex locus*, and it may also be true that all choice-of-law approaches have problems, the perception grew that a *lex locus* and vested-rights approach was a very bad way to choose the governing law.⁷⁰

With those problems in mind, in 1953 the American Law Institute undertook a review of the First Restatement's rules with the idea, at first, of modifying its mechanistic approach. That effort—the beginning of the Second Restatement—might have produced nothing more than substantial changes in the rules-oriented First Restatement, except for two earlier movements that picked up speed in the early

69. The vested-rights method had at least six escape devices. One is to recharacterize a claim, for example from tort to contract. *E.g.*, *Hudson v. Cont'l Bus Sys., Inc.*, 317 S.W.2d 584, 586-87 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.) (deciding a case where an action for damages from an automobile accident raised contractual issues between the bus company and passenger). A second and related escape device is to recharacterize a substantive issue as procedural. *E.g.*, *Paine v. Moore*, 464 S.W.2d 477, 479 (Tex. Civ. App.—Tyler 1971, no writ) (finding that the statute of frauds is evidentiary, and therefore, procedural). *Renvoi*, or the use of the other state's choice-of-law rule to reach a different result is a third escape device. *E.g.*, *Univ. of Chicago v. Dater*, 270 N.W. 175 (1936) (concerning a controversy over whether Michigan or Illinois law applied because the results varied depending on which rules governed); *see also* *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 54 (Tex. 1991) (explaining that Texas courts apparently did not have occasion to consider *renvoi* under the First Restatement, and have rejected it thus far under the Second Restatement). A fourth escape device is *dépeçage*, or the application of different laws to different issues in a lawsuit. *E.g.*, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984) (discussing which state law to apply in a contract action). A fifth device is the application of forum public policy to reject an otherwise applicable foreign law. *E.g.*, *Griffin v. McCoach*, 116 F.2d 261, 264 (5th Cir. 1940) (considering public policy grounds in reaching the outcome), *rev'd*, 313 U.S. 498 (1941). A sixth escape device is relying on the forum's lack of familiarity with the foreign law. *E.g.*, *Mex. Nat'l R.R. Co. v. Slater*, 115 F. 593 (5th Cir. 1902), *aff'd*, 194 U.S. 120 (1904) (stating that the court could not enforce the laws of Mexico because they were too different from Texas law); *see also supra* note 33; *infra* note 201. *See generally* RICHMAN & REYNOLDS, *supra* note 3, at 184-86, 191-92 (discussing a range of mechanisms for escaping the law of the place of injury); SCOLES, *supra* note 3, at 119-45 (examining pervasive problems with choice of law and how they are handled); WEINTRAUB, *supra* note 3, at 375-82 (analyzing the recharacterization methods).

70. *See supra* notes 64 & 69. *See generally* SCOLES, *supra* note 3, at 22-25 (“Although highly influential in the courts until the late 1950s, the vested-rights theory was subject to severe criticism in the literature even at the time of the debates on the formulation of the First Restatement.”).

1950s and came of force by the end of that decade. One movement took place in the courts, led by New York Chief Judge Stanley Fuld⁷¹ and joined by formidable judicial talent in Minnesota,⁷² California,⁷³ Oregon,⁷⁴ and other states.⁷⁵ The other movement occurred in books and law-review articles by conflicts scholars such as Cook,⁷⁶ Cavers,⁷⁷ Stumberg,⁷⁸ Ehrenzweig,⁷⁹ and later Cheatham,⁸⁰ Reese,⁸¹ Leflar,⁸² von Mehren,⁸³ Trautman,⁸⁴ and, clearly the most influential at the time,

71. See *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (discussing, through Judge Feld's opinion, the merits of the "center of gravity" or the "grouping of contracts" theory of the conflict of laws, under which the courts emphasize the law of the place "which has the most significant contacts" with the matter of the dispute); *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). *Babcock* is seen as a hallmark in the turn away from *lex locus* rules. But fourteen years earlier, a federal district court in Massachusetts had balanced the forum's governmental interests against Pennsylvania's in a husband's action against a third party for intentionally inducing loss of consortium. See *Gordon v. Parker*, 83 F. Supp. 40, 42-43 (D. Mass. 1949), *aff'd*, 178 F.2d 888 (1st Cir. 1949) (holding that, in all matrimonial tort actions, "the right to maintain a suit against a local defendant on account of local conduct turns on the matrimonial domicile of the plaintiff").

72. See *Schmidt v. Driscoll Hotel, Inc.*, 82 N.W.2d 365, 368 (Minn. 1957) (determining the conflicts-of-law issue by balancing the state's interests, rather than by using the Restatement).

73. See *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953) (determining that, because all of the parties to the case were residents of California, and because the estate of the decedent was being administered in California, the plaintiffs' right to prosecute their cause of action was governed by California law relating to the administration of estates).

74. See *Lilienthal v. Kaufman*, 395 P.2d 543, 551 (Or. 1964) (applying choice-of-law rules that were based on public policy).

75. See generally SCOLES, *supra* note 3, at 68-79.

76. See generally COOK, *supra* note 62, *passim*.

77. See generally, e.g., David Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

78. See generally, e.g., STUMBERG, *supra* note 64.

79. See generally, e.g., ALBERT EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* (1967); Albert Ehrenzweig, *A Proper Law in a Proper Forum: A Restatement of the Lex Fori Approach*, 18 OKLA. L. REV. 340 (1965).

80. See generally Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

81. See generally *id.*

82. See generally, e.g., ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* (4th ed. 1986).

83. See generally, e.g., ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

84. See generally, e.g., *id.*

Brainerd Currie.⁸⁵ With attacks on both judicial and academic fronts, Beale and the First Restatement were targets of voluminous, often harsh criticism from reformers who could not agree on a solution and were themselves accused of an inability to articulate a cogent choice-of-law theory.⁸⁶ Even with this criticism, the *lex locus* system remains in effect in ten states for contract claims and eleven for torts,⁸⁷ and it still has its defenders.⁸⁸

2. Currie's Governmental-Interest Analysis

Brainerd Currie had the idea—a valid one—that the process of choosing the governing law ought to have something to do with the purpose behind that law. In fact, he believed that choice of law ought to have *everything* to do with the law's purpose—an invalid idea. He argued that consideration of territorial events, especially irrelevant ones, should be replaced by a consideration of the pertinent laws' purpose, and the extent to which a particular law could accomplish its purpose in the instant case. This approach resulted in a choice-of-law test that looked like the following, quoted from Currie's parody of the Second Restatement project then underway:

If I were asked to restate the conflict of laws I would decline the honor. A descriptive restatement with any sort of internal consistency is impossible. Much of the existing law, or pseudo law, of the subject is irrational; profound changes destructive of the fundamental tenets of the traditional system are gathering momentum. On the assumption that the project admits of a statement of what is reasonable in existing law and what may reasonably be desired for the future, however, I volunteer the following as a substitute for all that part of

85. See generally CURRIE, *supra* note 13.

86. A footnote is no place to list the conflicts theorists accused of this flaw. I am not aware of any twentieth-century conflicts method that has not been roundly flayed and rejected by multiple critics.

87. See SCOLES, *supra* note 3, at 85.

88. One prominent First Restatement supporter is Judge Posner, who listed as one of American law's miscarried twentieth-century legal reforms "the destruction of certainty in the field of conflict of laws as a result of the replacement of the mechanical common law rules by 'interest analysis.'" RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 430 (1990).

the Restatement dealing with choice of law (for the purpose of finding a rule of decision):

§ 1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

§ 2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

§ 3. If the court finds an apparent conflict between the interests of the two states, it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

§ 4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

§ 5. If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum—until someone comes along with a better idea.

§ 6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.

The explanatory note might run a little longer.⁸⁹

89. Brainerd Currie, *Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963).

*Bernhard v. Harrah's Club*⁹⁰ provides a good example of interest analysis's judicial articulation, done here as a predicate to California's adoption of the comparative-impairment test,⁹¹ a variant of interest analysis. This paragraph, however, is limited to an explanation of Currie's interest analysis:

The search for the proper resolution of a true conflicts case, while proceeding within orthodox parameters of governmental interest analysis, has generated much scholarly examination and discussion. The father of the governmental interest approach, Professor Brainerd Currie, originally took the position that in a true conflicts situation the law of the forum should always be applied. . . . However, upon further reflection, Currie suggested that when under the governmental interest approach a preliminary analysis reveals an apparent conflict of interest upon the forum's assertion of its own rule of decision, the forum should reexamine its policy to determine if a more restrained interpretation of it is more appropriate.⁹²

Most opinions invoking interest analysis preface it with a much briefer statement and often identify few specific steps, as illustrated in a 1996 New Jersey case identifying two interest analysis "prongs": (1) "an inquiry into whether there is an actual conflict between the laws of the respective states,"⁹³ and (2) "identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties."⁹⁴ California cases are similarly brief in describing their choice-of-law test;⁹⁵

90. 546 P.2d 719 (Cal. 1974).

91. The comparative-impairment test "proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." *Id.* at 723.

92. *Id.* at 722-23 (internal citation omitted).

93. *Gantes v. Kason Corp.*, 679 A.2d 106, 109 (1996) (citing *Veazey v. Doremus*, 510 A.2d 1187, 1189 (1986)).

94. *Id.*

95. *See, e.g., Hurtado v. Super. Ct.*, 522 P.2d 666, 670 (Cal. 1974) (discussing the state's interests and underlying policies); *Offshore Rental Co., Inc. v. Cont'l Oil Co.*, 583 P.2d 721, 723 (Cal. 1978) (describing the proper application of choice-of-law analysis in California).

although federal courts applying the California test have been more descriptive.⁹⁶ This weakness is not limited to courts using Currie's interest analysis; Texas courts purporting to apply the Second Restatement's most-significant-relationship test have offered similarly shallow descriptions of the process being applied.⁹⁷ The difference is that the Second Restatement offers multiple factors for courts wishing to use them. Interest analysis does not.

In any event, with relatively early endorsements in California,⁹⁸ New Jersey,⁹⁹ Oregon,¹⁰⁰ and Pennsylvania,¹⁰¹ interest analysis began a sweeping reform of American conflicts practice, shifting the perspective from territoriality to an examination of the laws being applied and their underlying purposes.¹⁰² There is no doubt that Currie

96. *See, e.g.*, *Liew v. Official Receiver & Liquidator*, 685 F.2d 1192, 1196 (9th Cir. 1982) (examining the substantive law relating to both California and Singapore jurisdictions); *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1506-07 (9th Cir. 1993) (describing three steps: (1) examine the substantive law in the pertinent states to determine if they differ; (2) if so, apply the law of the state that has an interest; and (3) if more than one state has an interest, use the comparative impairment approach and apply the law of the state with the most impaired interest).

97. *See, e.g.*, *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 536 (5th Cir. 2002) (discussing the state's interests in the conflict-of-law analysis); *Fleetwood Enters., Inc., v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (holding, without elaboration, that under Texas choice-of-law rules, Texas law applies).

98. *See Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) (analyzing the interests of all parties involved in the case to determine the applicable law).

99. *See Mellk v. Sarahson*, 229 A.2d 625, 627 (N.J. 1967) (finding that "the State of Ohio has a real interest in having its rules of the road apply to the conduct of the parties in the operation of a motor vehicle on the highways of that state").

100. *See Erwin v. Thomas*, 506 P.2d 494, 496 (Or. 1973) (stating that when "in the particular factual context, the interests and policies of one state are involved and those of the other are not . . . reason would seem to dictate that the law of the state whose policies and interests are vitally involved should apply").

101. *See Griffith v. United Airlines, Inc.*, 203 A.2d 796, 806-07 (Pa. 1964) (holding that Pennsylvania law of damages was applicable, despite the fact that the accident took place in Colorado, because Colorado has no interest in the compensation of those rendering medical aid and assistance when death is immediate).

102. Professor Juenger noted that "Currie's postulates met with remarkable success among academicians. . . . Even academicians who quarrel with Currie beyond matters of detail accept some of his fundamental precepts, such as the division of choice of law problems into true and false conflicts." Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 13 (1984) (citing David F. Cavers, *Contemporary Conflicts Law in American Perspective*, 131 REC. DES COURS 73, 153 (1970)). Juenger further noted Currie's enormous caselaw impact: "Currie's ideas have also found their way into countless judicial opinions. Indeed, it has been asserted that 'Currie's approach is, in fact, usually applied today by courts committed to a policy-centered view of choice of law, even when they are purporting

exposed not just flaws, but voids in the vested-rights system. Foremost among them was his point that the law's underlying purpose matters.¹⁰³

Even when applying local law, courts refuse to apply a statute whose purpose will not be realized; it follows that courts should reject foreign laws in similar circumstances. This notion works well in cases in which the laws' purposes are obvious, but it can fail when the purposes are obscure. Noting the difficulty of ascertaining governmental interests, New York's Judge Breitel stated: "Intramural speculation on the policies of other states has obvious limitations because of restricted information and wisdom. It is difficult enough to interpret the statutes and decisional rules of one's own state."¹⁰⁴

Breitell was one of Currie's kinder critics, and Friedrich Juenger was perhaps the fiercest. Juenger wrote a critique of interest analysis in 1984 that included definitive compilations of judicial and scholarly criticism.¹⁰⁵ The list is impressive and included the majority of the mid-to-late twentieth century's leading conflicts scholars: Hill,¹⁰⁶ Korn,¹⁰⁷ Leflar,¹⁰⁸ von Mehren,¹⁰⁹ Reese,¹¹⁰ Rosenberg,¹¹¹ Sedler,¹¹²

to apply a different approach." *Id.* at 14 (citing Robert A. Sedler, *The Government Interest Approach to Choice of Law: An Analysis and Reformation*, 25 UCLA L. REV. 181, 181 (1977)). See also SCOLES, *supra* note 3, at 25-38 (discussing Currie's governmental-interests analysis and its once-dominant role in choice-of-law teaching).

103. See *supra* note 89 and accompanying text.

104. *Tooker v. Lopez*, 249 N.E.2d 394, 411 (N.Y. 1969) (Breitel, J., dissenting).

105. See generally Juenger, *supra* note 102, at 8-50.

106. Juenger, *supra* note 102, at 30 n.184 (citing Alfred Hill, *Governmental Interests and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 486-502 (1960)).

107. Juenger, *supra* note 102, at 30 n.185 (citing Harold Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 777, 959 (1983)).

108. Juenger, *supra* note 102, at 30 nn.186-87 (citing ROBERT LEFLAR, *AMERICAN CONFLICTS LAW* 186, 210-212 (3d ed. 1977)).

109. Juenger, *supra* note 102, at 31 n.188 (citing Arthur T. von Mehren, *Recent Trends in Choice of Law Methodology*, 60 CORNELL L. REV. 927, 938-39 (1975)).

110. Juenger, *supra* note 102, at 30 n.189 (citing Willis Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 722 (1980)).

111. "Rosenberg quarrels with the assumption that one can discern some clear-cut purpose behind each rule of law. He points out that many rules represent a compromise among conflicting policies." Juenger, *supra* note 102, at 30 (citing Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967)).

112. "[W]hat has endeared [Currie's] doctrine to judges is its potential as a giant escape device. Handled deftly, the mushy words 'policies' and 'interests' free courts from the constraints of rules and consistency, permitting them to reach any conclusion they choose. Interest analysts concede that 'where a court wants to apply its own

Rheinstein,¹¹³ Martin,¹¹⁴ Silberman,¹¹⁵ Twerski,¹¹⁶ Hay,¹¹⁷ Yntema,¹¹⁸ Ely,¹¹⁹ Brilmayer,¹²⁰ and Juenger himself.¹²¹ Juenger included judicial

law, it may 'manufacture' policies and interests." Juenger, *supra* note 102, at 49 n.304 (quoting Robert Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 203 (1977)). In spite of this critical comment, Sedler was a supporter of interest analysis. See generally, e.g., Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice of Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 865 n.1 (1990).

113. "Rheinstein, a renowned comparatist, contended that it is practically impossible to ascertain the policies of a foreign legal system. In international cases, experts even disagree on what rules prevail abroad, let alone what policies underlie such rules, and the decision of courts that trust their own impressions of foreign policies would be 'aphoristic and unreliable.'" Juenger, *supra* note 102, at 31 (quoting Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 663 (1962)).

114. Juenger, *supra* note 102, at 32 n.205 (citing James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 147-48 (1981)).

115. Juenger, *supra* note 102, at 32 n.204 (citing Linda J. Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 109, 110 (1981)).

116. Juenger, *supra* note 102, at 32 n.208 (citing Aaron Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 168 (1981)).

117. Juenger, *supra* note 102, at 32 n.207 (citing Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 722, 727-29 (1981)).

118. "Yntema believed that 'autarchic assertions of national policy . . . are not germane' to conflicts law; and termed the proposal that conflicts should be decided by a calculus of governmental interests, 'a vague and perverse idea, suggesting that laws are made for bureaucracy.'" Juenger, *supra* note 102, at 30 (citing Hesel Yntema, *Basic Issues in Conflicts Law*, 12 AM J. COMP. L. 474, 482 (1963)).

119. Juenger, *supra* note 102, at 29 nn.172-74 (citing John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 199-207 (1981)).

120. Juenger, *supra* note 102, at 29 n.169 (citing Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980)). See also Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 555 (1984) ("I believe that interest analysis is methodologically bankrupt, have said so in print, and have been criticized. . . . It is crucial to unmask this fallacy.").

121. The following passages are but a few examples of Juenger's intense attack:

In fact, there is little to support the [government interest] analysts' belief in the reality of such interests. To Currie it was an article of faith that governments have an interest in rules of private law, and he viewed the vindication of such interests as an important attribute of sovereignty. However, as we have seen, judges as well as scholars have questioned their

references as well,¹²² but he missed Judge Posner's. Posner listed as one of American law's miscarried twentieth-century legal reforms "the destruction of certainty in the field of conflict of laws as a result of the replacement of the mechanical common law rules by 'interest analysis.'"¹²³

The Scoles treatise summarizes interest analysis's weaknesses: the inadequacy and inherent bias in Currie's method of using nothing more than domestic statutory construction and interpretation; the difficulty of pinpointing the underlying policies; the difficulty of delineating a law's intended territorial reach; the fallacy of states

existence. True, many judicial opinions, including those of the United States Supreme Court, refer to state interests. But mere reiteration, even by the highest tribunal, cannot fill an empty word with meaning. After all, rights never really did vest, nor did obligations stalk hapless debtors, no matter how often the courts resorted to these figures of speech.

Juenger, *supra* note 102, at 36.

Interest analysts . . . actually believe in the reality of their approach and the imaginary problems it creates; they talk about conflicts, true and false, and unprovided-for cases as if these constructs had an existence independent of the theoretical framework that created them. Thus, while Currie helped free courts from the stranglehold of the vested rights doctrine, he forged new metaphysical irons and many law professors wear them with pride. Such intellectual bondage demands either self-deception or duplicity; it stifles inquiry and impairs the integrity of our discipline.

Juenger, *supra* note 102, at 50.

I doubt that interest analysis, taken seriously, has much to offer courts called upon to resolve problems posed by real-life interstate and international transactions. That methodology produces an intolerable lack of certainty, predictability, and uniformity of result, which is the inexorable consequence of an approach premised on empty imagery. The social cost of such an approach is great: counsel may commit malpractice if they settle; run of the mill traffic accidents must be litigated up to the highest state courts.

Friedrich K. Juenger, *Choice of Law: How It Ought Not to Be*, 48 MERCER L. REV. 757, 760 (1997) [hereinafter Juenger, *Choice of Law*].

122. See Juenger, *supra* note 102, at 26-28 (referencing judicial discontent with the uncertainties of interest analysis).

123. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 430 (1990). See also *Carter v. United States*, 333 F.3d 791, 794 (7th Cir. 2003) ("If Maryland followed the maddeningly indefinite 'interest-balancing' approach to conflicts issues, it conceivably might decide But Maryland does not follow such an approach: it adheres to the old-fashioned conflicts principle of *lex loci delicti*").

having an interest in private disputes; the inadequate concept of state interests that failed to consider multistate interests and noncitizen interests and that assumed state laws were not intended to apply to foreigners; and the unconstitutionality and moral reprehensibility of Currie's personal-law principle that states are interested only in their own citizens.¹²⁴ These criticisms barely scratch the surface of the numerous attacks on interest analysis.¹²⁵ On the other hand, the method still has ardent and articulate defenders.¹²⁶ Three states now use governmental-interest analysis as an official choice-of-law rule for tort cases;¹²⁷ federal common law uses it for certain federal choice-of-law matters;¹²⁸ and the U.S. Supreme Court has mandated it for full-faith-and-credit purposes.¹²⁹ Nonetheless, the interest-analysis vocabulary is more widespread and, when used in its pure form, is inappropriate with multifactored tests.

124. See SCOLES, *supra* note 3, at 35-38.

125. See SCOLES, *supra* note 3, at 33-34.

126. There are several current interest analysis defenders. See, e.g., WEINTRAUB, *supra* note 3, *passim*; Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle But Winning the War*, 37 WILLAMETTE L. REV. 123 (2001); Bruce Posnak, *Choice of Law: Interest Analysis and its "New Critics"*, 36 AM. J. COMP. L. 681 (1988); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

127. See *supra* note 12 (stating that California, New Jersey, and the District of Columbia currently use interest analysis as their common-law choice-of-law rule for tort cases).

128. See *Taylor v. Lloyds Underwriters*, 972 F.2d 666, 669 (5th Cir. 1992) (citing *Truehart v. Blandon*, 884 F.2d 223, 226 (5th Cir. 1989) (citing *Transco Exploration Co. v. Pac. Employers Ins. Co.*, 869 F.2d 862, 863 (5th Cir. 1989))). In *Taylor*, the court explains that maritime issues not governed by an established rule (here, punitive damages) are governed by state law. However, the state whose law governs is selected not by the local state's choice-of-law rule, but by a federal common law rule calling for "the state having the greatest interest in the resolution of the issues." *Id.*

129. *But see supra* note 27 (discussing the Supreme Court's recent interpretation of the full faith and credit clause). Even were the Court to pull back from *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495 (2003), and permit interest analysis to have a continued constitutional role, it should not be seen as a Supreme Court endorsement of Currie interest analysis. The full-faith-and-credit clause—addressing interstate relations in a federal system—is well served by interest analysis. In fact, it is difficult to think how else its purpose could be served other than by honoring state interests, to the extent they can be ascertained. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

3. The Second Restatement of Conflict of Laws

The American Law Institute approved the Second Restatement's final draft in 1969, and it appeared in print in 1971. Now used in twenty-four states for contract claims and in twenty-one for torts,¹³⁰ it is the most popular of the various theories currently used in American jurisdictions. The Second Restatement is eclectic, combining what its drafters believed to be the best of several choice-of-law methodologies. It functions like a code—that is, for any given problem, several Second Restatement sections are likely to apply. It more closely resembles the Uniform Commercial Code; other Restatements tend to pronounce fairly discrete rules of law.

Briefly described, the Second Restatement works through three related functions, described here in the reverse order of their best use.¹³¹ First is section 6—often identified per se with the most-significant-relationship test—with two components. Section 6(1) gives dispositive priority to the forum's statutory choice-of-law rules. If none apply, section 6(2) lists seven nonexclusive policies that may identify the state having the most significant relationship to the dispute:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.¹³²

The second functional component is a set of three general principles for torts, contracts, and property. The general principles for torts and contracts list contacts “to be taken into account in applying

130. SCOLES, *supra* note 3, at 14.

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

132. *Id.* § 6. Comments following section 6 explain each of these areas in detail.

the principles of § 6.”¹³³ These contacts are territorial and reminiscent of the First Restatement, except that they potentially point to different jurisdictions in complicated cases. For example, the tort general principle lists four contacts: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.¹³⁴

The black-letter language following this list states that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.”¹³⁵ That is, the court has discretion to analyze these territorial contacts on a case-by-case basis; although precedents acquired over time will erode that discretion. The general principle for property differs from those for torts and contracts in two respects. First, it has no territorial contacts. Second, it allows for *renvoi*—the application of another state’s choice-of-law rule—in some cases.¹³⁶

The Second Restatement’s third functional component is a number of sections focused on specific claims and issues. For torts, these issues are further broken down into particular torts (for example, personal injury,¹³⁷ property damage,¹³⁸ fraud,¹³⁹ defamation,¹⁴⁰ and others¹⁴¹), and then into particular issues (for example, standard of care,¹⁴² legal causation,¹⁴³ duty or privilege to act,¹⁴⁴ imputed negligence,¹⁴⁵ and others¹⁴⁶). Further tort sections address wrongful

133. *Id.* § 145.

134. *Id.*

135. *Id.*

136. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222. Its lack of territorial contacts is compensated for by the sections that follow, many of which have dispositive or presumptive choice-of-law rules. For example, real-estate mortgages are governed by “the law that would be applied by the courts of the situs.” *Id.* § 228. The validity and effect of a conveyance of a chattel, on the other hand, is presumptively governed by the law of the chattel’s situs. *Id.* § 244.

137. *Id.* § 146.

138. *Id.* § 147.

139. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148.

140. *Id.* § 149.

141. *Id.* §§ 150-55.

142. *Id.* § 157.

143. *Id.* § 160.

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 163.

145. *Id.* § 166.

146. *Id.* §§ 156-74.

death¹⁴⁷ and workers compensation.¹⁴⁸ Apart from torts, contracts, and property, the Second Restatement has further specific issues for procedure,¹⁴⁹ trusts,¹⁵⁰ status,¹⁵¹ agency and partnership,¹⁵² business corporations,¹⁵³ and administration of estates.¹⁵⁴ Finally, the Second Restatement also deals with personal jurisdiction¹⁵⁵ and judgments;¹⁵⁶ those sections have no direct bearing on choice of law. Texas state and federal courts have applied or cited twenty-nine of these specific sections since 1979.¹⁵⁷

For most choice-of-law questions, more than one section will apply. The confusion of multi-section analysis can be minimized with the following approach. First, does the forum has a choice-of-law statute on point? If so, it is applied pursuant to section 6(1).¹⁵⁸ Second, is the choice-of-law question limited to a specific issue, such as the coverage of a release in a tort claim (the *Duncan* issue¹⁵⁹)? If so, section 170, governing tort claim releases, applies, which points to section 145 (the general tort principle), listing four territorial contacts to be considered along with the policy factors in section 6. Other specific issues are, of course, governed by other sections. Third, if the governing law for an entire claim is at issue, does a specific Second Restatement section address it, for example multistate defamation? If so, section 150 applies, which creates a presumption that the law of the plaintiff's domicile applies unless another state has a more significant relationship under section 6. Fourth, if no specific sections governing claims or issues apply, begin the analysis with one of the three general principles for tort, contract, or property, as appropriate, and consider those contacts along with the policy factors in section 6. Fifth, if the claim is not one of tort, contract, or property, and also has no other

147. *Id.* §§ 175-80.

148. *Id.* §§ 181-85.

149. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122-44.

150. *Id.* §§ 267-82.

151. *Id.* §§ 283-90.

152. *Id.* §§ 291-95.

153. *Id.* §§ 296-313.

154. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 314-423.

155. *Id.* §§ 80-91.

156. *Id.* §§ 92-121.

157. *See infra* Appendix B (listing cases that have cited these sections of the Second Restatement)).

158. Of course, the Texas legislature provides the ultimate authority for this and not the Second Restatement. Any choice-of-law statute the legislature validly enacts supercedes the Second Restatement or any other common-law choice-of-law test.

159. *See infra* notes 237-50 and accompanying text.

specific section (such as business associations), then use section 6 to choose the appropriate law.

Although the Second Restatement's application can be confounding, numerous decisions have applied it very well, including many arising in Texas.¹⁶⁰ *Maxus Exploration Co. v. Moran Bros., Inc.* is a superior example. The case involved a contractual-indemnity suit arising from a personal-injury claim for a worker injured in a Kansas oilfield operation.¹⁶¹ Texas-based Moran contracted to drill the Kansas well for Delaware corporation Diamond Shamrock, using a form contract with a standard mutual-indemnity clause.¹⁶² Boydston, an Oklahoma resident working on the Kansas well, was injured and sued Moran in a Kansas federal court.¹⁶³ Moran then claimed indemnity against Diamond Shamrock and its insurer, who also perfected their indemnity claims against Moran.¹⁶⁴ Boydston won \$2.7 million against Moran, and the case settled.¹⁶⁵ Diamond Shamrock then sued Moran in a Texas state court, seeking an indemnity determination under Texas

160. *E.g.*, *W.R. Grace & Co. v. Cont'l Cas. Co.*, 896 F.2d 865 (5th Cir. 1990); *Caton v. Leach Corp.*, 896 F.2d 939 (5th Cir. 1990); *Danner v. Staggs*, 680 F.2d 427 (5th Cir. 1982); *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50 (Tex. 1991); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990); *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 789 (S.D. Tex. 1999); *Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991 (W.D. Tex. 1997); *Nunez v. Hunter Fan Co.*, 920 F. Supp. 716 (S.D. Tex. 1996); *Neo Sack, Ltd. v. Vinmar Impex, Inc.*, 810 F. Supp. 829 (S.D. Tex. 1993); *Becker v. Computer Scis. Corp.*, 541 F. Supp. 694 (S.D. Tex. 1982); *Sanchez ex rel. Estate of Galvan v. Brownsville Sports Ctr., Inc.*, 51 S.W.3d 643 (Tex. App.—Corpus Christi 2001, pet. granted); *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Wagner v. Hughes Wood Prods., Inc.*, 979 S.W.2d 84 (Tex. App.—Beaumont 1998), *aff'd*, 18 S.W.3d 202 (Tex. 2000); *In re Rhymer*, 969 S.W.2d 126 (Tex. App.—Beaumont 1998, no pet.); *CPS Int'l, Inc. v. Dresser Ind., Inc.*, 911 S.W.2d 18 (Tex. App.—El Paso 1995, writ denied); *Osborn v. Kinnington*, 787 S.W.2d 417 (Tex. App.—El Paso 1990, writ denied); *Ossorio v. Leon*, 705 S.W.2d 219 (Tex. App.—San Antonio 1985, no writ). Of the remaining choice-of-law opinions decided since 1979, the quality ranges from good to why-bother. As for the twenty-five opinions criticized in this Article, some were very well reasoned even if they applied something other than the Second Restatement. The identification of the above cases as good examples is, of course, because they applied the Second Restatement in the manner advocated here. Those who disagree might find them bad examples. Nonetheless, I believe it obvious that the Second Restatement is meant to be used as an integrated whole rather than applied randomly.

161. *Maxus Exploration*, 817 S.W.2d at 51-52.

162. *Id.* at 51.

163. *Id.* at 52.

164. *Id.* at 51-52.

165. *Id.*

law.¹⁶⁶ The trial and intermediate appellate courts applied Texas law and upheld Diamond Shamrock's indemnity claim.¹⁶⁷ The Texas Supreme Court affirmed, but under Kansas law.¹⁶⁸

The court's choice-of-law analysis first considered the most specific applicable section of the Second Restatement—section 173's comment *b*, which takes contractual-indemnity claims away from the tort rules and places them under the contract general principles in sections 187 and 188.¹⁶⁹ The contract had no choice-of-law clause, so the court examined section 188's territorial contacts, pursuant to section 188.¹⁷⁰ The court then turned to another specific area—section 196, governing services contracts and creating a presumption that the law of the state of performance will govern unless another state has a more significant relationship to the parties and the transaction.¹⁷¹ The court then examined the facts and made a preliminary finding that Kansas law should govern under section 196, because the contract was performed almost entirely there.¹⁷² Following through on the other end of section 196's presumption, the court then examined whether some other state had a more significant relationship. Carefully considering all of section 6's seven policy factors, the court verified the section 196 presumption pointing to Kansas law.¹⁷³ *Maxus Exploration* is a model Second Restatement application. Among its other strengths, *Maxus Exploration* took the better path when offered a false conflict opportunity—the court found that the pertinent Texas law was probably not intended to have an extraterritorial effect.¹⁷⁴ The Texas Supreme Court allowed the test to work as it should, through all components. *Maxus Exploration* is also a good example of why the Texas choice-of-law rule, through *Duncan*,¹⁷⁵ should not be read as being limited to

166. *Maxus Exploration*, 817 S.W.2d at 51-52.

167. *Id.* at 52-53.

168. *See id.* at 54, 56. In spite of reaching the same conclusion under Texas and Kansas law, the supreme court noted two true conflicts between those laws.

169. *Id.* at 53 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173 cmt. b (1971)).

170. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 and that section's five contacts: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the subject matter; and (5) the parties' domicile, residence, nationality, place of incorporation, and place of business).

171. *Maxus Exploration*, 817 S.W.2d at 53-54 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 & cmt. c to note "several virtues" of section 196).

172. *Id.* at 54.

173. *Id.* at 57.

174. *Id.*

175. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

section 6.

In spite of *Maxus Exploration's* clarity, Justice Hecht's skillful use of the most-significant-relationship test is no better an argument for the Second Restatement than Justice Traynor's persuasive use of government-interest analysis in *Reich v. Purcell*.¹⁷⁶ To be sure, the Second Restatement has its flaws and its detractors, as summarized in three current conflicts treatises.¹⁷⁷ Professor Weintraub believes that the Second Restatement's general principles sections for torts¹⁷⁸ and contracts¹⁷⁹ mislead judges and lawyers into territorial-contacts counting without regard for the purpose of the laws that would be applied.¹⁸⁰ He further objects to the Second Restatement's suggestion that when the actor's conduct and the injury occur in the same state, that state's law will usually apply. Weintraub believes that such a rule is "contrary to a consequences-based analysis,"¹⁸¹ and he points out that "[t]he landmark cases departing from the place-of-the-wrong rule are all cases in which the tortfeasor's conduct and the injury occurred in

176. 432 P.2d 727, 729-31 (Cal. 1967) (ruling in a personal-injury case that each state's respective interest determines which law to apply).

177. See Albert Ehrenzweig, "The Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason Versus the Restatement Second, 28 LAW & CONTEMP. PROBS. 700 *passim* (1963); Robert A. Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 *passim* (1972); Arthur T. von Mehren, *Recent Trends in Choice of Law Methodology*, 60 CORNELL L. REV. 927, 963-64 (1975) (contending that the Second Restatement only made conflict-of-law questions more difficult).

178. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

179. *Id.* § 188.

180. Weintraub argues that section 145

[a]ppears to envision a method of conflicts analysis that focuses on the policies underlying putatively conflicting tort rules[. . .] but the list of 'contacts to be taken into account' is antithetical to such an analysis. Whether or not a particular contact with a state is significant for conflicts purposes cannot be known until one first knows exactly what domestic tort rules are in conflict and what the policies underlying those rules are. Only then can one intelligently 'evaluate' rather than mechanically count the contacts. . . . The Restatement [Second] formulation, although probably consistent with an interest analysis, has mislead courts and lawyers on this most basic element of that analysis

WEINTRAUB, *supra* note 3, at 357-58. He argues the same for contracts section 188, seeing a "grave danger that section 188 will be interpreted to direct the counting of physical contacts with the parties and with the transaction and the awarding of the palm to the state with the 'most' contacts." WEINTRAUB, *supra* note 3, at 460.

181. WEINTRAUB, *supra* note 3, at 358.

the same state, but nevertheless the court discerned that it made no sense whatever to apply the tort law of that state.”¹⁸² Weintraub believes that the Second Restatement is confusing to judges and lawyers with too little time to scrutinize it “in all its detailed commentary on the black letter.”¹⁸³ Further he believes that it is inconsistent with functional analysis to list any contact as significant a priori, and even more inconsistent to create a presumption that if the place of negotiation and the place of performance coincide, this state’s law usually will govern.¹⁸⁴

Although Richman’s and Reynolds’s treatise endorses the Second Restatement,¹⁸⁵ it summarizes the complaints against it, including judicial ineptitude in its application,¹⁸⁶ misleading language in the comments,¹⁸⁷ and judicial failure to apply the topic-specific sections.¹⁸⁸ Richman and Reynolds report that the initial reaction to the Second Restatement was “almost completely negative, criticizing the document as ‘too much of a compromise among conflicting philosophies, too vague, exceedingly elastic, unpredictable, directionless, and rudderless,’” but that recent scholarly assessment has been more measured, and the real success has been in the courts, where it has become the “dominant choice-of-law methodology in the United States today.”¹⁸⁹

182. WEINTRAUB, *supra* note 3, at 358-59 (referring to *Schmidt v. Driscoll Hotel*, 82 N.W.2d 365 (Minn. 1957), *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), and other cases).

183. WEINTRAUB, *supra* note 3, at 460.

184. WEINTRAUB, *supra* note 3, at 460. Weintraub notes that “[t]his confusion, with its hallmark of Ouija Board manipulation of physical contacts without advertence to the domestic laws in putative conflict or to their underlying purposes, can be illustrated by two cases cited in the Reporter’s Notes to section 188.” WEINTRAUB, *supra* note 3, at 461 (leading into an analysis of *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954) and *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 425 P.2d 623 (Wash. 1967)).

185. See RICHMAN & REYNOLDS, *supra* note 3, at 238 (stating that the Second Restatement has provided the dominant choice-of-law methodology in the United States today).

186. RICHMAN & REYNOLDS, *supra* note 3, at 214-15.

187. RICHMAN & REYNOLDS, *supra* note 3, at 215 (noting that a frequently quoted example is a hypothetical in the comments to section 146 that has created the impression “that they should override the place of the injury rule only in cases where the parties stray unintentionally there”) (citing Weintraub, *Hippocratic Standard*, *supra* note 3, at 1290).

188. RICHMAN & REYNOLDS, *supra* note 3, at 216 (citing a study discussed in Borchers, *supra* note 7, at 1240-46).

189. RICHMAN & REYNOLDS, *supra* note 3, at 238 (quoting and citing

Richman and Reynolds also point out that state adoption statistics do not tell the entire story. First, the Second Restatement is more pervasive than the official adoption numbers indicate, used as a reference by many federal courts and by some states that formally follow other methods.¹⁹⁰ But on the down side of the calculation, states using the Second Restatement do not necessarily employ the same methods, some using it for contacts counting, some for territorial preferences, and some for interest balancing.¹⁹¹ Richman and Reynolds conclude that “there is a town-gown split” on the Second Restatement, but that its influence is such that “it will form the jumping-off place for any Third Restatement, or indeed any future choice of law reform with a serious chance of success.”¹⁹²

The Scoles treatise offers praise for the Second Restatement but acknowledges that “[i]t is a judicial task of some magnitude to define the place of the most significant relationship in light of [section] 6 and the connecting factors, or to weigh factors for their ‘relative’ significance.”¹⁹³ The Scoles authors note further problems: (1) that “relative significance” must be determined on an issue-by-issue basis, thus multiplying the law-fact patterns;¹⁹⁴ (2) that all Second Restatement illustrations are drafted from the perspective of a neutral forum; yet very few cases arise in a neutral forum; thus making it more

Symeonides, *Judicial Acceptance*, *supra* note 3, at 1249-50 and sources cited therein).

190. RICHMAN & REYNOLDS, *supra* note 3, at 214 n.3.

191. RICHMAN & REYNOLDS, *supra* note 3, at 239. Texas has numerous examples of choice of law based on contact counting, in spite of *Duncan*'s contrary instruction to look at quality, not quantity. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). *See, e.g.*, *Thomas v. Chase Manhattan Bank, N.A.*, 994 F.2d 236 (5th Cir. 1993); *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572 (5th Cir. 1987); *Barnes v. Forest Hills Inv., Inc.*, 11 F. Supp. 2d 699 (E.D. Tex. 1998); *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998); *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 888 F. Supp. 1372 (S.D. Tex. 1995), *aff'd*, 78 F.3d 202 (5th Cir. 1996); *Chevalier v. Animal Rehab. Ctr., Inc.*, 839 F. Supp. 1224 (N.D. Tex. 1993); *Hines v. Tenneco Chems., Inc.*, 546 F. Supp. 1229 (S.D. Tex. 1982); *Torrington Co. v. Stutzman*, 36 S.W.3d 511 (Tex. App.—Beaumont 1999), *aff'd in part, rev'd in part and remanded*, 46 S.W.3d 829 (Tex. 2000); *GXG, Inc. v. Texacal Oil & Gas Co.*, 977 S.W.2d 403 (Tex. App.—Corpus Christi 1998, pet. denied); *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683 (Tex. App.—Fort Worth 1996, no writ); *Ramirez v. Lagunes*, 794 S.W.2d 501 (Tex. App.—Corpus Christi 1990, no writ); *State Nat'l Bank v. Academia, Inc.*, 802 S.W.2d 282 (Tex. App.—Corpus Christi 1990, writ denied).

192. RICHMAN & REYNOLDS, *supra* note 3, at 238.

193. SCOLES, *supra* note 3, at 65.

194. SCOLES, *supra* note 3, at 65-66.

likely that various sections will overly favor forum law;¹⁹⁵ and (3) that the Second Restatement suffers from lack of predictability.¹⁹⁶ The Scoles treatise finds, however, that these problems are being ameliorated by developing case law.¹⁹⁷

With its acknowledged shortcomings, the Second Restatement is a workable system that offers flexibility for the variety of fact patterns and the nuances between similar cases that present themselves in American courts. It considers governmental interests along with those of the parties, the forum, and the national need for certainty, predictability, and uniformity. More importantly for now, it is the choice-of-law rule in Texas.

B. *Choice of Law in Texas*

Texas courts began applying other states' laws under Story's system during the Republic,¹⁹⁸ and, later, in the well-known *Slater v. Mexican National Railroad Co.*, which received Justice Holmes's blessing.¹⁹⁹ From 1841 to *Duncan's*²⁰⁰ full adoption of the most-

195. SCOLES, *supra* note 3, at 66.

196. SCOLES, *supra* note 3, at 67. Scoles attributes this to the Second Restatement's flexible structure, which depends on later litigation to produce precedents rather than suggesting a priori rules; because most law practice is in the form of legal advice prior to litigation, conflicts advice is difficult to give from the Second Restatement. SCOLES, *supra* note 3, at 67.

197. SCOLES, *supra* note 3, at 67.

198. The first reported case is *Hill v. McDermott*, a suit to recover secured collateral alleged to have been taken forcibly from the plaintiff's wife. Dallam 419 (Tex. 1841). The court ended up applying Texas law because the plaintiff failed to prove the content of Georgia law. *Id.* at 422. The secured property was two slaves, a mother and a child. *Id.* at 419. See also *supra* note 30 (distinguishing between real statutes that operated locally and personal statutes that had extraterritorial effect); *Huff v. Folger, Lamb & Co.*, Dallam 530 (1843) (denying interest in suit on promissory note because plaintiff failed to prove entitlement under New York law, where the contract was made).

199. 194 U.S. 120 (1904). Laredo resident Slater died in Laredo from injuries suffered on the job in nearby Nuevo Laredo, Mexico. The Fifth Circuit reversed a federal trial-court verdict for Slater's widow on the grounds that the Mexican remedy was too dissimilar because it arose under Mexico's penal law and required adjustable periodic payments, rather than a lump sum judgment. *Mex. Nat'l R.R. Co. v. Slater*, 115 F. 593, 610 (5th Cir. 1902). Writing the Supreme Court's affirmance, Holmes offered a classic statement of the vested-rights doctrine:

When such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is

significant-relationship test in 1984, Texas courts applied Story's comity and then Beale's vested-rights theories—both using the territorial *lex locus* test—to over two hundred cases.²⁰¹ Although many were justly resolved, Texas litigants also experienced the *lex locus* malfunctions discussed earlier in the American historical account,²⁰² from *Slater* in 1904 up through *Marmon v. Mustang Aviation, Inc.*,²⁰³ *Gutierrez v. Collins*,²⁰⁴ and *Duncan v. Cessna Aircraft Co.*,²⁰⁵ discussed below.

Texas judges had negative reactions to the First Restatement's rigidity, similar to those of judges in other states, and were clearly influenced by judicial and scholarly movements.²⁰⁶ This influence resulted in early deviations from *lex locus* to experiments with Currie's interest analysis and the emerging drafts of the Second Restatement of Conflict of Laws, as well as discussions of other tests such as New York's center-of-gravity approach. These judicial experiments in Texas prior to *Gutierrez* and *Duncan* show an almost even split between interest analysis (five cases) and the Second Restatement (six cases), beginning in 1968. Five Texas cases—two state and three federal—invoked interest analysis as preferable to Texas's long-standing use of the First Restatement. Both state-court cases were from

subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.

Slater, 194 U.S. at 126. In spite of this endorsement of transitory actions, the Court upheld the Fifth Circuit's dismissal on dissimilarity grounds. *Id.* at 129.

200. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

201. Case list on file with the author.

202. See *supra* notes 38-68 and accompanying text. Between *Hill v. McDermott*, Dallam 419 (1841), and *Duncan* in 1984, Texas courts issued well over two hundred choice-of-law opinions applying *lex locus* and later, vested-rights principles. A significant majority of these opinions reached results supportable under modern theories. A list is on file with the author.

203. 430 S.W.2d 182 (Tex. 1986).

204. 583 S.W.2d 312 (Tex. 1979).

205. 665 S.W.2d 414 (Tex. 1984).

206. The scholarly movements included Texas writers, most notably George Stumberg, who promoted Cook's "principles of expediency," and later, Russell Weintraub, who defends interest analysis but proposes a broader inquiry. STUMBERG, *supra* note 64, at 14-17; WEINTRAUB, *supra* note 3, *passim*.

the supreme court, one a dissent,²⁰⁷ and one a majority opinion.²⁰⁸ The Southern District of Texas accounted for all three federal cases.²⁰⁹ Six Texas cases—one supreme court dissent and five federal rulings²¹⁰—invoked or referred to the Second Restatement prior to its adoption in *Gutierrez*.²¹¹ The supreme court dissent was Justice Steakley's *Marmon* dissent, discussed above, in which he urged the court to adopt a new choice of law test and promoted the Second Restatement as a possibility.²¹²

After equal attention to the Second Restatement and Currie's

207. The court in *Marmon v. Mustang Aviation, Inc.* applied Colorado's \$25,000 cap for wrongful-death claims in a case resulting from a Colorado air crash killing the pilot and several Dallas businessmen. 430 S.W.2d at 184-85. The flight was from Montana to Dallas, and the Colorado crash site was arguably fortuitous, resulting in Justice Steakley's dissenting argument that Colorado had no interest in the accident. *Id.* at 189-92 (Steakley, J., dissenting).

208. The court in *Continental Oil Co. v. Lane Wood & Co.*, applied Texas law to a dishonored check suit, using a *lex locus* analysis but including the finding that "Oklahoma's connection with the transaction is minimal and fortuitous and it has no interest in the present controversy." 443 S.W.2d 698, 701 (Tex. 1969).

209. *Couch v. Mobil Oil Corp.*, 327 F. Supp. 897, 905 (S.D. Tex. 1971) (applying Texas law to plaintiff's personal-injury action arising in Libya, holding that "it would seem more appropriate to apply Texas law, which this court will do, thereby adopting the interest analysis test in this thorny field of conflicts of law"); *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375, 385 (S.D. Tex. 1974) (applying New York law to action for lost goods, and using interest analysis and the Second Restatement to reinforce its *lex locus* choice); *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77, 81 (5th Cir. 1975), *rev'd*, 423 U.S. 3 (1975), *on remand*, 546 F.2d 26 (5th Cir. 1977) (applying Texas law to personal-injury and wrongful-death claims by U.S. soldiers for a malfunctioning artillery round that exploded prematurely in Cambodia; the Supreme Court reversed because the lower courts used interest analysis and ignored Texas's then-current *lex locus* rule).

210. *Diaz v. Southeastern Drilling Co. of Arg., S.A.*, 324 F. Supp. 1, 4 (N.D. Tex. 1969) (using the Second Restatement to support a *lex locus* decision to apply Texas law to an action for accounting relating to oil drilling in Argentina); *Dailey v. Transitron Elec. Corp.*, 475 F.2d 12, 13 (5th Cir. 1973) (applying Texas law in a wrongful-discharge claim with facts connected to five jurisdictions); *Lipschutz*, 373 F. Supp. at 384-85 (using both interest analysis and the Second Restatement to reinforce a *lex locus* decision); *Cont'l Oil Co. v. Gen. Am. Transp. Corp.*, 409 F. Supp. 288, 295-96 (S.D. Tex. 1976) (speculating that Texas would ignore its *lex locus* test as unworkable in this commercial dispute regarding forty-six malfunctioning railroad cars, and instead using the Second Restatement). *See also* *Assoc. Press v. Berger*, 460 F. Supp. 1003, 1005-06 (W.D. Tex. 1978) (applying Second Restatement sections 6 and 188 to reinforce *lex locus* choice of New York law in breach-of-contract case).

211. 583 S.W.2d 312, 318-19 (Tex. 1979).

212. *Marmon*, 430 S.W.2d at 188-93 (Steakley, J., dissenting).

governmental-interest analysis, the Texas Supreme Court chose the former. The opportune facts arose in *Gutierrez v. Collins*—a car crash in Mexico between two Texas residents. As then required in Texas, the trial court dismissed under the dissimilarity doctrine, and the court of appeals affirmed.²¹³ The Texas Supreme Court reversed, adopting the Second Restatement's most-significant-relationship test for tort cases²¹⁴ and disavowing the dissimilarity doctrine.²¹⁵ The supreme court did not adopt the Second Restatement in its entirety, even for limited application to tort claims. Rather, it specified sections 6 and 145 as providing the guiding elements and policy considerations, and remanded to the trial court for additional fact-finding relevant to the new analytical factors.²¹⁶

In *Robertson v. Estate of McKnight*²¹⁷ the Texas Supreme Court again adopted a single Second Restatement tort rule. The action arose from a Texas airplane crash in which New Mexico residents Byron and Amelda McKnight were killed, allegedly because of Mr. McKnight's piloting error.²¹⁸ Building on its *Gutierrez* precedent, the Texas Supreme Court held that section 169 of the Second Restatement governed interspousal tort immunity, rather than *lex locus delicti*, thus applying New Mexico law and permitting the wife's estate's claim to go to trial.²¹⁹

The next step came in *Duncan*, where the Texas Supreme Court extended *Gutierrez*'s partial adoption of the Second Restatement to all choice-of-law matters not governed by statute or contract.²²⁰ That extension, however, was problematic. In its move to a modern choice-of-law analysis, the Texas Supreme Court blended two distinct choice-of-law approaches and produced an inappropriate hybrid. As the table in the following section demonstrates, this erroneous hybrid has resulted in state and federal courts applying aspects of a Currie interest analysis in twenty-one percent of the choice-of-law cases decided since 1979. Although this hybrid functions well enough to produce plausible

213. *Gutierrez v. Collins*, 570 S.W.2d 101, 101-03 (Tex. Civ. App.—El Paso 1978), *rev'd*, 583 S.W.2d 312 (Tex. 1979).

214. *Gutierrez*, 583 S.W.2d at 318.

215. *Id.* at 319-22.

216. *Id.* at 319.

217. 609 S.W.2d 534 (Tex. 1980).

218. *Id.* at 535.

219. *Id.* at 536-37. Texas law barred spousal negligence claims; New Mexico law did not. *Id.* at 535-36.

220. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). *See infra* Part IV.A.1.a (describing *Duncan* in detail).

results in most cases, it produces short-circuited analysis in some, and it also holds the possibility of significant unfairness in a few cases. Moreover, the hybrid calls for a near-impossible assessment of implicit legislative intent in cases where speculation is the only means of discerning that intent.

IV. POST-*GUTIERREZ* MISUSE OF INTEREST ANALYSIS IN TEXAS

Since the Texas Supreme Court's *Gutierrez* decision in 1979, courts have applied the most-significant-relationship test to Texas conflicts 119 times in civil cases. This number includes all pertinent cases from the Texas Supreme Court (nine), Texas intermediate courts of appeals (forty-one), federal district courts in Texas (thirty-four), and Fifth Circuit decisions appealed from Texas federal courts (thirty-five). The 119 cases were drawn from 288 Texas choice-of-law decisions rendered since 1979, eliminating decisions that were limited to:

- a Texas or federal choice-of-law statute;²²¹
- a contract's choice-of-law clause;²²²
- a dispositive choice-of-law rule from an issue-specific section of the Second Restatement that does not involve the most-significant-relationship test;²²³
- federal common-law tests in admiralty, bankruptcy, and other cases;²²⁴

221. *E.g.*, *Gen. Am. Life Ins. Co. v. Rodriguez*, 641 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1982, no writ) (applying Tex. Ins. Code Ann. art. 21.42 to compel the application of Texas law over Missouri law); *Owens-Corning v. Carter*, 997 S.W.2d 560, 571-72 (Tex. 1999) (applying Tex. Civ. Prac. & Rem. Code Ann. § 71.031 to resolve a limitations question).

222. *E.g.*, *Chase Manhattan Bank v. Greenbrier N. Section II*, 835 S.W.2d 720, 723 (Tex. App.—Houston [1st Dist.] 1992, no writ) (upholding parties' choice of New York law in mortgage-deficiency suit).

223. *E.g.*, *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1142 (5th Cir. 1992) (applying Second Restatement section 201, which designates the law chosen by the parties' choice-of-law agreement to control fraud-in-the-inducement claims).

224. *E.g.*, *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496, 499 (5th Cir. 1992) (using a federal common-law choice-of-law test to choose English law over United States law for maritime claims for wrongful arrest of cargo). These federal tests may also apply in state courts where concurrent jurisdiction exists over some maritime claims. *See Stier v. Reading & Bates Corp.*, 992 S.W.2d 423 (Tex. 1999) (involving a personal-injury claim for offshore accident near Trinidad).

- a dispute governed by public international law, such as the conflict between local and foreign-country discovery rules;²²⁵
- the application of another state's choice-of-law rule because of an inconvenient venue transfer;²²⁶
- *Erie*²²⁷ or reverse-*Erie*²²⁸ analyses resolving a state-federal conflict of law;
- a party's failure to plead or prove the content of foreign

225. *E.g.*, AG Volkswagen v. Valdez, 897 S.W.2d 458 (Tex. App.—Corpus Christi 1995), *aff'd*, 909 S.W.2d 900 (Tex. 1995) (per curiam) (applying the Restatement (Third) of the Foreign Relations Law of the United States section 442 to a local discovery request to be performed in Germany, in violation of its law).

226. Venue transfers for the convenience of the parties under 28 U.S.C. § 1404 require the use of the transferor court's choice-of-law rule. *See, e.g.*, Indus. Indem. Co. v. Chapman & Cutler, 22 F.3d 1346 (5th Cir. 1994) (involving a case transferred from California federal court, resulting in the Texas federal court applying California's interest-analysis choice-of-law rule).

227. *Erie* conflicts between state and federal law arise most often in lawsuits brought to federal court under diversity of citizenship, where state law governs substantive issues but sometimes overlaps with federal procedural law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that there is no federal common law and that federal courts should apply state law in diversity cases except where the subject matter involves the United States Constitution or acts of Congress). An interesting *Erie* conflict arose in *J.M. Couch v. Mobil Oil Corp.*, 327 F. Supp. 897 (S.D. Tex. 1971). Defendants argued that Libyan law controlled the right to jury trial, which the court considered both as a Texas conflicts question (under the Texas choice-of-law rule, what law governs the right to jury trial?), and an *Erie* conflict (does the Texas choice-of-law rule apply, or is this just a matter of federal procedural law?). The issue was further complicated by the parties' choice-of-law agreement pointing to California law. *Id.* at 899-901. The court did the obvious and applied federal law to the jury issue. *Id.* at 900. *Couch* also dealt with choice of law on the substantive tort claim. *See supra* note 209 and accompanying text (presenting a negligence case under Texas law for an incident that occurred in Libya).

228. "Reverse *Erie*" occurs when a state court is confronted with a federal-state conflict to which preemption does not apply. *See, e.g.*, Davis v. State, 645 S.W.2d 288 (Tex. Crim. App. 1983) (dealing with a federal-state conflict regarding admissibility of evidence of prior convictions for impeachment purposes). The court held that, if the prior conviction were federal, it did not follow that federal law controlled the admissibility of that conviction in a subsequent state case, and that instead, state law controlled. *Id.* at 291-92. The court cited, without discussion, Second Restatement sections 137-38, providing that forum law governs the admissibility of, respectively, witnesses and evidence. *Id.* at 291-92 & n.5. It is not clear from this citation whether the court believed that the Restatement applies to federal-state conflicts issues. It was not intended to do so. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (1971).

- law (thus causing a default to Texas law),²²⁹ and criminal cases.²³⁰

Of the 119 choice-of-law analyses, 25 contain language indicating the use of a Currie-type approach. These twenty-five ranged from the invocation of a single Currie element (e.g., the Currie false conflict used in *Duncan*), to mixes of Currie's test with the most-significant-relationship test, to the extreme of pure interest analyses that ignored the Second Restatement's elements.²³¹ The results are further broken down in the chart below, where *cases* indicates the total

229. *E.g.*, *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 437 (Tex. App.—Dallas 2002, no pet.) (holding that failure to give notice or proof of Nigerian law under Texas Rule of Civil Procedure 203 invoked the presumption that foreign law is the same as the law of the forum).

230. This study does not include criminal cases; although eight criminal decisions have considered choice-of-law issues since 1979. *See Richardson v. State*, 744 S.W.2d 65 (Tex. Crim. App. 1987) (concerning the validity of Oklahoma common-law marriage for purposes of spousal privilege); *Tompkins v. State*, 774 S.W.2d 195, 215-16 (Tex. Crim. App. 1987), *aff'd per curiam*, 490 U.S. 754 (1989) (involving a patient-psychiatrist privilege arising in Virginia); *Hawkins v. State*, 745 S.W.2d 511, 514 (Tex. App.—Fort Worth 1988, pet. ref'd) (refusing judicial notice of California law regarding agent's right to carry a handgun); *Alvarado v. State*, 853 S.W.2d 17 (Tex. Crim. App. 1993) (discussing confession obtained by Mexican police; not so much a choice-of-law analysis as a scope-of-*Miranda* analysis); *Davidson v. State*, 977 S.W.2d 708 (Tex. App.—Fort Worth 1998), *aff'd*, 25 S.W.3d 183 (Tex. Crim. App. 2000) (determining the admissibility of confession to federal officer in Montana); *Gonzalez v. State*, 21 S.W.3d 595 (Tex. App.—Houston [1st Dist.] 2000) (dealing with a priest-penitent privilege arising in California); *Davidson v. State*, 25 S.W.3d 183 (Tex. Crim. App. 2000) (en banc) (deciding the admissibility of confession to federal officer in Montana); *Vega v. State*, 84 S.W.3d 613 (Tex. Crim. App. 2002) (addressing the admissibility of juvenile's confession in Illinois). Of those eight, none inappropriately applied interest analysis; although several appropriately considered governmental interests as a factor.

231. The following indicators were used to identify Currie-influenced choice-of-law cases: (1) using the term "false conflict" to mean a state not having an interest; (2) using a finding of non-interest to eliminate a state from the choice-of-law calculus, whether the term "false conflict" was used or not; (3) analyzing contacts and other factors purely in terms of governmental interest; (4) phrasing the conclusion in governmental-interest terms; (5) failing to consider factors other than governmental interests; (6) counting contacts, equating the count with state interest, and then using that finding to reach the choice-of-law conclusion. However, cases were not labeled as Currie-oriented merely for considering governmental interests, or even turning on governmental interests, as long as other choice-of-law factors were examined. *E.g.*, *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex. 1990) (holding that the law of the state with materially greater interest should govern instead of the parties' choice-of-law clause).

number of choice-of-law analyses governed by the most-significant-relationship test (including and after *Gutierrez*), and *I-A* indicates the number of cases invoking Currie's interest analysis (either partly or fully):

<u>Court</u>	<u>Cases</u>	<u>I-A</u>	<u>Percentage</u>
Texas Supreme Court	9	2	22.22
Intermediate appellate courts	41	6	14.63
Fifth Circuit Court of Appeals	35	8	22.86
Federal district courts in Texas	34	9	26.47
Totals	119	25	21.01%

It is important to note that the *I-A* numbers do not include all cases in which governmental interest was a factor—governmental interest accounts for two of the seven policy considerations in section 6 of the Second Restatement.²³² Instead, the *I-A* number is limited to cases in which the interest is driving the analysis rather than merely being part of the balance. Under the Second Restatement's approach, governmental interest may decide the balance, but it does not guide the analysis.

A. *Texas State Courts*

In spite of *Duncan*'s mixing of tests,²³³ Texas state courts are far less likely than federal courts to include a Currie-type interest analysis. Of the 50 applications of the most-significant-relationship test in Texas state courts since 1979, only eight (16%) have used some aspect of Currie's test. Federal courts, including federal district courts in Texas and Fifth Circuit opinions applying the Texas choice-of-law rule, applied aspects of Currie's test in seventeen of sixty-nine cases, or 24.64% of the time.

1. The Texas Supreme Court

Of its nine choice-of-law opinions under the most-significant-relationship test, the Texas Supreme Court has twice used or been

232. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

233. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421-22 (Tex. 1984).

influenced by a Currie-type interest analysis. Unfortunately, the first case is the seminal *Duncan* case, perhaps explaining the later courts' misapplication.

a. *Duncan v. Cessna Aircraft Co.*

Duncan, the case adopting the most-significant-relationship test as the Texas common-law standard, also invoked Currie's interest analysis. *Duncan* involved wrongful-death claims in an air crash in New Mexico, but the specific issue in front of the supreme court was contract, specifically a release signed in an earlier lawsuit.²³⁴ Carolyn Parker Duncan was the widow of a man killed, along with pilot Smithson, when a Cessna 150 crashed in New Mexico, and a faulty seat design failed to protect them on impact.²³⁵ In a prior lawsuit, Duncan had sued the plane's owner, Air Plains West, in federal court in Dallas; the case settled, and Duncan signed a global release excusing Air Plains West and related agents and entities, and more importantly, "any other corporations or persons whomsoever responsible therefor, whether named herein or not."²³⁶

Duncan and Smithson then sued Cessna in a Texas state court, and Cessna raised the defense of release based on the global-release language in the prior suit's settlement. Under New Mexico law, global releases mean what they say and are effective as to nonparties.²³⁷ The law in Texas was not clear, with splits in the courts of appeals that were later resolved in *In re Estate of Garcia-Chapa* to apply only to specifically identified parties.²³⁸

The trial court honored the release and ordered a take-nothing judgment for Duncan's claim against Cessna, but it did find Cessna at fault and ordered damages for Smithson.²³⁹ The Austin Court of Appeals reversed as to Duncan, and found that the release did not apply because Cessna was not named.²⁴⁰ The court of appeals further rejected

234. *Id.* at 417.

235. *Id.* at 418.

236. *Id.* (emphasis deleted).

237. *Id.* at 420 (citing *Johnson v. City of Las Cruces*, 521 P.2d 1037 (N.M. Ct. App. 1974)).

238. 33 S.W.3d 859, 862 (Tex. App.—Corpus Christi 2000, no pet.); *see also infra* Part III.A.2.f.

239. *Duncan*, 665 S.W.2d at 417.

240. *Duncan v. Cessna Aircraft Co.*, 632 S.W.2d 375, 380-81 (Tex. App.—Austin 1982), *rev'd*, 665 S.W.2d 414 (Tex. 1984) (applying Texas law to the release under a *lex loci contractus* rule, based on the release being signed in Texas).

Duncan's argument for a choice of Texas law under a Second Restatement analysis, ruling that, in spite of the most-significant-relationship test's advantages, its application to contract claims would have to await the Texas Supreme Court's action extending *Gutierrez* beyond tort law.²⁴¹ The court remanded Duncan's claim for jury trial,²⁴² but Cessna immediately appealed the choice-of-law issue to the Texas Supreme Court, which reversed, reaching the same result (that Texas law applied) under a new choice-of-law test.²⁴³

The Texas Supreme Court wasted little language (two paragraphs) in adopting the most-significant-relationship test—already adopted for torts in *Gutierrez*²⁴⁴—for “all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause.”²⁴⁵ The court further explained that by “most significant relationship,” it meant the seven-factor test stated in section 6 of the Second Restatement.²⁴⁶ By limiting its express adoption to section 6, the Texas Supreme Court demonstrated its unfamiliarity with the most-significant-relationship test, which operates through a number of choice-of-law presumptions to be followed unless another state has a more significant relationship under the policy factors in section 6.²⁴⁷ In

241. *Id.* Duncan argued that her claim should be characterized as a tort (wrongful death), and that under *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979), the Second Restatement's section 170 (regarding the law governing tort releases) would apply.

242. The court also ordered retrial of Smithson's claims because of improper evidence. *Id.* at 390.

243. *Duncan*, 665 S.W.2d at 420-21.

244. *Gutierrez v. Collins*, 583 S.W.2d 312, 315-16 (Tex. 1979).

245. *Duncan*, 665 S.W.2d at 421. In addition, the most-significant-relationship test does not apply if a forum statute directs the choice of law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971). It also may not apply if the parties have a valid choice-of-law agreement under section 187(1). In addition, the Second Restatement as a whole does not apply to state-federal choice-of-law problems. *Id.* § 2 cmt. c. Further, the Second Restatement may be preempted by federal common law for important federal policy reasons. *See, e.g., Volkswagen v. Valdez*, 909 S.W.2d 900 (Tex. 1995) (per curiam). *Valdez* concerned a conflict between Texas and German law on discovery relating to a German company's telephone book. The Texas Supreme Court overturned the trial judge's order compelling discovery, finding that the lower court had failed to balance the parties' interests and failed to consider German law, as suggested by the Restatement (Third), Foreign Relations Law of the United States § 442 (1987). *Id.* at 902.

246. *Duncan*, 665 S.W.2d at 420-21 (referring to its prior action in *Gutierrez*, 583 S.W.2d at 318).

247. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS. It is important to note that the Second Restatement uses the term “policy factors” to refer to all seven factors

spite of this narrow adoption expressly limited to section 6, nothing thus far indicated anything outside the Second Restatement.

The deviation began in the opinion's next paragraph, after the court identified the choice-of-law contacts, in its conclusion that "[s]ome contacts are more important than others because they implicate state policies underlying the particular substantive issue. Consequently, selection of the applicable law depends on the qualitative nature of the particular contacts."²⁴⁸ Indeed, the contacts' quality is more important than their mere number, but the proper implication is not merely for the related governmental policies. The contacts evaluation ought to include all seven policy factors in section 6, several of which are unrelated to or go beyond governmental interests. One example, pertinent in *Duncan*, is party expectation.²⁴⁹

The next paragraph of the opinion then recited the pertinent contacts: *Duncan's* husband lived in Texas and worked in New Mexico; pilot Smithson lived and worked in New Mexico; the airplane's defective seats were designed and manufactured in Kansas; the airplane entered service in Texas; owner Air Plains West is a New Mexico corporation; and plaintiff *Duncan* executed the release in Texas to settle a federal lawsuit in Texas.²⁵⁰ Unstated here was that the crash occurred in New Mexico,²⁵¹ and while that fact had only indirect relevance to the contract question at issue here, the supreme court's ignoring of that fact missed a possibly crucial analytical point. The underlying action was a tort claim, and Second Restatement section 170 provides that the effect of one tortfeasor's release on a joint tortfeasor is determined by the law chosen by section 145, the general tort principle.²⁵² Section 145's four contacts—place of injury, place of

in section 6, both the governmental-interest factors and the ones transcending single-state issues, such as the needs of the interstate and international system, party expectations, and efficiency.

248. *Duncan*, 665 S.W.2d at 421.

249. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) & cmt. g (stating that protection of a party's justified expectation is important because it would be unfair to hold him liable when he had molded his conduct to conform to another state's requirements and because this factor is the one that allows parties to choose the law that will govern the validity of their contract). See also *id.* § 188 cmt. b (explaining the primacy of party expectation in contract law); *id.* § 222 cmt. b (providing the same for property law).

250. *Duncan*, 665 S.W.2d at 421.

251. *Id.* at 418.

252. Second Restatement section 170(b) states: "The law selected by the application of the rule of § 145 determines whether a particular instrument is a release or a covenant not to sue with respect to joint tortfeasors who are not parties to the

wrongful conduct, party domicile, and center of relationship—probably still weigh in favor of Texas law, but not as clearly as the court's decision under its simpler application of section 6 alone. The defendant had a better argument under section 145, and the court's omission of the New Mexico contact (a tort contact) accompanies its omission of an entire line of reasoning and suggests an outcome-oriented test. The fault here is not in the court's predisposition, but in interest analysis. Under Currie's narrow eye, Texas law prevails because New Mexico, in fact, had no "interest" in governing this particular contract claim between a Texas widow and a Kansas defendant, regarding a release signed in Texas to settle a Texas lawsuit. But if the Second Restatement is allowed to function, the argument expands to encompass this claim's tort aspects. Although this omission was almost certainly harmless in *Duncan* (which was rightly governed by Texas law), similar omissions and singular analyses could produce injustice in other cases.

Duncan's Currie approach was magnified at the end of the same paragraph, where the court stated that "[t]he *beginning point* for evaluating these contacts is the identification of the policies or 'governmental interests,' if any, of each state in the application of its rule."²⁵³ This statement is perfectly in line with a Currie interest analysis,²⁵⁴ and it is misleading at best as to section 6 and the most-significant-relationship test. Except for a few issues where state interest is paramount (as in the use of the forum's own procedure²⁵⁵ and certain property issues²⁵⁶), the Second Restatement does not instruct this approach to choice-of-law analysis. To the contrary, the comments to section 6 specify that the factors are not listed in any order of importance.²⁵⁷ Under the Currie approach highlighted in *Duncan*, the choice-of-law analysis will default to the single state deemed to have an interest. Under a Second Restatement analysis, the disinterested state is less likely to be chosen, but the analysis will continue with any other

instrument." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 170(b). As reported by the court of appeals, Mrs. Duncan argued for section 170's application at trial, *Duncan*, 632 S.W.2d at 380, no doubt to bring her claim under section 145, already blessed by *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979).

253. *Duncan*, 665 S.W.2d at 421 (emphasis added).

254. See *supra* note 97 and accompanying text (discussing the application of Currie-style analysis in two Fifth Circuit cases). See also SCOLES, *supra* note 3, at 28-30; RICHMAN & REYNOLDS, *supra* note 3, at 241-58.

255. See *supra* note 15.

256. See *supra* note 16.

257. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c.

pertinent factors.

The *Duncan* court continued examining governmental interests, assessing New Mexico's state interests as nil because the immediate issue was not the air crash that occurred there, but rather, Duncan's release signed in Texas.²⁵⁸ If the release were effective in this second lawsuit, the benefit would flow to Cessna, a Kansas corporation, with no benefit to a New Mexico-based party.²⁵⁹ Texas, on the other hand, had two interests: its abolition of the "unity of release" rule (which was not fully resolved until this case),²⁶⁰ and Duncan's expectation that Texas law would govern.²⁶¹ The court underscored its Currie approach in the concluding paragraph to the choice-of-law analysis:

An analysis of the relevant state contacts reveals that New Mexico has no underlying interest in the application of its law, while Texas has important interests in allowing Duncan's action against Cessna. *In this situation, known as a "false conflict," it is an established tenet of modern conflicts law that the law of the interested state should apply.*²⁶²

The court relied on references to three leading conflicts authorities, a reading of which produces informative results. All three explain the operation of false conflicts and attribute it to Currie, but do not necessarily endorse it.

The first is Professor Martin, who acknowledged that the false conflict was Currie's greatest contribution and that it was accepted by a great majority of courts.²⁶³ Professor Martin also noted a problem with courts' freedom to define forum interest broadly, and, if they wished, to

258. *Duncan*, 665 S.W.2d at 421.

259. Kansas law was not considered because no party had raised it. *Id.* at 421 n.6.

260. *Id.* at 422. In abolishing the unity of release rule (that is, limiting global releases to identified parties), the supreme court resolved a 2-to-1 court of appeals split. *Id.* at 419-20.

261. *Id.* at 422.

262. *Duncan*, 665 S.W.2d at 422 (citing J. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 85 (1980)) (emphasis added); see also E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.6 at 17 (1982) (discussing "false conflicts" in conflict-of-laws cases).

263. J. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 85 (1980).

almost never apply another state's law.²⁶⁴ Martin further noted that "Currie's recommended treatment of the true conflict situation was by far the more controversial part of his scheme of analysis."²⁶⁵

Duncan's second academic reference is a prior edition of the Scoles treatise, which, like Martin, praised interest analysis. Specifically, it reported Currie's false conflict as having "found widespread acceptance in American conflicts law since Currie,"²⁶⁶ and added that the breakdown in Currie's system was only in its resolution of true conflicts.²⁶⁷ The current edition of the Scoles treatise, published in 2000, has qualified its praise to observe that false conflicts analysis "is neither controversial nor controvertible, at least for those who subscribe to the view that consideration of state interests is a proper starting point for resolving conflicts of laws."²⁶⁸ The new edition also reports that "[w]hile judicial support for Currie's approach has decreased dramatically in recent years, his analysis 'still controls the academic conflicts agenda,' although its 'new critics' seem to outnumber its old and new defenders."²⁶⁹

Duncan's third academic reference is a prior edition of Professor Weintraub's treatise,²⁷⁰ which remains in its current edition a strong endorsement of interest analysis but with a functional approach that considers other factors.²⁷¹ More of a synthesizer than a criticizer,

264. *Id.* (noting that "some courts have claimed an 'interest' in dispensing justice where no interest otherwise exists") (citing *Griggs v. Riley*, 489 S.W. 469 (Mo. App. 1972)).

265. *Id.* at 86.

266. SCOLES & HAY, *supra* note 262, at 17.

267. SCOLES & HAY, *supra* note 262, at 17 n.19.

268. SCOLES, *supra* note 3, at 29. Contrary to this statement, false conflicts analysis has stirred criticism. *See, e.g.*, Robert A. Leflar, *True "False Conflicts," Et Alia*, 48 B.U. L. REV. 164, 169 (1968) ("This technique of using the deprecatative label [of false conflict] to buttress a result independently reached could be used equally well by followers of any choice-of-law theory."); Reppy, *supra* note 11, at 647; John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 176-78 (1983); Westen, *supra* note 24, at 80.

269. SCOLES, *supra* note 3, at 34 & n.47 (quoting Kurt H. Nadelmann, *Internationales Privatrecht: A Sourcebook on Conflicts Theory Analyzed and Reviewed*, 17 HARV. INT'L L.J. 657, 672 (1976)).

270. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.1, at 48 & § 2.6, at 267-68 (2d ed. 1980).

271. Professor Weintraub, although certainly an interest analyst, has kept a somewhat more objective distance from the fray than some conflicts scholars. One example is his criticism of *Bernhard v. Harrah's Club*, 128 Cal. Rptr. 215, 546 P.2d 719 (Cal. 1976), whose result, Weintraub argued, showed that interest analysis needed further development and should be balanced with other principles such as the

Professor Weintraub has noted that, while “[i]t is sometimes said that this ‘most significant relationship test’ of the Second Restatement differs fundamentally from the ‘interest analysis’ associated with Professor Brainerd Currie,”²⁷² his disagreement with the Second Restatement is limited to choice-of-law exercises lacking inquiry into the conflicting laws’ purposes, and specific property sections that retained territorial rules.²⁷³ Nonetheless, Professor Weintraub supports a Second Restatement analysis that includes a proper interest analysis, where contacts are evaluated in light of the purposes behind the conflicting states’ laws.²⁷⁴

Thus, on *Duncan*’s false-conflicts point, one of the three scholarly sources—Martin—did not endorse false conflicts at the time; another—the Scoles treatise—now has qualified its support as being limited to those who agree with governmental interests as the starting point; and the third—Weintraub—continues to support both interest analysis and false conflicts. Other critics are more severe, as discussed above.²⁷⁵

Missing from *Duncan*’s false-conflicts point is any reference to the Second Restatement. None is possible. The Second Restatement does not use the term *false conflict* even once—not in the black-letter sections, not in the comments, not in the Reporter’s Notes. The Second Restatement’s only allusion to a false conflict is to that term’s other meaning, where the laws of all pertinent states are the same or would reach the same result.²⁷⁶

avoidance of unfair surprise to the defendant. Russell J. Weintraub, *The Future of Choice of Law for Torts: What Principles Should Be Preferred?*, 41 LAW & CONTEMP. PROBS. 146, 159-62 (1977).

272. WEINTRAUB, *supra* note 3, at 7-8.

273. WEINTRAUB, *supra* note 3, at 7-8 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971) (governing the validity and effect of conveyance of interest in land); *id.* § 260 (addressing intestate succession to movables)).

274. WEINTRAUB, *supra* note 3, at 7-8, 357-58, 458-61.

275. *See, e.g.*, *supra* notes 121-22 and accompanying text.

276. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. i; *id.* § 186 cmt. c. Both comments are entitled, “*When rule in two or more states is the same*” and provide that in such cases, the contacts are treated as if from a single state. It is unclear what the drafters’ purpose was here. One effect is to group the contacts, and thus to enhance the calculation against any differing states. An opposite effect is to treat multiple states as one; thus limiting their collective impact on the analysis. In spite of this failure to use the term “false conflict,” the subsequent Reporter’s Notes refer to discussions of false conflicts of both kinds—the no-legal-difference kind and the disinterested-state kind. *See id.* § 145 reporter’s note to cmt. i (citing Leflar, *supra* note 268, at 171-74 and other sources). The Second Restatement does not discuss

Duncan reached the correct conclusion in spite of its unfortunate hybrid choice-of-law test. A proper analysis, either limited to section 6 or including section 188,²⁷⁷ would almost certainly hold that Texas had the more significant relationship to Duncan's release, which was signed to settle a Texas lawsuit. Although the release's other party—Air Plains West—was a New Mexico entity, its expectations of the law governing this release were irrelevant in the second lawsuit against Cessna. Cessna, the party invoking the release, had little or no right to any expectation of governing law for a contract between other parties. The court adequately considered the governmental interests of Texas and New Mexico, also pointing to Texas law, and the only other section-6 factor implicated here is ease of application, again favoring Texas law. Reaching the right result under the wrong test worked no harm in *Duncan*, but it may have led to wrong results in its application to later cases.

Before continuing with other cases using some aspect of Currie's interest analysis, an important question must be addressed. Given the *Duncan* court's saying one thing (adopting the Second Restatement's most-significant-relationship test as enunciated in section 6), and doing another (a Currie interest analysis that ignored several aspects of section 6), just what is the choice-of-law test in Texas? The argument can be made that because of *Duncan*'s application, the test is a hybrid of the Second Restatement with an emphasis on government-interest analysis as articulated by Professor Currie. I contend that the two are incompatible. If Currie's approach is the rule, then much of the Second Restatement is irrelevant, and in fact, much of section 6 is irrelevant. The better reading is that the Texas Supreme Court intended then and now that the Texas courts use the most-significant-relationship test from section 6, and other sections subsequently adopted.²⁷⁸ In 288 choice-of-law opinions since 1979,

false conflicts as eliminating the need for any choice-of-law analysis where all laws are the same, perhaps because the drafters deemed the point obvious. Professor Leflar did explain that application, as do other scholars. See Leflar, *supra* note 268, at 171 (discussing absurd results from choice-of-law analyses where there were no conflicts of laws).

277. Second Restatement § 188 is the general contract principle in the absence of a choice-of-law clause. See *infra* note 418.

278. Professor Weintraub points out that “[a]t least in the early cases, such as *Duncan*, the Supreme Court of Texas indicated that although it would be guided by R2d, the Court reserved the right to reject the Restatement when it did not accord with the principles in sec. 6. See *Duncan* fn. 4.” E-mail from Russell Weintraub, Professor of Law, University of Texas School of Law, to James George, Professor of Law,

Texas state and federal courts have applied or cited twenty-nine topic-specific choice-of-law sections,²⁷⁹ along with the more basic subject-matter sections 145, 187, and 188. The better argument is that the most-significant-relationship test is the law in Texas, with unadopted sections serving as persuasive authority.

b. *Torrington Co. v. Stutzman*²⁸⁰

Like *Duncan*, the Texas Supreme Court's other Currie-influenced case uses Second Restatement elements and reaches a plausible conclusion, but it does not apply the most-significant-relationship test as stated in section 6. *Torrington* was a wrongful-death action on behalf of two Marines killed in a helicopter crash in Alabama. The Marines were from Michigan and Nebraska, but were based in North Carolina. Texas-based Bell Helicopter was the manufacturer of the helicopter, and the defective rotor bearing was made in Connecticut.²⁸¹ The jury awarded more than thirty-five million dollars in actual damages (remitted to twenty-nine million dollars) and fifty million dollars in punitive damages (remitted to five million dollars); the court of appeals reversed the punitive damages award and affirmed the rest.²⁸² On supreme-court review, the only choice-of-law dispute was which law governed compensatory damages. Defendant *Torrington* argued for the application of Michigan or Nebraska law because those states were the decedents' domiciles; both Michigan and Nebraska law greatly reduced plaintiffs' damages.²⁸³ Plaintiffs' choice

Texas Wesleyan School of Law (Aug. 27, 2003). That *Duncan* expressly limited its adoption to section 6 is clear. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). Because of that limited adoption, and because of the court's use of other Second Restatement sections going back to *Gutierrez v. Collins*, 583 S.W. 2d 312, in 1979 (following section 145, the general tort principle) and *Robertson v. McKnight*, 609 S.W.2d 534, in 1980 (following section 169, spousal tort immunity), it is also clear that the Texas Supreme Court is adopting the Second Restatement sections only as needed. See James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH L. REV. 833, 842 n.32 (1994) (stating that the court in *Duncan* adopted only the most-significant-relationship test and not the entire Second Restatement).

279. See *infra* Appendix B (listing Texas state and federal cases in the Fifth Circuit applying the Texas choice-of-law rules that considered topic-specific sections of the Second Restatement).

280. 46 S.W.3d 829 (Tex. 2000).

281. *Id.* at 833, 849.

282. *Torrington Co. v. Stutzman*, 36 S.W.3d 511, 516 (Tex. App.—Beaumont 1999), *aff'd in part, rev'd in part, and remanded*, 46 S.W.3d 829 (Tex. 2000).

283. *Torrington*, 46 S.W.3d at 848 n.16. Michigan law did not award mental

was Texas law, and no other states were considered.²⁸⁴

The Texas Supreme Court upheld the trial court's choice of Texas law, relying heavily on interest analysis applied under sections 6 and 145.²⁸⁵ In *Torrington*, however, interest analysis was appropriate because of its emphasis on the Second Restatement's tort sections.²⁸⁶ But the supreme court over indulged in a Currie analysis on at least three points, none of which undermined the conclusion. First, at the beginning of the choice-of-law analysis, after quoting sections 6 and 145, the court stated that the number of contacts was not determinative and that, instead, "we must evaluate the contacts in light of the state policies underlying the particular substantive issues."²⁸⁷ This may be nothing more than stock language quoted from *Duncan* and used to preface the actual analysis. Nonetheless, it mischaracterizes the Second Restatement's multifactored approach, and should not be used even as a prefacing statement. A better statement is that "[s]ection 6's criteria provide the means for qualitatively weighing the contacts uncovered on section 145's list."²⁸⁸

Torrington's second Currie deviation is in the following sentence: "Texas is the forum state and the parties acquiesced to the trial court's application of Texas law to the liability issue."²⁸⁹ Although the Second Restatement does not catalogue state interests, it does provide that where the forum's only contact is being the place of

anguish damages. MICH. COMP. LAWS ANN. § 600.2922(6) (West 1986). Nebraska law limited recovery to pecuniary losses. NEB. REV. STAT. 30.810 (1995).

284. The trial court held that North Carolina, the Marines' duty post, had the most significant relationship to the claims, but that law was not used because no party introduced evidence of its content. The parties later agreed that North Carolina and Texas laws were the same on the damages issue. *Torrington*, 46 S.W.3d at 848. The supreme court observed that "Torrington does not contend that the law of Connecticut, where the bearing was manufactured, should apply." *Id.* at 849 n.18. Alabama—the crash site—is never mentioned as a contender, showing how completely Texas courts have abandoned their pre-*Gutierrez* views.

285. *Id.* at 848.

286. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. e (1971); *id.* § 145 cmt. b (discussing the importance of state interests in tort cases).

287. *Torrington*, 46 S.W.3d at 848 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)).

288. *Moorhead v. Mitsubishi Aircraft Int'l Inc.*, 639 F. Supp. 385, 390 (E.D. Tex. 1986).

289. *Torrington*, 46 S.W.3d. at 850 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g), but apparently meaning to cite section 6(2)(j), dealing with "ease in the determination and application of the law to be applied").

trial, its interest is limited to procedural issues.²⁹⁰ In *Torrington*, of course, Texas had additional interests because the accident occurred there, but nothing in the Second Restatement suggests that merely being the forum counts separately as a forum-state interest in having forum law applied. To do so would unduly emphasize the forum's preference for its own law, which is already favored in the presumptions that if plaintiff fails to prove the content of foreign law, or fails to prove a conflict between forum and foreign law, then forum law applies.²⁹¹ These presumptions are further reinforced by the forum's inherent and often unstated inclination to apply its own law and to slant choice-of-law analyses in that direction. Although the Second Restatement does not count forum status as an interest, Currie's method does, resulting in an overwhelming favoring of forum law that is clearly reflected in *Torrington*.²⁹² The same sentence stated that the parties' acquiescence to the trial court's application of Texas law to liability issues was an additional interest supporting the application of Texas law to the damages issue. This conclusion is contrary to the edict to treat choice of law on an issue-by-issue basis, expressed both in *Duncan*²⁹³ and in the Second Restatement.²⁹⁴

290. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. e.

291. See, e.g., *Monsanto Co. v. Boustany*, 73 S.W.3d 225, 229 (Tex. 2002); *Am. Int'l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 540 (5th Cir. 1987); *Unocal Corp. v. Dickinson Res., Inc.*, 889 S.W.2d 604, 607 n.2 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 607 n.2 (Tex. App.—Houston [14th Dist.] 1995, writ. denied); *Thyssen Steel Co. v. M/V Kavo Yerakas*, 911 F. Supp. 263, 266 (S.D. Tex. 1996); *Holden v. Capri Lighting, Inc.*, 960 S.W.2d 831, 833 (Tex. App.—Amarillo 1997, no writ); *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 798 (S.D. Tex. 1999); *In re Estate of Garcia-Chapa*, 33 S.W.3d 859, 862 (Tex. App.—Corpus Christi 2000, no pet.); *Compaq Computer Corp. v. LaPray*, 79 S.W.3d 779, 791 (Tex. App.—Beaumont 2002, no pet.); *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 438 (Tex. App.—Dallas 2002, no pet.).

292. See *SCOLES*, *supra* note 3, at 704-09 (discussing Currie's favoritism for the *lex fori*).

293. *Duncan* stated that "all choice of law cases, except those cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." 665 S.W.2d 414, 421 (Tex. 1984) (emphasis added). This practice is known as *dépeçage* and is implicitly promoted by the Second Restatement's use of distinct sections focused on a variety of issues such as capacity to contract. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 198; *id.* *Introductory Note* to ch. 8, topic 1, tit. c, at 631 (observing that although most cases will be governed by a single law, on occasion an approach directed to the particular issue will be appropriate). See also *SCOLES*, *supra* note 3, at 922-24 (discussing *dépeçage* in the Second

Torrington's third Currie tendency was the choice-of-law analysis itself. The court considered the purpose of compensatory damages, and the interests of Texas, Michigan, and Nebraska, concluding that Texas policies outweighed those of the other states.²⁹⁵ Unlike the court of appeals, the supreme court found that Michigan and Nebraska had an interest, but that it was outweighed by the Texas interest as the principal situs of two defendants, Bell and Textron.²⁹⁶ The section-145 contacts were analyzed almost entirely in terms of states' interests. The only other section-6 factor applied was ease in determination and application of the law from section 6(2)(g). This has already been discussed above as a likely misapplication of this factor,²⁹⁷ leaving the opinion with an almost pure state-interest discussion. Because the issue was damages, and because the Second Restatement strongly emphasizes "the state with the dominant interest" for damages issues, the court's analysis is at least adequate.²⁹⁸ On the other hand, *Torrington's* orientation toward interest analysis is

Restatement); WEINTRAUB, *supra* note 3, at 94-101 (addressing *dépeçage* generally). *See, e.g.*, CPS Int'l, Inc. v. Dresser Indus., Inc., 911 S.W.2d 18, 34-35 (Tex. App.—El Paso 1995, writ denied) (using Texas law for the contract claims and Saudi law for tort claims); Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368 (5th Cir. 1985) (applying Texas law to the tort-liability issues and California law to the issue of successor-entity liability, and quoting section 302 cmt. d of the Second Restatement: "The courts have long recognized that they are not bound to decide all issues under the local law of a single state.").

294. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. f (offering the example of a husband negligently injuring his wife—for example, in a car wreck—outside their home state, and suggesting that the situs jurisdiction has the greater interest in determining liability, while the domiciliary jurisdiction has the greater interest in determining spousal immunity). *See also id.* § 145 cmt. d; *id.* § 188 cmt. d ("Each issue is to receive separate consideration if it is the one which would be resolved differently under the local law rule of the of two or more of the potentially interested states.").

295. *Torrington*, 46 S.W.3d at 848-49.

296. *Id.* at 849-50.

297. *See supra* note 289.

298. A heavy use of state-interest analysis is justified in *Torrington*, in which the choice-of-law issue was limited to damages. Second Restatement section 178 governs damages, and although its black-letter language simply defers to section 175 (which presumes that accident situs law governs unless some other state has a more significant relationship), the commentary provides that "[i]n general, this should be the state which has the dominant interest in the determination of this issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 cmt. b, *cited in Torrington*, 46 S.W.3d at 849. Thus worded, it is at best a strong presumption that deserves a slightly more thorough analysis under section 6.

demonstrated in its vocabulary, in its mischaracterization of the Second Restatement as counting forum status and the application of forum law to other issues, and in the actual analysis that excludes other section-6 factors.

2. The Texas Courts of Appeals

The Texas courts of appeals have made post-*Gutierrez* use of the most-significant-relationship test 41 times, with only six cases (14.64%) involving aspects of a Currie interest analysis. This percentage gives the courts of appeals, collectively, the best record of the four court systems involved, but where they strayed was sometimes far from the baseline.

a. Texas Commerce Bank National Ass'n v. Interpol 80 L.P.²⁹⁹

Texas Commerce used a choice-of-law analysis as a factor in a personal-jurisdiction contest regarding a Colorado partnership's oil-and-gas venture in Texas. Interpol contracted with Lewis Energy Corporation to purchase a 12.5% working interest in oil-and-gas leases in Live Oak and Karnes counties. Although Interpol paid its obligations up to a point, the drilling stopped before the well reached its "casing point" that would vest Interpol's ownership interest. Lewis and Interpol disagreed over further operations, and after Lewis's bankruptcy, assignee Texas Commerce Bank sued Interpol for \$63,076.77, its share of unpaid costs.³⁰⁰ The trial court dismissed for lack of personal jurisdiction, finding that Interpol was not doing business in Texas.³⁰¹ In reversing, the Corpus Christi Court of Appeals employed Texas choice-of-law rules to show that Texas law would apply, thus illustrating Texas's "special interest" in the case.³⁰² To reach this finding, the court first noted that "accepted choice of law principles provide that the law of the state which is the situs of the property would govern the validity of the contract to sell the property and the rights created thereby."³⁰³ The court quoted a pre-*Duncan*

299. 703 S.W.2d 765 (Tex. App.—Corpus Christi 1985, no writ).

300. *Id.* at 768-69.

301. *Id.* at 768.

302. *Id.* at 773-74.

303. *Id.* at 773.

precedent for this proposition,³⁰⁴ but reinforced it with a citation to section 189 of the Second Restatement, which supports the court to some extent. Section 189 governs contract validity for land interest transfers and presumes that the law of the land's situs will control; that presumption may be rebutted if another state has a more significant relationship to the transaction and the parties.³⁰⁵ Although Colorado easily could have been shown not to have a more significant relationship under section 6's factors,³⁰⁶ the court ignored this follow-through with section 189, and pursued a different approach.

One problem was the court's lack of focus on the issue—was it Interpol's debt on drilling expenses or Interpol's debt for the mineral interest's purchase price? This confusion is evident in the court's next reference, an outdated Texas choice-of-law rule that "if a contract is made in one state but relates to and is to be performed in another state, the law of the place of performance governs."³⁰⁷ The court then recited pertinent facts, including the contract's formation in Colorado and performance in Texas, and the crucial fact of the contract's purpose—Texas mineral exploitation.³⁰⁸ Then the court stated its conclusion that "even under the 'most significant relationship' test of the Restatement, Texas has a legitimate and even special interest in this suit."³⁰⁹

304. *Tex. Commerce*, 703 S.W.2d at 773 (citing *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 487 (5th Cir. 1982)).

305. *Id.* at 773-74.

306. Colorado's only connection was Interpol's status as a Colorado partnership. Because there was no issue as to Interpol's partnership entity, and because no activities occurred in Colorado (other than Interpol's monetary loss), none of the section-6 factors is implicated here.

307. *Tex. Commerce*, 703 S.W.2d at 773 (citing pre-*Duncan* cases *Castilleja v. Camero*, 414 S.W.2d 424, 426 (Tex. 1967) and *Smith v. Bidwell*, 619 S.W.2d 445, 449 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.)).

308. *Id.* at 773-74.

309. *Id.* at 774 (emphasis added) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 and related cases). As a postscript, the court noted that the Interpol-Lewis contract had a choice-of-law agreement designating Texas law, a dispositive point if the issue were choice of law. *Id.* For personal jurisdiction, however, a choice-of-law clause is not dispositive of defendant's amenability but is merely a contact with the forum state. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481 (1985). It is not clear what the choice-of-law analysis added.

b. American Home Assurance Co. v.
Safway Steel Products Co., Inc.³¹⁰

American Home is the consolidation of two cases addressing insurers' obligation to indemnify punitive damages. In one case, Rawlings Sporting Goods lost a judgment, including a \$750,000 punitive-damages award, to a high-school football player injured by a failed helmet.³¹¹ The second case involved a failed steel scaffold for which manufacturer Safway Steel Products Company had to pay \$1 million in punitive damages.³¹² Following these judgments, Rawlings and Safway sued their respective insurers for coverage of the punitive damages. Rawlings's case had connections to New York (the insurer's state of incorporation and location), Missouri (Rawlings), and Texas (the accident situs).³¹³ Safway had connections to Pennsylvania (insurer's state of incorporation), New York (insurer's location), Wisconsin (Safway), and Texas (accident situs).³¹⁴ The common element for consolidation was seeking insurance indemnification for punitive damages rendered by a Texas court.

The two trial courts found for Safway and Rawlings, and the Austin Court of Appeals affirmed.³¹⁵ In an extended choice-of-law analysis, the court of appeals first found that a Texas insurance statute directed the application of Texas law in spite of the contracts' having been made in other states between non-Texas parties.³¹⁶ This decision seems sound, given that the specific insured risks were in Texas, as were the resulting lawsuits. Having reached this plausible conclusion, the court of appeals continued with separate choice-of-law analyses, invoking the Second Restatement sections 6 and 188, but based entirely on an assessment of the various states' interests. The justification for the overuse of state-interest analysis was the Second Restatement's section 188 comment *e*, which the court read as directing the use of section 188's contact factors (place of contracting, etc.)³¹⁷ as leading to

310. 743 S.W.2d 693 (Tex. App.—Austin 1987, writ denied).

311. *Id.* at 695.

312. *Id.*

313. *Id.* at 696.

314. *Id.*

315. *Am. Home*, 743 S.W.2d at 695.

316. *Id.* at 699-700. The Texas choice-of-law statute requires the application of Texas law to certain Texas-based claims, no matter where the policy originated or which law the policy may have designated. See TEX. INS. CODE ANN. art. 21.42 (Vernon 2002).

317. *Am. Home*, 743 S.W.2d at 698.

nothing more than indication of “which states are most likely ‘interested’ within the meaning of § 6.”³¹⁸ Momentarily indicating a larger understanding of the most-significant-relationship test, the court observed that if comment *e* directed interest analysis for section 188(2), then “at best, the § 188 factors only pertain to one part of a *larger analytical scheme* that determines whose local law will be applied to resolve the issue at hand.”³¹⁹ But the court erred here in two regards. First, the court failed to consider the entirety of section 188, in which comment *b* gives priority to the contracting parties’ justified expectations and links that factor to the other section-6 factors of certainty, predictability, and result uniformity.³²⁰ Second, if the court did understand that state interest is only a part of the analysis, it did not follow through with the remaining policy factors in section 6.

Applying this approach, the court found the other kind of false conflict (the proper kind) between Texas and Wisconsin—their pertinent laws of contract construction were the same. But a true conflict existed between Texas and Missouri laws on the issue of whether the insurance policy covered punitive damages. The court resolved this conflict with a pure interest analysis—identify the interests of each state and “assess the relative strength of those interests based primarily upon the specific contacts set forth in 188.”³²¹ Then the court found the other kind of false conflict (a Currie false conflict) between Texas and New York, whose public policy forbade the

318. *Id.*

319. *Id.* (emphasis added). The term *larger analytical scheme* apparently referred to section 6.

320. “Protection of justified expectations of the parties is the basic policy underlying the field of contracts.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b. Section 188 has five comments. Comment *a* merely states that section 188 applies to contracts lacking a choice-of-law clause. Comment *b* (the longest) is the first addressing section 188’s content, and it prioritizes party expectation. Comment *c* directs that courts consider the purpose of any particular state’s contract rule and to give it less weight (or no weight) if that purpose cannot be achieved. On the other hand, comment *c* also provides that:

Frequently, it will be possible to decide a question of choice of law in contract without paying deliberate attention to the purpose sought to be achieved by the relevant contract rules of the interested states. This will be so whenever by reason of the particular circumstances one state is obviously that of the applicable law.

Id. §188 cmt. c.

321. *Am. Home*, 743 S.W.2d at 699.

insuring of punitive damages. Although this Article condemns the use of Currie false conflicts in a Second Restatement analysis, the court was correct in this instance not to consider New York law for the specific issue of contract *construction* if New York law would void this contract. The court also did something that many Currie analysts would not do. When the issue of contract construction was resolved (favoring the Texas interpretation that covered punitive damages), the court addressed public-policy concerns, and, in doing so, reconsidered the New York bar on insuring punitive damages.³²² The New York policy lost, but it was fully considered at the policy level.³²³

At the close of the choice-of-law analysis, the court concluded “that given the relevant state interests involved and the contacts of the states to the question of policy coverage, the trial court properly applied Texas law.”³²⁴ The opinion did not address party expectations as directed both in section 188 comment *b* and section 6(2)(d). Neither did the court address several other policy issues in section 6(2). This could be a crucial omission. The insured—Rawlings—might have expected to have punitive-damage insurance in states that allowed it. On the other hand, the insurer might have thought such issues would be governed by a single state’s law, rather than being subject to variations anywhere that Rawlings did business.

The court correctly resolved the issues under the pertinent Texas choice-of-law statute³²⁵ but erred in its alternative analysis under the most-significant-relationship test by focusing on interest analysis and ignoring important policy factors that might have redirected this case. One fault may have been the litigants’ for failing to direct the court’s attention to those factors, but once the choice-of-law issue is raised, the court should not conduct a short-circuited analysis just because the parties have.

322. *Id.* at 700-01.

323. *Id.*

324. *Id.* at 700.

325. *See supra* note 316.

c. Trailways, Inc. v. Clark³²⁶

Although *American Home* drew its interests analysis from a partial reading of the Second Restatement section 188,³²⁷ the court in *Trailways* followed *Duncan*'s unfortunate dictum application of interest analysis.³²⁸ *Trailways* involved a bus crash in Mexico that killed two Texas residents who had purchased their round-trip tickets to Mexico City in Corpus Christi. They bought the tickets from American-based carrier Trailways, which had an agreement with Mexican carrier Transportes Del Norte ("TDN") to combine their services for trips from the interior United States to the interior of Mexico.³²⁹ The decedents began the trip in Corpus Christi on a Trailways bus, then changed to a TDN bus in Brownsville. At a ninety-degree turn about halfway between Queretero and Mexico City, the bus turned over and killed the decedents.³³⁰

In determining that Texas law controlled, the Corpus Christi Court of Appeals first quoted Second Restatement sections 6, 145 (the general tort section), and 175 (wrongful death),³³¹ which is a very good start. The court then noted that *Duncan* had stated that "the beginning point in conflicts analysis is the identification of the policies or governmental interest, if any, of each state in the application of its law."³³² Although *Duncan* contains this language, the Second Restatement does not, and as noted throughout this Article, this approach may skew the choice-of-law analysis. The court then considered the Second Restatement section 175's almost-mechanical wrongful-death rule, applying the law of the accident's situs unless "other competing factors would make the interests of one state any more significant than those of the other."³³³ This reference to section 175 shows a misunderstanding of its content and function. Section 175 does not turn on state-interest calculations, but instead creates a presumption that situs law controls in wrongful-death cases unless some other state has a more significant relationship. That

326. 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, writ denied).

327. *Am. Home*, 743 S.W.2d at 696.

328. *Trailways*, 794 S.W.2d at 485.

329. *Id.*

330. *Id.* at 482.

331. *Id.* at 484-85.

332. *Id.* at 485 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)).

333. *Trailways*, 749 S.W.2d at 485.

determination—whether some other state has a more significant relationship—rests on sections 6 and 145, in which state interest is one of several factors. Rejecting section 175's presumption of situs law, the court then conducted a pure state interest calculation leading to Texas law.³³⁴ Although the court did list the pertinent contacts meticulously, it analyzed them only according to its perception of the interests of Texas and Mexico.³³⁵ The court also quoted *Gutierrez* in a manner suggesting that it endorsed interest analysis, which it did not.³³⁶

As with *American Home*, the missing analysis in *Trailways* could have resulted in a different outcome. A proper analysis under sections 6, 145, and 175 could well point to Mexican law. Section 175 states a somewhat mechanical rule that situs law controls in wrongful-death cases unless some other state has a more significant relationship.³³⁷ Thus, we start with a presumption that Mexican law applies. To question this presumption, we examine the factors of section 145 (the general tort principle) and then section 6's seven policy factors. Section 145 focuses on four contacts,³³⁸ with the first two (accident site and the wrongful-conduct site) both being in Mexico. The third and fourth contacts are mixed: the parties' domicile and nationality are both rooted in Texas and Mexico, as is the site of the decedent-defendant relationship (formed in Corpus Christi but occurring mostly in Mexico). The court's analysis of these contacts emphasized the ticket purchase in Corpus Christi, which occurred through a Trailways office and did not directly involve the Mexican carrier TDN. That alone does not seem sufficient to overcome the presumption of Mexican law controlling.

To support its conclusion that the forum can apply its law to a tort occurring outside the state, the court cited two cases, *Wall v. Noble*³³⁹ and *Kinnett v. Sky's West Parachute Center, Inc.*³⁴⁰ *Wall* was

334. *Id.*

335. *Id.* at 485-87.

336. The *Gutierrez* reference read: "The trial judge, therefore, should have some latitude in balancing legitimate competing state interests. *See Gutierrez*, 583 S.W.2d at 319." *Trailways*, 794 S.W.2d at 485. This quote apparently refers to the last paragraphs in the *Gutierrez* choice-of-law section, where the Texas Supreme Court explained that, although choice of law is a question of law, this case needed remanding to the trial court for further fact finding. *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979). Nothing in the *Gutierrez* discussion suggests applying a choice-of-law analysis that is driven by state-interest analysis.

337. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971).

338. *Id.* § 145.

339. 705 S.W.2d 727, 733 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).

a Texas malpractice action against a Texas-licensed plastic surgeon with offices in Texas and Louisiana, the patient seeing him both places.³⁴¹ *Kinnett* was a Wyoming wrongful-death lawsuit to recover for an air crash over Colorado for a round-trip flight from Wyoming to Texas.³⁴² Neither case compares well with *Trailways*. As a medical-malpractice case, *Wall* does not invoke the same policies or damage considerations as a wrongful-death case, and it involved a doctor-patient relationship created in Texas, a far greater contact than purchasing a bus ticket. The *Kinnett* air crash in Colorado was fortuitous—the flight from Wyoming to Texas was not intended to touch down in Colorado, and the crash resulted from a mid-air collision. The accident could have happened in any of several states. The TDN bus accident was far less fortuitous, involving a ride from Brownsville into Mexico. Any accident that was going to occur as a fault of the Mexican carrier was almost certain to happen in Mexico. The court's citation of two supporting cases can be countered by a number of other cases applying the law of the accident's situs to facts like these; that is, where the negligent conduct and the death occurred in the same state.³⁴³ This counterargument is not to say that choosing Texas law was wrong. It is to say that the test should be correctly applied in order to achieve more supportable results.

d. *Vizcarra v. Roldan*³⁴⁴

Vizcarra is a personal-injury and family-consortium case arising in Mexico. Defendant *Vizcarra* worked for defendant Rock Shop of El Paso, and was on an errand to his employer's warehouse in Juarez.

340. 596 F. Supp. 1039 (D. Colo. 1984).

341. 705 S.W.2d at 733.

342. 596 F. Supp. at 1040.

343. *E.g.*, *Nailen v. Ford Motor Co.*, 873 F.2d 94, 95 (5th Cir. 1989) (applying Mississippi's choice-of-law rule); *Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989) (applying federal choice-of-law rule); *Rottman v. Krabloonik, Inc.*, 834 F. Supp. 1269, 1269, 1271 (D. Colo. 1993) (applying Colorado's choice-of-law rule); *Hataway v. McKinley*, 830 S.W.2d 53, 57-60 (Tenn. 1992) (applying Tennessee's choice-of-law rule); *Ricci v. Alternative Energy, Inc.*, 211 F.3d 157, 165 (1st Cir. 2000) (applying Maine's choice-of-law rule); *Martineau v. Guertin*, 751 A.2d 776, 778-81 (Vt. 2000) (applying Vermont's choice-of-law rule). For other cases following Second Restatement section 175's presumption applying the law of the state where conduct and injury occurred, see cases cited in support at RESTATEMENT (SECOND) CONFLICT OF LAWS § 175 (1971 & Supp. 2002).

344. 925 S.W.2d 89 (Tex. App.—El Paso 1996, no writ).

While in Juarez, Vizcarra lost control of the pick-up and jumped a curb in a residential area, striking plaintiff Roldan, who was standing in his front yard. Plaintiff won at trial under Texas law. The court of appeals reversed and held that Mexican law applied. Mexico's law had a more limited damages scheme and did not allow for bystander claims, thus eliminating the loss of consortium claims. Although the court of appeals paid lip service to the contact factors under Second Restatement section 145, it chose Texas law under a pure interest analysis. The court limited its use of section 6 to the state-interest factors and cited *Duncan's* unfortunate interest-analysis phrase,³⁴⁵ along with a similar phrase from another Texas case overemphasizing state-interest factors.³⁴⁶ In a final paragraph that almost pulls this case within a proper Second Restatement range, the opinion included the point that the facts did not "significantly impact any of the other qualitative policy factors stated in Section 6 of the Restatement."³⁴⁷ In cases where only one or two policy factors matter, other choice-of-law factors can often be dispensed with quickly. But the dispensation was too brief in light of the court's fact analysis discussed only in terms of state interest.

Unlike the results in *American Home and Trailways*, it is difficult to see here where a more appropriate analysis—looking to all contacts and policy factors in sections 6 and 145—would produce a different result. Where a forum resident travels outside the state and negligently injures people in their home state, hardly any of the Second Restatement's factors would support the application of forum law. One exception is if a forum's law was intended to govern its residents' conduct outside the state,³⁴⁸ but no such law applied here. Nonetheless,

345. Following the *Duncan* citation, the court noted parenthetically: "(governmental interest of each forum is the 'beginning point' for determining most significant relationship)." *Vizcarra*, 925 S.W.2d at 91 (paraphrasing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)).

346. The *Vizcarra* court stated parenthetically that "(relevant policies of the forum is most critical consideration in determining most significant relationship)." *Id.* (paraphrasing *Seth v. Seth*, 694 S.W.2d 459, 463 (Tex. App.—Fort Worth 1985, no writ)).

347. *Id.* at 92.

348. Plaintiff argued this, using products-liability law as an example and citing two federal diversity cases that applied Texas law to out-of-state incidents. *Id.* at 91 (citing *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990) and *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1140 (N.D. Tex. 1980)). The *Vizcarra* court correctly pointed out that the state intent in regulating locally made products, even in out-of-state use, differed greatly from the car accident liability imposed in a master-servant context. *Vizcarra*, 925 S.W.2d at 91. Interestingly, both

a preferable approach is to reach the same result under the correct choice-of-law rule, which will provide sounder precedents.

e. Ford Motor Co. v. Aguiniga³⁴⁹

Aguiniga is a wrongful-death claim for a single-car accident in Mexico that killed Texas residents on vacation there. Plaintiff Jorge Aguiniga, a car dealer in Houston, bought a 1991 Ford Aerostar van at auction in Louisiana. He had bought the van for family use, and in 1994, his wife, children, and family friends left on an extended trip through Texas and Mexico. While traveling in the mountains near Monterrey, Mexico, the van's brakes and steering failed. The van left the mountain road and rolled into a ravine, killing all passengers except the driver, Estehla Aguiniga.³⁵⁰ The driver and her husband sued Ford in Houston and won a trial verdict of \$16 million.³⁵¹ The court of appeals affirmed the trial court's application of Texas law, using interest analysis under the guise of Second Restatement sections 6 and 145, including a finding of a false conflict because only Texas had an interest in the case.³⁵² The use of interest analysis here probably did not affect the outcome because the accident location was less of a factor than the apparent manufacturing defect that could have failed in other locations.

f. *In re* Estate of Garcia-Chapa³⁵³

This was an estate action to declare heirship in thirty-one bank accounts in eight Texas banks; the accounts were owned by two sisters who were Mexican citizens and residents at the time of their death.³⁵⁴ A parallel claim was underway in Mexico, and the Texas case already had been through two trials, both adjudicated under Texas law.³⁵⁵ The primary issue in the appeal was what law governed intestate succession

Mitchell and *Baird* also applied a Currie-type state-interest analysis, as discussed below. See *infra* Parts IV.B.1.c & 2.a.

349. 9 S.W.3d 252 (Tex. App.—San Antonio 1999, pet. denied).

350. *Id.* at 255-56.

351. *Id.* at 255.

352. *Id.* at 260-61 (citing *Duncan*, 665 S.W.2d at 422 for the false-conflicts point).

353. 33 S.W.3d 859 (Tex. App.—Corpus Christi 2000, no pet.).

354. *Id.* at 861.

355. *Id.*

to these accounts. After noting the applicability of the most-significant-relationship test and quoting Second Restatement section 6,³⁵⁶ the court of appeals briefly recited Texas's interests in not interrupting foreign disputes over assets located in Texas. The court cursorily concluded that the Restatement would support the application of Mexican law.³⁵⁷ The choice-of-law point was moot, however, because at the second trial (now being appealed), no one had offered sufficient proof of pertinent Mexican law. The court of appeals therefore affirmed the trial court's application of Texas law to this Mexican probate issue.³⁵⁸

It is obvious that the court's short treatment of the choice-of-law issue was harmless dicta because of the failure to prove pertinent Mexican law, and it is possible that the court would have done a more thorough analysis if Mexican probate had been provided. The opinion is nonetheless flawed in reaching its conclusion based on a few sentences analyzing nothing but Texas interests (albeit interests pointing to Mexican law). This outcome was no doubt correct, but it could have been reached more convincingly. Second Restatement section 260 provides that succession to intestate property is governed by the law that would be applied by the state where decedent was domiciled at the time of death.³⁵⁹ Although the Texas Supreme Court has not adopted the entire Second Restatement, it can be used as persuasive authority. Applied here, section 260 would require application of Mexico's choice-of-law rule to this issue. But with the failure to prove relevant Mexican law, the result would be the same, and Texas law would still control by default.

B. *The Federal Courts*

When applying the Texas choice-of-law rules in diversity cases, federal courts in the Fifth Circuit are more inclined than Texas state courts to use a Currie-type interest analysis, using it to some degree in one out of four cases. Federal courts have applied Texas's most-significant-relationship test sixty-nine times since *Gutierrez*, and have included some aspect of Currie interest analysis in seventeen (24.64%)

356. *Id.* at 861-62.

357. *Id.* at 862.

358. *In re Estate of Garcia-Chapa*, 33 S.W.3d at 862-63.

359. RESTATEMENT (SECOND) CONFLICT OF LAWS § 260 (1971) ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.").

of those cases.

1. The Fifth Circuit Court of Appeals

The Fifth Circuit has invoked the most-significant-relationship test thirty-five times since *Gutierrez*, and included interest analysis (as a test, not merely a factor) in the eight cases that follow:

a. *Transco Leasing Corp. v. United States*³⁶⁰

Transco illustrates how the Second Restatement's emphasis on state-interest analysis in tort cases can be misread as a dispositive choice-of-law test. The case arose from a 1982 air collision over Addison, Texas, that destroyed two planes and killed all occupants.³⁶¹ The collision led to numerous claims, including a Federal Tort Claims Act suit against the United States for the air traffic controller's negligence.³⁶² All other claims were disposed of except the federal tort claim, which went to trial with judgment going to plaintiffs.³⁶³ The appeal included the United States's challenge to the trial court's application of Louisiana law to the damages issue.³⁶⁴ The Fifth Circuit held that: (1) a federal choice-of-law rule applied to FTCA claims; (2) the rule called for the law of the state of the act or omission (Texas), including its choice-of-law rule, and (3) Texas used the most-significant-relationship test.³⁶⁵

The court then noted that "[a]ccording to the Restatement, the law of the state with the *dominant interest* in determining the measure of damages in a wrongful death action should be applied," mistakenly citing section 175 comment *b*.³⁶⁶ The quoted language does not appear in section 175, but rather, approximates language in section 178 comment *b*, governing damages, which was the issue in conflict here.³⁶⁷ Although this comment is consistent with the Second Restatement's emphasis on state interests in tort cases,³⁶⁸ it must be read in light of the

360. 896 F.2d 1435 (5th Cir. 1990).

361. *Id.* at 1439.

362. *Id.* at 1440.

363. *Id.* at 1440-41.

364. *Id.* at 1450.

365. *Transco Leasing Corp.*, 896 F.2d at 1450.

366. *Id.* (emphasis added).

367. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 cmt. b (1971) (stating that "[i]n general, this should be the state which has the dominant interest in the determination of this issue").

368. *See supra* note 286 and accompanying text.

sections to which it pertains, that is, sections 178, 175, 145, and ultimately section 6. Section 175 applies to “Right of Action for Death” and calls for the law of the state where the injury occurred, unless some other state has a greater relationship under the principles stated in section 6.³⁶⁹ In none of the pertinent black-letter sections is state interest or dominant interest a dispositive factor. In any event, the Fifth Circuit took this cue to do a pure interest analysis with no mention of the accident’s situs (Texas), or of the situs presumption explicit in section 175 and implicit in section 178. The court of appeals affirmed the trial court’s holding that Louisiana law controlled because Texas had no interest in the damages issue for Louisiana residents.³⁷⁰

As with so many other cases discussed in this Article, the court’s choice is supportable but poorly analyzed. Moreover, a better analysis under sections 6 and 145 would illuminate other considerations that could have changed the outcome. For example, because the accident occurred in Texas and was allegedly the fault of the controller, the United States would have some expectation that errors made in Texas would be compensated for according to Texas law. Among other things, this would be the basis for evaluating loss projections and, although the United States is self-insuring, the principle that a local party (the air traffic control operation) has some expectation of local law controlling local mistakes is nonetheless valid.

b. Coakes v. Arabian American Oil Co.³⁷¹

In *Coakes*, the Fifth Circuit affirmed the district court’s *forum non conveniens* dismissal of an Aramco employee’s fraudulent misrepresentation claim. Coakes was an English citizen who took a job with Aramco to work in Saudi Arabia.³⁷² The employment interviewing process occurred in England through Aramco’s

369. Second Restatement § 175 states:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175.

370. *Transco Leasing Corp.*, 896 F.2d at 1451.

371. 831 F.2d 572 (5th Cir. 1987).

372. *Id.* at 573.

Netherlands subsidiary, and had no connection to the United States other than Aramco's corporate presence in Houston and other U.S. cities. While on the job in Saudi Arabia, Coakes was arrested and imprisoned for making alcohol. When released, Coakes and his wife sued in a Houston federal court, claiming that Aramco affirmatively represented to Coakes that he could make alcohol while working in Saudi Arabia.³⁷³ Aramco moved for a *forum non conveniens* dismissal,³⁷⁴ one element of which is the governing law.³⁷⁵ The district court concluded that U.S. law should not govern and granted the dismissal.³⁷⁶ Although the Fifth Circuit continued the choice-of-law analysis from the perspective of whether U.S. law should govern,³⁷⁷ it made clear that the Texas choice-of-law rule applied and implicitly held that these claims would arise under state law and not "United States law."³⁷⁸ The court did a quick choice-of-law affirmance, looking only to a balance of interests between the United States, England, Saudi Arabia, and apparently the Netherlands.³⁷⁹ The court did list contacts—Coakes was a British subject, the contract was made in England after negotiation under the control of an Aramco subsidiary in the Netherlands, and the performance was in Saudi Arabia.³⁸⁰ But these facts, as in other interest-analysis cases, supported nothing more than the court's quick estimation of various states' interests. Ultimately, the court concluded, "[i]n short, the United States has only a minimal interest in the issues presented in this case."³⁸¹

The court did not consider the parties' expectations, contrary to the Second Restatement's emphasis of that factor in contract cases.³⁸² Applying party interest with a bit of unwarranted speculation (the kind

373. *Id.* Their claims included fraud, breach of contract, mental anguish, and loss of consortium.

374. *Id.*

375. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

376. *Coakes*, 831 F.2d at 574.

377. *Id.* The court was, of course, referring to whatever law in the United States that might apply.

378. *Id.*

379. *Id.* The analysis was brief, and the other countries' interests were not identified. The analysis sought only to eliminate American states from consideration, rather than to choose the single appropriate governing law.

380. *Id.*

381. *Coakes*, 831 F.2d at 574. The United States, as such, had no interest if government interest is measured by stated policies. Although the court's purpose is clear, and the result is plausible, any legal or policy analysis that incorrectly characterizes the policy-maker will increase the likelihood of error.

382. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971).

courts use for interest analysis), it is likely that Aramco expected that a British recruit would not be able to rely on Texas law for contract claims arising either in England or Saudi Arabia. It is also likely that Aramco's expectation would be more reasonable than any reliance on Texas law that Coakes might claim. That result would be better supported under the most-significant-relationship test.

c. *Mitchell v. Lone Star Ammunition, Inc.*³⁸³

Mitchell is a *Challoner*-type action for two Marines' deaths and another's injury from a defective mortar shell that was manufactured in Texas and exploded during training at Camp Lejeune, North Carolina.³⁸⁴ Defendants moved for summary judgment under North Carolina's six-year statute of repose, which all parties agreed would bar plaintiffs' claims.³⁸⁵ The trial court ruled that Texas law applied, and, under that law, plaintiffs won at trial.³⁸⁶ In its affirmance, the Fifth Circuit did an interest analysis,³⁸⁷ showing stronger evidence of a Currie approach than some cases because of its careful explanation of a two-step choice-of-law process: (1) "identify the relevant state contacts" and (2) "identify the policies or governmental interests of each state."³⁸⁸ This language tracks the governmental-interest approach used, for example, in California.³⁸⁹ The court recited the pertinent Second Restatement provisions as sections 6 and 145³⁹⁰ and it even footnoted section 6.³⁹¹ The court also connected the facts relevant to section 145: plaintiffs were from Indiana, New Mexico, and Kentucky; defendants were Maryland and California corporations, both doing business in Texas; the explosion was in North Carolina; and the defective shell was completed and placed into the stream of commerce

383. 913 F.2d 242 (5th Cir. 1990).

384. *Id.* at 243-44. See also *supra* note 209 (discussing *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975), where the Supreme Court reversed the Fifth Circuit's use of government-interest analysis to select Texas law for the injury and death of two American soldiers from a malfunctioning mortar round).

385. *Id.* at 244, 249 n.13.

386. *Id.* at 244.

387. *Id.* at 249-50.

388. *Mitchell*, 913 F.2d at 249.

389. See *supra* notes 90-92 and accompanying text (quoting *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976)).

390. *Mitchell*, 913 F.2d at 249.

391. *Id.* at 249 n.14.

in Texas.³⁹² The court's only employment of section 6 was the comparison of Texas and North Carolina interests, and facts were included only in regard to the state-interest discussion.³⁹³ The court did not mention section 146 (personal injury) or section 175 (wrongful death), both having a presumption that the law of the place of the injury controls unless another state has a more significant relationship. *Mitchell's* choice of Texas law is suspect on two points. First, the court's finding that Texas had a greater interest was partly based on its conclusion that North Carolina's statute of repose was designed to protect in-state manufacturers that were not present in *Mitchell*.³⁹⁴ *Mitchell* drew its conclusion about the North Carolina legislature's purpose from a North Carolina case that, in fact, discussed the statute of repose at length but did not once indicate that its focus was limited to North Carolina manufacturers.³⁹⁵ This is a good example of interest analysts' tendency to assume that foreign legislatures act only in regard to their own, an idea central to Currie's philosophy.³⁹⁶ *Mitchell's* second flaw is that, even if the North Carolina statute was limited to its own manufacturers, and even if Texas therefore had a greater interest, *Mitchell* reached its conclusion to apply Texas law in isolation from other section-6 factors.

d. Albany Insurance Co. v. Anh Thi Kieu³⁹⁷

Albany was a marine insurer's action seeking a declaration of nonliability for damage to a shrimping vessel used in Texas waters.

392. *Id.* at 249.

393. *Id.* at 249-50.

394. *Id.* at 249-50 (citing *Tetterton v. Long Mfg. Co.*, 332 S.E.2d 67, 74 (N.C. 1985)).

395. *Mitchell* misapplied North Carolina's *Tetterton* decision. In considering the statute of repose's constitutionality, the North Carolina court stated that it was "enacted as a part of the products liability act, which was the [North Carolina] legislature's 'response to the upheaval in products liability law of the 1970's.'" *Tetterton*, 332 S.E.2d at 73 (quoting Terry Morehead Dworkin, *Product Liability of the 1980's: "Repose is Not the Destiny" of Manufacturers*, 61 N.C. L. REV. 33, 33 (1982)). None of the *Tetterton* court's language suggests a focus on North Carolina manufacturers, and this may be an example of Juenger's point that tort-reform statutes are more often the result of lobbying by multistate interests, rather than local interests. See Friedrich K. Juenger, *Choice of Law: How It Ought Not to Be*, 48 MERCER L. REV. 757, 759 (1997).

396. See SCOLLES, *supra* note 3, at 37 & n.55.

397. 927 F.2d 882 (5th Cir. 1991).

The trial court awarded the boat owner \$90,405.³⁹⁸ The insurer's appeal included an argument that the trial court should have applied Louisiana law, which would apply a stricter standard than Texas law to the insured's misstatements of fact in her insurance application.³⁹⁹ The Fifth Circuit's double choice-of-law analysis first considered whether state or federal law governed the interpretation of the insurance policy, and when federal law was eliminated in a lengthy discussion,⁴⁰⁰ the second question was which state's law governed. That decision was also a matter of federal law,⁴⁰¹ one that required another lengthy discussion because of the ambiguity in the federal choice-of-law rule.⁴⁰² The court clarified that the federal choice-of-law rule for maritime-insurance issues was interest analysis, but, in doing so, it compared that rule's function to the Second Restatement's approach, which it described for contract cases as looking to contacts initially, then to state interests.⁴⁰³ Under this analysis, the court chose Texas law over Louisiana's⁴⁰⁴ and affirmed the trial court's judgment.⁴⁰⁵ Although this was a maritime case governed by a federal choice-of-law rule, it reveals the court's misunderstanding of the Second Restatement and the most-significant-relationship test, which it characterized as substantially similar to government-interest analysis.

e. *Pruitt v. Levi Strauss & Co.*⁴⁰⁶

Billy Kirk Pruitt left a good job in California for what he thought was a better one in Dallas. California-based Levi Strauss had recruited Pruitt as a salesman for its new Tops division, and, according to Pruitt, promised him "employment for as long as he performed satisfactorily."⁴⁰⁷ Things went well for a time, and after five months the company promoted Pruitt to regional sales manager. But projected sales did not materialize, and in spite of Levi's cash infusion, the

398. *Id.* at 885-86.

399. *Id.* at 890 n.8.

400. *Id.* at 886-90.

401. *Id.* at 890 (citing *Gonzalez v. Naviera Neptuno, A.A.*, 832 F.2d 876, 880 n.3 (5th Cir. 1987)).

402. *Albany*, 927 F.2d at 890-91.

403. *Id.* at 891.

404. *Id.*

405. *Id.* at 895.

406. 932 F.2d 458 (5th Cir. 1991), *abrogated on other grounds by*, *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181 (5th Cir. 1995).

407. *Id.* at 460.

division lost \$15 million in three years and had to be closed.⁴⁰⁸ All employees were fired, including Pruitt, who sued under California's covenant of good faith and fair dealing for employment contracts.⁴⁰⁹ The federal court in Dallas refused to apply California law and entered summary judgment for Levi Strauss.⁴¹⁰ In upholding the summary judgment, the Fifth Circuit correctly invoked Second Restatement section 196's presumption that service contracts are governed by the law where the majority of services are to be performed.⁴¹¹ The court also noted section 196's second component—that the presumption is overcome if another state has a more significant relationship to the transaction and the parties.⁴¹² At this point, the court should have followed the *DeSantis* model (which it cited three times⁴¹³) and considered all seven factors in section 6. Instead it considered only state interests, prefaced with this statement: "In effect, the most significant relationship approach examines the relative interests of the states sharing a relationship with the transaction and the parties."⁴¹⁴ That it does, along with five other factors including the parties' expectations.⁴¹⁵ Unlike *Coakes*, where a British plaintiff's expectations of Texas law governing his contract probably would not have been reasonable,⁴¹⁶ it was reasonable for Pruitt to anticipate California law governing his contract, made in California by two parties from California.⁴¹⁷ Without the pertinent facts available at this point, it is impossible to estimate whether Pruitt's expectation would overcome section 196's presumption that the site of performance governs. If, however, the issue were characterized as relating to the contract's formation and not to a performance issue, the section 196 presumption would disappear and Pruitt's expectations would become an even stronger factor.⁴¹⁸ In any event, these matters might have been

408. *Id.*

409. Texas has no such requirement for service contracts. *Id.*

410. *Id.*

411. *Pruitt*, 932 F.2d at 461 & n.2 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 and citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex. 1990)).

412. *Id.* at 461.

413. *Id.*

414. *Id.*

415. See *infra* note 418.

416. See *supra* Part IV.B.1.b.

417. *Pruitt*, 932 F.2d at 460.

418. For example, Second Restatement section 205 governs the nature and extent of contractual obligations and includes parol evidence issues. RESTATEMENT

considered if the court had analyzed all of section 6's factors.

f. Huddy v. Fruehauf Corp.⁴¹⁹

Texas resident Huddy was injured when his truck overturned in Georgia. He was employed by a Tennessee corporation, and the trip was from Texas to Georgia.⁴²⁰ Huddy sued truck manufacturer Fruehauf, a Michigan-based corporation. The case was tried to a federal magistrate judge who ruled that Michigan law—which does not recognize strict liability—governed.⁴²¹ Fruehauf won the negligence case, and Huddy appealed the jury's failure to consider his strict liability claim under Texas law.⁴²²

In noting the conflict between Michigan and Texas law, the Fifth Circuit signaled its interest-analysis approach in this sentence: "In fact, of all the states that have even a slight interest in this case, Michigan appears to be the only one which would not recognize Huddy's theory [of strict liability]."⁴²³ The court of appeals reversed the lower court, and specifically held that the magistrate judge had erred in concluding that plaintiff's move to New Jersey three years after the accident negated Texas's interest in the case.⁴²⁴ In so holding, the court cited section 145's Introductory Notes, indicating that residence

(SECOND) OF CONFLICT OF LAWS § 205 & cmt. e (1971). Section 205 provides that the law governing questions such as parol evidence will be determined by section 188 (if the parties have not chosen a law). Section 188 is the general contract principle, listing five contact factors: (a) place of contracting; (b) place of negotiation; (c) place of performance; (d) location of the subject matter; and (e) domicile, residence, nationality, place of incorporation and place of business of the parties. *Id.* § 188. Without the presumption favoring the place of performance, California interests are more evenly balanced. For this analysis, party expectation, which is also one of the seven policy factors under section 6, is especially important. *See id.* § 188 cmt. b (recognizing that of the policy factors outlined in section 6, party expectations is especially important in contract cases; although it would be less so in tort claims). On the other hand, section 196 comment *a* provides that the performance situs's law governs "the circumstances under which either party may terminate the contract," thus returning to the presumption favoring Texas law. *Id.* § 196. *Pruitt* is an especially difficult choice-of-law case in which characterization is a crucial issue. Were the promises made at the time of employment essential terms governing the obligations, or simply grounds for termination?

419. 953 F.2d 955 (5th Cir. 1992) (per curiam).

420. *Id.* at 956.

421. *Id.*

422. *Id.*

423. *Id.* at 956-57.

424. *Huddy*, 953 F.2d at 957.

changes after the suit is filed should seldom affect the choice-of-law decision.⁴²⁵ The ensuing analysis heavily favored state interests but did examine the contacts under section 145, distinct from the interest analysis. In particular, the court noted the presumption that the accident situs's law controls and found that the presumption was of little value here because Fruehauf's failure could have occurred anywhere.⁴²⁶ Again, however, the court concluded this point by stating that "the location of the wreck was fortuitous and that Georgia has no other interest in this case" and "Georgia's interest in this case does not appear compelling."⁴²⁷ This statement is somewhat justified by the comments to section 145, which emphasize state interest as a compelling factor in tort cases.⁴²⁸ Nonetheless, other factors are also important,⁴²⁹ and none of the section-6 policies is summarily eliminated in tort claims.⁴³⁰ The issue did not matter anyway because of Georgia law's consistency with Texas law.⁴³¹ The court continued its section 145 contact analysis, and, finding the place of manufacture indeterminate and both Texas and Michigan being residences of parties,⁴³² the court returned to underlying state interests. It concluded that the Texas interest in using strict liability to protect its residents outweighed Michigan's rejection of strict liability.⁴³³

425. *Id.* at 957 n.2 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 introductory notes; *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 601-02 (5th Cir. 1981)).

426. *Id.* at 957.

427. *Id.*

428. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmts. b, c, e. *See also supra* note 286 and accompanying text.

429. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. b (explaining that in tort cases, the section-6 factors of (d) justified expectations and (f) certainty/predictability/uniformity of results are less important because lawyers and clients tend not to consider tortious conduct ahead of time). (The Second Restatement was finalized in 1972, prior to the collapse of Enron.) Assuming greater importance in tort cases are the following section-6 factors: (a) the needs of the interstate and international system, (b) & (c) the policies of the forum state and other interested states, and (g) ease in determination and application of the law. *Id.*

430. *Id.* § 145(1) (directing that choice of law for tort claims is determined by the state having "the most significant relationship to the occurrence and the parties under the principles stated in section 6"). Although the comments to section 145 emphasize some factors over others for tort claims, nothing in section 145 eliminates any of section 6's factors. *See infra* text accompanying note 499 (citing section-6 factors as justification for their choice-of-law decision).

431. *Huddy*, 953 F.2d at 957.

432. *Id.* at 957-58.

433. *Id.* at 958.

It is difficult to find fault with this conclusion. The fact that the court omitted some section-6 factors from the analysis is of little import because the absent factors would not have mattered. Ease in application of the law is irrelevant here, and the needs of the interstate and international system have little impact on a straightforward choice between Texas's strict-liability remedy and Michigan's lack of one. Certainty, predictability, and uniformity also have little importance here. One missing factor might have reinforced the conclusion. Section 6's factor (e)—the basic policies underlying the field of law—had relevance in that strict liability is an almost-pervasive remedy and was used by all relevant states but Michigan in this case.⁴³⁴ The court noted that fact, but it did not note that factor. Although the addition of this component would not have changed the result, the court could have followed Texas law and the most-significant-relationship test for torts by adding a paragraph no longer than this one, merely itemizing and eliminating the additional factors in section 6.

g. DeAguilar v. Boeing Co.⁴³⁵

DeAguilar involved an interesting and perhaps unique choice-of-law application to removal jurisdiction and the determination of federal jurisdictional amount. Following the 1986 crash of a Mexicana Airlines jet near Mexico City, the victims' relatives and personal representatives filed a number of lawsuits in various forums in the United States, all of which were dismissed either voluntarily by plaintiffs, on grounds of foreign sovereign immunity, or for *forum non conveniens*.⁴³⁶ According to the Fifth Circuit, the plaintiffs were "determined to find a United States forum in which to try their case."⁴³⁷

In the instant case, plaintiffs sought a Texas state court because of Texas's nonrecognition of *forum non conveniens* in wrongful death cases (later legislatively overruled) that might permit litigation in the United States. Defendant Boeing, on the other hand, wanted a federal forum, hoping to obtain another *forum non conveniens* dismissal. Plaintiffs' state-court petition had alleged unspecified damages in excess of the state court's \$500 jurisdictional threshold, and when defendant removed, a lengthy battle began over whether the damages

434. *Id.* at 956-57, 957 n.1.

435. 47 F.3d 1404 (5th Cir. 1995).

436. *Id.* at 1406.

437. *Id.*

for each plaintiff exceeded the then-requisite \$50,000.01. Through several district- and appellate-court rulings, the issue eventually narrowed to whether certain party and estate representatives had authority to file a stipulation, binding on all parties, limiting damages to \$50,000 or less. To support their position, plaintiffs argued that Mexican law governed the issue of authority to stipulate to damages. This is not to say that plaintiffs conceded that Mexican law governed the tort claims—only that it governed this estate-administration issue.⁴³⁸ To determine governing law, the court did as so many others have in the cases reviewed here—it noted that a federal court considering a diversity case was bound by the choice-of-law rules of the state in which it sat, correctly identified the Texas choice-of-law rule as the most-significant-relationship test, quoted the pertinent Second Restatement sections, and then ignored them and limited its analysis to a comparison of government interests.⁴³⁹ As with several other cases using interest analysis, the court recited pertinent facts but limited their application to interest analysis.

Then the court went a step beyond and made a debatable finding that the issue of who had authority to bind the Mexican parties and estates was not one of estate administration, but one akin to the “procedural” aspects of a case.⁴⁴⁰ The court placed the term *procedure* in quotes to emphasize the accompanying footnote that stated: “Strictly speaking, this is not a procedural issue: otherwise, the federal procedural rules would apply.”⁴⁴¹

This akin-to-procedure characterization led to the court’s finding that “Mexico has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a

438. *Id.* at 1414.

439. *Id.* at 1413-15.

440. *DeAguilar*, 47 F.3d 1404, 1414. In support of this point, the court also found that the accident’s situs in Mexico was fortuitous and irrelevant to this issue. Although the crash site often is found to be fortuitous in airplane- and even auto-crash cases, the court misstates the issue here. For estate-administration purposes, an important if not controlling issue is the decedents’ nationality or residence. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 314(a) cmt. e (noting the importance of the decedent’s domicile in probate matters).

441. The court did not cite authority for the line it drew here. The court is incorrect on several points in this analysis. One is that if this issue were deemed procedural, it does not follow that the Federal Rules of Civil Procedure would control. For one thing, the Federal Rules do not address this issue. Under those circumstances, federal law would, no doubt, turn to state law for the answer, bringing the analysis full circle.

Texas cause of action.”⁴⁴² Texas, however, did have an interest, and thus, controlled the issue. The court deviated from interest analysis for a one-sentence point that applying Texas law would promote uniformity and predictability, alluding to but not citing Second Restatement section 6(2)(f). But it returned to the Currie fold with a relish by concluding that “[t]his is a false conflict, and Texas law applies.”⁴⁴³

In tort cases, governmental interests are stronger than in some actions. But the issue was not tort; it was authority to bind the estates to a damage stipulation. Mexico had strong interests in a properly characterized analysis that were not addressed here. On the other hand, good reasons exist for rejecting plaintiffs’ assurances of a \$50,000 damage cap per party. Parallel claims were underway in Mexico and possibly to be filed in other American states. It is understandable that the court would want impeccable assurances of the damages cap because a finding for plaintiffs on this issue would cause remand to state court and thus create a Texas forum in which a *forum non conveniens* motion was not possible. Deciding this issue under Mexican law, a crucial holding not binding on Mexican courts, could place defendants at an unacceptable risk of multiple judgments. The factors in section 6 adequately address these problems.⁴⁴⁴ One approach, then, would have been to note Mexico’s interest in the estate-administration issue but find that Texas law controlled in light of other section-6 factors. This balance addresses important issues of: (1)

442. *DeAguilar*, 47 F.3d at 1414.

443. *Id.* at 1414 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984)). The *false conflict* point leading to a finding that Mexico had no interest, and then immediately to a holding that Texas law applied is a prime example of Currie interest analysis. See *supra* note 89 and accompanying text for the Currie analysis steps. See also SCOLES, *supra* note 3, at 27-30.

444. The Second Restatement also includes sections addressing probate and estate administration. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 236-43 (real property); *id.* §§ 260-66 (movables). However, no sections address the specific issue here of authority to bind the estate. In this circumstance, the issue would default to section 222 (the general property principle), which provides that “interests of the parties in a thing are determined, depending upon the circumstances, either by the ‘law’ or by the ‘local law’ of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.” *Id.* § 222. The law/local law distinction refers to instances where a court should apply another jurisdiction’s entire law, including its choice-of-law rule. See, e.g., *id.* § 223 (governing the validity and effect of real property conveyances, and calling for the whole law of the land’s situs, including its choice-of-law rule). See also *id.* §§ 4, 223 cmt. b (discussing renvoi).

avoiding multiple damages and (2) allowing defendants a hearing on *forum non conveniens* by allowing the action to remain in federal court.

All seven factors in section 6 promote one or both of these policies⁴⁴⁵ and would have reached the same result more convincingly.

h. *In re* Air Disaster at Ramstein Air
Base, Germany⁴⁴⁶

This case involved a group of wrongful-death and personal-injury claims from the crash of an Air Force C-5A in Germany. Defendants included Lockheed Corporation (Delaware incorporated and Georgia based) and General Electric Corporation (New York incorporated and based).⁴⁴⁷ Much of the design and installation work was done in Georgia, and the plane was based in San Antonio.⁴⁴⁸ Plaintiffs from Texas, Florida, Kansas, Missouri, and North Dakota filed seven lawsuits in state courts in Florida and Texas.⁴⁴⁹ Defendants removed all suits to federal court, and the Judicial Panel on Multidistrict Litigation transferred them to the Western District of Texas. The trial court ruled that Georgia law governed, resulting in summary judgment for the defendants.⁴⁵⁰

The Fifth Circuit affirmed the choice of Georgia law in a brief analysis—perhaps too brief, considering the severe result of eliminating plaintiffs' claims by summary judgment.⁴⁵¹ In setting up the analysis, the court observed that under Texas choice-of-law rules,⁴⁵² Second

445. Specifically, applying Texas law to determine authority to stipulate to damages in this case promoted: (1) the needs of the interstate and international systems in an air crash case; (2) Texas policies; (3) policies of other states having connections to this matter; (4) defendants' justified expectations that they will not be subject to multiple judgments; (5) the basic policies underlying air crash cases, that is, avoiding multiple judgments and addressing *forum non conveniens* issues; (6) certainty, predictability, and uniformity of result; and (7) ease in applying Texas law instead of Mexican law on an apparently difficult issue.

446. 81 F.3d 570 (5th Cir. 1996), *amended by*, *Perez v. Lockheed Corp.*, 88 F.3d 340 (5th Cir. 1996).

447. *Id.* at 572 nn.2-3.

448. *Id.* at 572.

449. *Id.* at 572 & n.4.

450. *Id.* at 573 nn.5-6 (noting that the summary-judgment issues included Georgia law—not having a duty to warn of obvious design defects—and Georgia's ten-year statute of repose).

451. *See generally In re Air Disaster*, 81 F.3d at 576-77 (determining which choice-of-law rules to apply and affirming the district court's choice of Georgia law).

452. This was a multidistrict-transfer case under 28 U.S.C. § 1407. As such, the

Restatement sections 6 and 145 applied, with section 6 containing the general principles, “whereas Restatement Section 145 lists the factual matters to be considered when applying the Section 6 principles to a given case.”⁴⁵³ After establishing this thorough and accurate predicate, the court quickly disposed of the issue by finding that: (1) the place of the injury was fortuitous;⁴⁵⁴ (2) the victims’ residences did not matter;⁴⁵⁵ and (3) the important contact was the place of design and manufacture.⁴⁵⁶ To complete this hasty run through the factors, the court cited what it deemed the only relevant contact—the design and manufacturing activities in Georgia⁴⁵⁷—and then connected that directly to state-interest analysis. Specifically, the court stated: “Virtually all of the relevant conduct complained of took place in Georgia, with some possible activity by General Electric in Ohio. Georgia thus has the strongest interest in applying its law to businesses that design, manufacture and sell products into its stream of commerce.”⁴⁵⁸ This analysis, though feasible, is weak on two points. First, it short-circuits the most-significant-relationship test by hastily eliminating all states but Georgia, based on findings supportable by the

court had to consider which choice-of-law rule to apply. Federal law requires that the transferee court apply individually the choice-of-law rules of each of the transferor courts. *Id.* at 576 (citing *Van Dusen v. Barrack*, 376 U.S. 612 (1964)). All the cases came from Florida and Texas, which both use the Second Restatement’s most-significant-relationship test. Thus, that was the applicable choice-of-law rule. *See id.* at 576-77 (citing *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979) and *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980)).

453. *Id.* at 577 (citing *Crisman v. Cooper Indus.*, 748 S.W.2d 273, 276 (Tex. App.—Dallas 1988, writ denied)).

454. The alleged cause here was product failure; thus making the German accident site fortuitous, as the court found. But the court’s statement could be read to say that accident sites in general are irrelevant in tort cases, and this is simply wrong. Contrary to the court’s discussion, the Restatement advises that the accident site is a primary consideration, except where the occurrence is fortuitous. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e (discussing situations “where the place of injury will not play an important role in the selection of the state of the applicable law”).

455. Similar to the point made in the prior footnote, this case should not be read to mean that victims’ or parties’ residences, citizenships, or nationalities are irrelevant to tort claims. They are strong factors, as specifically stated in section 145(2)(c) and discussed further in section 145 comment e. *Id.* §§ 145(2)(c), 145 cmt. e.

456. *In re Air Disaster*, 81 F.3d at 577 (citing *Foster v. United States*, 768 F.2d 1278, 1282-83 (11th Cir. 1985)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e.

457. *In re Air Disaster*, 81 F.3d at 577.

458. *Id.* (emphasis added).

Second Restatement's comments but ignoring a more thorough reading of those comments. Second, the court appears to make a one-to-one connection between the one contact it finds significant (the place of design and manufacture), and the one policy factor (interest analysis) it finds significant. The Georgia contact is pertinent under section 145, but it is to be considered in light of all seven section-6 factors, as the court noted on the same page.⁴⁵⁹ Although brief choice-of-law analyses often are adequate, the ones barring a plaintiff's claim should apply a more thorough test. In the *Ramstein* analysis, section 145 clearly directs a final step under section 6's seven-factor test, of which the court considered only state interest.

2. Texas Federal District Courts

Federal district courts in Texas (including bankruptcy and magistrate courts) use some aspect of interest analysis more often than any other judicial category reported in this Article, doing so in nine of their thirty-four (26.47%) applications of the most-significant-relationship test since *Gutierrez v. Collins* in 1979. This percentage is inflated because of the federal district courts' greater tendency to use Currie vocabulary even in cases not otherwise overdone with interest analysis. Such cases tend to count contacts and then label the conclusion as "state X having a greater interest" rather than doing a proper Second Restatement analysis.⁴⁶⁰

a. Baird v. Bell Helicopter Textron⁴⁶¹

Baird is so thoroughly analyzed under Second Restatement principles that it hardly belongs here, except for its express use of the Currie false-conflicts approach. Baird was a Canadian citizen who was severely injured while flying a Bell helicopter in Surinam.⁴⁶² Baird and his wife brought several claims against Bell, who asked that Canadian law be applied both to the plaintiffs' claims and to Bell's third-party-

459. *Id.* at 577 n.9.

460. *See, e.g.,* Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D. Tex. 1985), *rev'd*, 799 F.2d 1000 (5th Cir. 1986) (discussed *infra* Part IV.B.2.b); Hefner v. Republic Indem. Co. of Am., 773 F. Supp. 11, 13 (S.D. Tex. 1991) (discussed *infra* Part III.B.2.g).

461. 491 F. Supp. 1129 (N.D. Tex. 1980).

462. *Id.* at 1132.

contribution claims.⁴⁶³ The court had to determine the applicable law for five issues: basic liability (the Canadian remedy was limited to negligence);⁴⁶⁴ Bell's third-party-contribution claims (the liability apportionment differed);⁴⁶⁵ Baird's pecuniary damages (there was no conflict);⁴⁶⁶ Baird's nonpecuniary damages (Canada capped them at \$100,000);⁴⁶⁷ and Baird's wife's loss-of-consortium claims (the court ordered plaintiffs to provide additional evidence of pertinent Canadian law).⁴⁶⁸ The court considered these issues only months after the *Gutierrez* decision.⁴⁶⁹ It did a textbook analysis leading to Texas law for (1) liability, (2) Bell's third-party claims, and (3) Baird's pecuniary losses.⁴⁷⁰ It looked to Canadian law for (4) Baird's pain and suffering and (5) his wife's claims.⁴⁷¹ The only misstep is a concluding point in the liability section that "[t]he analysis so clearly mandates the use of Texas products liability law that this issue very nearly represents a false conflict."⁴⁷² This language clearly refers to Currie's concept of false conflicts—the court already had concluded that British Columbia's interest in protecting its citizens by limiting the remedy to negligence and noted that this interest would not be served in regard to non-Canadian-resident Bell.⁴⁷³ This conclusion apparently was speculation, given the court's statement that "[a]n *evident* policy of British Columbia is to protect its citizen manufacturers"⁴⁷⁴ British Columbia's purpose could just as easily have been an outright rejection of the theory of personal-injury recovery without proof of negligence,

463. *Id.* at 1140, 1142, 1148. It is unclear whether Bell asked for Canadian law for the loss-of-consortium claims. *Id.* at 1152. No party asked for the law of Surinam. *Id.* at 1139. The court noted the Second Restatement's emphasis on situs law in tort claims, and it further explained that the presumption is overcome where the accident location was fortuitous. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e).

464. *Baird*, 491 F. Supp. at 1140-42.

465. *Id.* at 1142-48.

466. *Id.* at 1148-49.

467. *Id.* at 1149-52.

468. *Id.* at 1152.

469. *Baird*, 491 F. Supp. at 1147.

470. *Id.* at 1142, 1148-49.

471. *Id.* at 1152.

472. *Id.* at 1141 (citing DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 89 (1965)).

473. *Id.*

474. *Baird*, 491 F. Supp. at 1141 (emphasis added). The opinion does not provide any other support for this conclusion about British Columbia's policy on personal-injury remedies.

which would include Bell and all other manufacturers. The court's conclusions were very well supported without this point, and this dictum foray into Currie interest analysis does not affect the validity of an otherwise very well reasoned opinion.

b. *Faloona v. Hustler Magazine, Inc.*⁴⁷⁵

Faloona is a very well-analyzed invasion-of-privacy suit, except for its choice-of-law analysis.⁴⁷⁶ The plaintiffs were two children suing through their mother for the unauthorized reprinting of nude pictures sold to Hustler Magazine without the mother's specific permission. In selecting the applicable law, the court bifurcated the distinct issue of plaintiffs' claims for invasion of privacy (a tort) and Hustler's affirmative defense of a release (a contract issue).⁴⁷⁷ The choice-of-law discussion's introductory sentence signals the influence of interest analysis in this case: "Both California and Texas have some interest as to each issue."⁴⁷⁸ For the right-of-privacy claim, the court concluded that the other states' contacts were insufficient to displace the Restatement's emphasis on Texas as the plaintiffs' domicile at the time of publication.⁴⁷⁹ Although the court did not take the next step of considering any offsetting factors under section 6, this conclusion is almost certainly correct. In any event, it is not an overuse of interest analysis but an underuse, and it is not the subject of this Article.

Turning to the validity of the mother's release, the court took a

475. 607 F. Supp. 1341 (N.D. Tex. 1985), *rev'd*, 799 F.2d 1000 (5th Cir. 1986).

476. *Faloona* has superior reasoning in a case where a mother agreed to the publication of nude pictures of her five- and seven-year-old children in *The Sex Atlas*, a book containing erotic and sexually explicit depictions of group sex, sado-masochism, pederasty, bestiality, and other activities. When her children's pictures were reprinted in *Hustler*, the mother and children objected to them as pornographic. Although a quick description of these facts might suggest the frivolity of this claim, the issues were more complicated. In rejecting the plaintiffs' claims, the court concluded that taking the plaintiffs' testimony at face value (their disgust at *Hustler*), their real goal should not be damages but censorship. *Id.* at 1360-61. The resulting dismissal flows from a quote from Clare Boothe Luce: "Censorship, 'like charity, should begin at home; but unlike charity, it should end there.'" *Id.* at 1361.

477. *Id.* at 1352.

478. *Id.*

479. *Faloona*, 607 F. Supp. at 1352. Second Restatement section 153 provides that multistate invasion-of-privacy claims are subject to the most-significant-relationship test, but that the chosen state will "usually be the state where the plaintiff was domiciled at the time if the matter complained of was published in that state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 153 (1971).

government-interest approach. The court first selected the plaintiffs' domicile as the primary contact under Second Restatement section 188: "Therefore, although the place of contracting, the location of the subject matter of the contract, and the reasonable expectations of the parties are to be considered, substantial weight must be given to the domicile of the plaintiffs and their parents."⁴⁸⁰ Listing the plaintiffs' and parents' contacts with Texas, the court found that "[t]hese close ties with Texas give this state a very strong interest in governing the relationship between the plaintiffs and their parents."⁴⁸¹ Then, contrasting California's equally strong contacts, the court concluded that "California's interests concerning the validity of the release is not as strong as that of Texas—so Texas law will also govern the release issue."⁴⁸²

Faloon thus shows the influence of an interest-analysis approach. Its opening sentence foreshadowing the conclusion to apply Texas law was termed only in interest analysis,⁴⁸³ and its discussion of the mother's release summarized the contacts in terms of interest analysis. *Faloon* may be an example of nothing more than vocabulary—that is, a tendency to use the term *interest* to mean the state having the strongest contacts or having the most significant relationship. If so, it is also an example of how the area of conflict of laws has defined some of its terms poorly, leading to differing applications in the courts and calling for a revamping of vocabulary.⁴⁸⁴

c. *Tidelands Royalty B Corp. v. Gulf Oil Corp.*⁴⁸⁵

480. *Faloon*, 607 F. Supp. at 1353 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188).

481. *Id.*

482. *Id.* The court also found that the release was binding under both Texas and California law. *Id.* at 1353 n.35. The ensuing discussion of the validity of the release may be found at pages 1353-55. The Fifth Circuit Court of Appeals disagreed on this point only, finding that California law would control because of the children's later presence there, the granting of the mother's divorce there, and her custody of the children there. *Faloon v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1003 (5th Cir. 1986). The point was moot, however, because the appellate court affirmed the district court's conclusion that no invasion of privacy had occurred. *Id.* at 1007.

483. *See supra* text accompanying note 478.

484. *See generally supra* text accompanying note 1 (quoting Professor Juenger and implying the pervasiveness of Currie's influence on conflicts vocabulary and suggesting the need to coin new terms).

485. 611 F. Supp. 795 (N.D. Tex. 1985).

This claim arose from the wrongful drainage of gas by adjacent leaseholds in submerged property off the coasts of southwest Louisiana and southeast Texas. Federal law provided a choice-of-law rule—specifically, that such disputes be governed by the law of the adjacent state, further defined as applying to offshore areas “which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf.”⁴⁸⁶ The court found that this pointed to Louisiana law,⁴⁸⁷ but shored up its analysis by showing that, if the federal choice-of-law rule did not control, Louisiana law nonetheless would govern. Although the Texas choice-of-law rule would control because the federal court sat there, the court noted that Louisiana also used the Second Restatement approach.⁴⁸⁸ Having noted the Restatement’s applicability in both states, the court did not apply any of its sections, and instead conducted a pure interest analysis leading to Louisiana law.⁴⁸⁹

d. *Abston v. Levi Strauss & Co.*⁴⁹⁰

Abston involved a federal claim for age discrimination with pendent state-law claims for breach of contract and intentional or negligent infliction of emotional distress.⁴⁹¹ The plaintiff was a Texas-based salesman for a California company who argued for California law for his contract claim and for Texas law for his emotional-distress claim; the defendant wanted Texas law for both claims.⁴⁹² In choosing Texas law for both claims, the court first rejected the use of Second Restatement section 196, which governs contracts for services, because, according to the court, the Texas Supreme Court had adopted only section 6, and no Texas cases had used section 196.⁴⁹³ The court

486. *Id.* at 799 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 485-86 (1981) (citing the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, 1333(A)(2) (1976))).

487. *Id.* at 800.

488. *Id.* (citing *Lee v. Hunt*, 631 F.2d 1171, 1174 (5th Cir. 1980); *Wickham v. Prudential Ins. Co. of Am.*, 366 So. 2d 951 (La. App. 1978)).

489. *Id.*

490. 684 F. Supp. 152 (E.D. Tex. 1987).

491. *Id.* at 153.

492. *Id.* at 154.

493. *Id.* at 154. The Texas Supreme Court later invoked section 196 in *De Santis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 n.4 (Tex. 1990), and it was used again in two federal cases. See *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 461 (5th Cir. 1991) (“In cases involving contracts for the rendition of services, the Texas Supreme Court

offered a one-paragraph analysis using four of section 6's seven factors—the forum state's interests, California's interests, outcome predictability, and party expectation.⁴⁹⁴ This short analysis seems to resolve the question fairly, and *Abston* would not make this list except for two points.

The first is a sentence characterizing section 6 as favoring interest analysis in contract cases: "Most important here are the relevant policies of the forum state and of other states alleged to have an interest in the application of their law to the case."⁴⁹⁵ Under the most-significant-relationship test, state interests are always a possible factor. But *Abston* was a contracts case, and the "[p]rotection of the justified expectations of the parties is the basic policy underlying the field of contracts."⁴⁹⁶ The court did expressly consider party expectation, and that is the second point of contention—it did so in a short-handed conclusion that "it can hardly be said that a party who has lived and worked in Texas for eleven years, and has brought suit here, would be unfairly surprised to have Texas law apply to him."⁴⁹⁷ The issue here, of course, is not whether a party would be surprised that a Texas court would generally apply Texas law, but whether the contracting parties expected Texas law to apply to their contract. Because the contract was for services in Texas, and because plaintiffs did not negotiate in California and were not recruited from there, they should have expected Texas law to govern. But the court's conclusion is based, as worded, on two factors—plaintiff's Texas residence, and plaintiff's decision to file his lawsuit in Texas. The unilateral residence of one contracting party, though relevant, is insufficient to indicate the parties' expectations as to governing law. The second factor—filing suit in Texas—is irrelevant to the contracting parties' expectations.⁴⁹⁸

has particularly relied on section 196 of the Restatement."); *Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 1003 (W.D. Tex. 1997) (applying section 196 of the Restatement).

494. *Abston*, 684 F. Supp. at 154-55.

495. *Id.* at 154.

496. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971).

497. *Abston*, 684 F. Supp. at 155.

498. *Id.*; see *supra* Part IV.A.1.b (discussing *Torrington Co. v. Stutzman*, 46 S.W.2d 829 (Tex. 2000)). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. e (pointing out that, where the forum state has no interest in the case other than being the forum, its only relevant policies will be "embodied in its rules relating to trial administration"). Currie, on the other hand, believed that the forum always had an interest in applying its own law, a point echoed by current interest analysts. See CURRIE, *supra* note 13, at 60-62. See also, e.g., Louise Weinberg, *Against Comity*, 80

Thus, these additional section-6 factors—party expectation and outcome predictability—were considered only in a short-handed fashion that left interest analysis the only real test here.⁴⁹⁹

e. Adams v. Gates Learjet Corp.⁵⁰⁰

Adams contains a very brief choice-of-law analysis based on the obviously correct conclusion that Kansas law should govern this claim for reimbursement of aircraft modification costs. The opinion is interlocutory, merely determining that Kansas law controls and ordering plaintiffs to submit new responses to defendant's summary-judgment motion, this time premised on Kansas law.⁵⁰¹ Some or all of the plaintiffs were owners of a Learjet, which, after purchase, required modification to meet federal airworthiness standards.⁵⁰² Plaintiffs were from Texas, Missouri, Colorado, Oklahoma, Nevada, Florida, Michigan, and Oregon, and only three of the twelve plaintiffs resided in Texas.⁵⁰³ Defendant Gates Learjet was a Kansas corporation, the plane was built and the modifications were made in Kansas, and the federal order came from a Kansas FAA office.⁵⁰⁴ Moreover, plaintiff Tri City had a purchase agreement with Gates Learjet containing a Kansas choice-of-law clause.⁵⁰⁵ The apparent purpose of the Texas forum was plaintiffs' pursuit of a claim under the Texas Deceptive Trade Practices Act.⁵⁰⁶

Noting Kansas's overwhelming contacts and Texas's relative lack of any contracts, the court then quoted what appeared to be the *ratio decidendi*: "As Judge Bue recognized in *Continental Oil*

GEO. L.J. 53, 94 (1991) (opining that when a court's sovereign interest is invoked there is no substitute for its taking "unilateral responsibility for the enforcement of the law"). Critics continue to argue against the forum preference. *E.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 311 (1992) (arguing that the elimination of forum preference altogether is the only constitutional solution to violations of the Full Faith and Credit Clause).

499. *Abston*, 684 F. Supp. at 155.

500. 711 F. Supp. 1374 (N.D. Tex. 1988).

501. *Id.* at 1375-76 (discussing choice-of-law and new summary-judgment response briefs, and dismissing various claims under Texas law and the counterclaim against a bankrupt plaintiff).

502. *Id.* at 1375.

503. *Id.*

504. *Id.* at 1375 n.1.

505. *Adams*, 711 F. Supp. at 1375 (binding only Tri City with the clause).

506. *Id.* at 1375-76.

Company v. General American Transportation Corporation, the state in which a defendant manufacturer is located ‘has a significant interest in determining the liability of in-state manufacturers and, accordingly, controlling defendant’s conduct.’⁵⁰⁷ This in turn led to the conclusion that “Kansas has the most significant relationship to the merits of this controversy.”⁵⁰⁸ Following that conclusion the court explained: “The application of Kansas law will ensure ‘certainty, predictability, and uniformity of result’ in this case.”⁵⁰⁹ The result is correct without a doubt, but the only stated rule in reaching that result was interest analysis, with an after-reference to an additional section-6 factor.

f. *In re Chanel Financial, Inc.*⁵¹⁰

Continental Casualty Company asked a Dallas bankruptcy court to impose a constructive trust on Cosmopolitan Credit and Investment Corporation, later known as Chanel Financial, Inc., based on the latter’s fraud.⁵¹¹ Three choice-of-law questions arose. The first was whether the constructive trust issue was substantive or remedial. The court began with an outdated quote: “The general conflict of laws rule in Texas is that ‘questions of substantive law are controlled by the state where the cause of action arose, but . . . matters of remedy and of procedure are governed by the law of the state where the action is sought to be maintained.’”⁵¹² The court then noted that *Duncan* had

507. *Id.* at 1375 (quoting *Cont’l Oil Co. v. Gen. Am. Transp. Corp.*, 409 F. Supp. 288, 296 (S.D. Tex. 1976)).

508. *Id.*

509. *Id.* at 1375 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971)).

510. 102 B.R. 549 (Bankr. N.D. Tex. 1988).

511. *Id.* at 551.

512. *Id.* at 550 (quoting *Morris v. LTV Corp.*, 725 F.2d 1024,1027 (5th Cir. 1984); *California v. Copus*, 309 S.W.2d 227, 230 (1958)). Contrary to *Chanel*’s present-tense usage, this statement of Texas law was wrong at the time and wrong when *Morris* was published on March 2, 1984, following *Duncan*’s February 15, 1984 issuance. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 417 (Tex. 1984) (holding that an insurance release had to be construed according to Texas law because Texas had the most significant relationship to the issue). The Fifth Circuit’s misstatement of the Texas conflicts rule in *Morris* is to be expected because of its proximity to *Duncan*’s issuance, but *Chanel*’s misstatement is not. *Chanel*’s point, of course, is that the Texas Supreme Court had not changed the conflicts rule regarding forum procedure; although forum law no doubt controls procedural issues in the vast majority of cases, it is not at all clear that conflicts involving procedure are immune from *Duncan* and the most-significant-relationship test. See *infra* note 513. See also

overruled this approach in 1984, but that, since then, “the reported authorities have neither overruled nor questioned the vitality of *Morris*” for its proposition that remedies are governed by forum law.⁵¹³ The court then characterized the imposition of a constructive trust as a remedy; thus, it was governed by Texas law.⁵¹⁴

The second choice-of-law issue was which law governed fraud, a predicate to imposing the constructive trust.⁵¹⁵ Here the court began with the presumption under Second Restatement section 148 that “if the plaintiff’s action in reliance took place in the same state where the false representations were made,” that state’s law controls unless another state has a more significant relationship to the issue.⁵¹⁶ The court found that all pertinent acts—the plaintiff’s and the defendant’s—occurred in Louisiana, whose law would control unless another state had a more significant relationship.⁵¹⁷ This determination should have been tested not just by contacts but also by the seven factors in section 6. Instead, the court noted several Louisiana contacts⁵¹⁸ and then reached a quick conclusion that “[w]hile both Texas and Louisiana have significant state interests in protecting its [sic] residents from fraud, the facts do not justify the conclusion that Texas has an overriding state interest in protecting CCC to overcome the presumption.”⁵¹⁹ This analysis thus follows a pattern found in many other cases in this Article of pairing contacts with a summary interest-analysis conclusion. The third choice-of-law issue—the res’s traceability—was not analyzed under the

RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122-44 (governing choice of law for procedural issues and illustrating instances in which procedural issues would be governed by non-forum law).

513. *In re Chanel Fin., Inc.*, 102 B.R. at 550. Although the Texas Supreme Court has not broadly addressed choice-of-law questions regarding remedies and procedure, it has applied the most-significant-relationship test in at least two instances, both after *Chanel*, that may give insight. *See generally* *Ford Motor Co. v. Leggat*, 904 S.W.2d 643 (Tex. 1995) (applying the test to evidentiary privilege); *Hughes Wood Prods. v. Wagner*, 18 S.W.3d 202 (Tex. 2000) (discussing the exclusivity of Louisiana’s workers’ compensation remedy).

514. *In re Chanel Fin., Inc.*, 102 B.R. at 550.

515. *Id.* at 551.

516. *Id.* (citing *Nelson v. Nationwide Mortgage Corp.*, 659 F. Supp. 611, 616 (D.D.C. 1987) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1))).

517. *Id.*

518. *Id.* The opinion failed to identify any Texas contacts pertaining to fraud, and simply concluded they were insufficient. Also missing is any information regarding the parties’ residences, places of business, or states of incorporation.

519. *In re Chanel Fin., Inc.*, 102 B.R. at 551.

most-significant-relationship test, and is thus not pertinent here.⁵²⁰

g. *Hefner v. Republic Indemnity Co. of America*⁵²¹

Hefner, ironically, lacks any real interest analysis and could have used some as part of a proper Second Restatement analysis. Nonetheless, it is included here as a good example of a case equating contact counting with state interest, which is then used as a conclusory label rather than an analytical factor. Two guards at Paseo Apartments assaulted Hefner, who later won a state-court judgment against complex owner Westhill Management, Inc., a Texas limited partnership.⁵²² Hefner then brought this action against Lasky, a California resident and a limited partner in Westhill, seeking recovery as a third-party beneficiary against two of Lasky's personal insurers.⁵²³

The federal district court dismissed one of Lasky's insurers for insolvency,⁵²⁴ leaving Hefner's action against Republic Indemnity, a California insurer. Republic moved for summary judgment on grounds of nonliability, which turned on which state's law applied. The district court first held that Texas Insurance Code article 21.42, which placed the choice-of-law analysis under *Duncan*,⁵²⁵ did not control.⁵²⁶

520. For the res's traceability, the court relied on a 1967 federal decision from California and an 1884 United States Supreme Court case, both for the following state law proposition: "It is well settled that the law of the situs of the trust governs the trust." *Id.* at 551 (citing *In re Dollard*, 275 F. Supp. 1001, 1004 (C.D. Cal. 1967); *Spindle v. Shreve*, 111 U.S. 542, 546 (1884)). The court found that the proceeds of the res had been delivered to the trustee in Texas and would thus be governed by Texas law. Although this proposition no doubt has legal support, it fails to invoke either a Texas choice-of-law rule or Texas substantive authority, contrary to *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 488 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); and *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

521. 773 F. Supp. 11 (S.D. Tex. 1991).

522. See *Westhill Mgmt., Inc. v. Hefner*, No. 01-87-000617-CV, 1988 WL 46399, at *1-2 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (affirming the trial court's award of damages in the original case).

523. *Hefner*, 773 F. Supp. at 12-13.

524. *Id.* at 13.

525. *Id.* (citing *Duncan*, 665 S.W.2d 414).

526. TEX. INS. CODE ANN. art. 21.42 (Vernon 2002) is a statutory choice-of-law rule requiring the application of Texas law to certain Texas-based claims, no matter what law the policy may designate. The *Hefner* court held that it applied only when: (1) the insurance proceeds are payable to a Texas citizen (Californian Lasky was the payee here); (2) the policy is issued by a company doing business in Texas (Republic

In establishing the predicate for the choice-of-law analysis, the court did not mention section 6 or its factors, but it did recite section 188's factors without attribution: the place of negotiation; the place of signing; the place of performance; the location of the subject matter; and the parties' domicile, residence, place of incorporation, and place of business.⁵²⁷ Applying this list to the facts, California's contacts were considerable, and Texas was merely the place of the injury and the victim's home.⁵²⁸ Rather than apply these contacts to the policies in section 6, the court concluded that "California has a more significant relationship and a greater interest in having its law applied than Texas."⁵²⁹ Although the court included the term *significant relationship*, it was used as an ultimate finding alongside *greater interest*, without any consideration of section-6 policies.⁵³⁰ *Hefner* is an example of contact-counting analysis packaged in a state-interest conclusion, without applying the most-significant-relationship test. For that matter, *Hefner's* only state-interest analysis was done through contact counting. As with several other cases discussed in this Article, *Hefner's* outcome is reasonable, but the approach is wrong, and the discounting of Texas contacts and interests was too quickly done.

h. Grynberg Production Corp. v. British
Gas, P.L.C.⁵³¹

did not); and (3) the claim arises in the course of the insurer's Texas business (the court found it did not). 773 F. Supp. at 13 (citing *Howell v. Am. Line Stock Ins. Co.*, 483 F.2d 1354, 1360 (5th Cir. 1973) and other cases).

527. *Hefner*, 773 F. Supp. at 13.

528. One predicate the court did not recite is that "[t]he contacts with a particular state are not determinative. Some contacts are more important than others because they implicate particular state policies underlying the particular substantive issue. Consequently, selection of the applicable law depends on the qualitative nature of the contacts." *Duncan*, 665 S.W.2d at 421. With this in mind, the number of California contacts is not as significant as what those contacts were, and the two Texas contacts—place of injury and victim's home—should have led to more than a one-paragraph choice-of-law analysis.

529. *Hefner*, 773 F. Supp. at 13.

530. In effect, the court did discuss the section 6(f) factor of certainty, uniformity, and result predictability by noting that if the Republic policy were subject to the laws of every state where Lasky owned property, then Lasky would be subject to twenty different states' laws. *Id.* If that argument were valid, insurance policies would be governed by the most favorable law, and statutes such as article 21.42 would be disfavored.

531. 817 F. Supp. 1338 (E.D. Tex. 1993).

This action involved a dispute over rights to develop oil interests in Kazakhstan, complicated by the fall of the Soviet Union in 1991.⁵³² Originally filed in a Texas state court in Jefferson County,⁵³³ the defendant removed the case to federal court in Beaumont, and in that removal, a choice-of-law issue arose. Specifically, the court had to consider the possible applicability of Texas law and its application to the issue of an employee tortfeasor and fraudulent party joinder.⁵³⁴ Kazakhi law held only the corporate entity liable for the claims alleged;⁵³⁵ Texas law provided a remedy against tortfeasor employees.⁵³⁶ In finding that Texas law possibly could apply at the trial, the court cited to *Duncan* and *Gutierrez* and identified the most-significant-relationship test,⁵³⁷ but it neither quoted nor cited any section of the Second Restatement. Instead, the court conducted a government-interest analysis in which contacts related only to various states' interests.⁵³⁸ The court found that it was very possible that Texas substantive law could apply to some issues, a situation that justified the employees' presence in the suit for liability purposes, and thus, destroyed diversity removal.⁵³⁹ The case nonetheless was removable on federal-question grounds under the well-pleaded-complaint rule.⁵⁴⁰ In this interlocutory ruling on federal removal jurisdiction, the choice-of-law analysis was somewhat tangential, directed only to the court's lack of diversity jurisdiction, and the analysis was then mooted by the presence of federal question jurisdiction. But the fact that this was a dictum analysis does not diminish the importance of a federal court accurately applying the local state's choice-of-law rule, especially when it has potential jurisdictional significance.

i. *Elvis Presley Enterprises, Inc. v. Capece*⁵⁴¹

This case, like *Hefner*,⁵⁴² equates state-interest balancing with contact counting, thus using state interests as a conclusory label for the

532. *Id.* at 1343-45.

533. *Id.* at 1345-46.

534. *Id.* at 1349-51.

535. *Id.* at 1350.

536. *Grynberg Prod. Corp.*, 817 F. Supp. at 1349.

537. *Id.*

538. *Id.* at 1350-51.

539. *Id.* at 1351.

540. *Id.* at 1352-65.

541. 950 F. Supp. 783 (S.D. Tex. 1996).

542. *See supra* Part III.B.2.g (discussing *Hefner*).

state with the most contacts. Also like *Hefner*, this case failed to apply the most-significant-relationship factors found in section 6, including a proper examination of the Tennessee interests at stake. Unlike *Hefner*, the real error here was in analyzing this as a tort rather than as a property claim.

The case arose when Elvis Presley's estate sued Barry Capece for his use of the name "The Velvet Elvis" for his Houston nightclub.⁵⁴³ Along with the federal trademark infringement claims, the estate brought a state-law claim over right of publicity, which, because Presley's estate was in Tennessee, required a choice-of-law analysis.⁵⁴⁴

The federal district court quoted both sections 6 and 145 (the general tort principle)⁵⁴⁵ and then examined the contacts listed in section 145 in a one-paragraph analysis that concluded: "Since the 'locus of the conduct' is in Texas, the Court believes that Texas has a 'greater interest in seeing that its standard of care is applied' because of the affect [sic] it will have on the way parties tailor their conduct within the state."⁵⁴⁶ The court reinforced this conclusion with section 145's presumption that in tort cases, the law of the place of the conduct ordinarily governs standards of conduct.⁵⁴⁷ True enough, Capece's conduct was at issue, but right of privacy is a property claim, not a tort claim.⁵⁴⁸ In fact, after using the Second Restatement's tort section to choose Texas law, the court adjudicated the claim under Texas property law.⁵⁴⁹ For property rights, depending on the issue, the Restatement gives additional weight to the property's situs,⁵⁵⁰ which of course, was

543. *Elvis Presley Enters., Inc.*, 950 F. Supp. at 787-89.

544. *Id.* at 800.

545. *Id.*

546. *Id.* at 800 (quoting *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1414 (5th Cir. 1995)).

547. *Id.* at 801 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d (1971), which states: "Thus, subject only to rare exceptions, the local law of the state where the conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection.").

548. *See, e.g.*, TEX. PROP. CODE ANN. § 26.002 (Vernon 2000) (indicating that an individual's right in the use of the individual's name, voice, likeness, etc. after death is a property right in Texas).

549. *Elvis Presley Enters., Inc.*, 950 F. Supp. at 801-03.

550. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (governing the validity and effect of conveyance of an interest in land). Section 223 provides that the governing law is that which would be applied by the courts of the situs and adds that this will usually be situs law. The Restatement does not have a section specific to the right of privacy, which would thus default to section 6, as called for in section 222,

Tennessee.

In addition to using the general tort principle (section 145) for a property claim, the court fell into the trap of combining contact counting with an interest-analysis conclusion that failed to consider the real interests at stake. Those interests, including Tennessee's governmental interests, might have come out had section 6 been applied. Although the court found no compensable damage, plaintiff obtained partial relief with a permanent injunction against Capece's using Elvis's image, employing associated phrases, or displaying the name "Elvis" in larger letters than those used for "Velvet."⁵⁵¹

V. RECOMMENDATIONS

The proposition that one out of five Texas choice-of-law opinions applies the wrong test requires proof, and that proof requires an understanding of the distinctions in some of law's most abstract principles. I hope I have made that proof, and in particular, that I have established four points. First, governmental-interest analysis is a test distinct from the Second Restatement's most-significant-relationship test. Governmental interests matter in both tests, but they drive the interest analysis. They merely serve as a factor in the Second Restatement approach.

Second, Texas courts are inappropriately mixing Currie's interest analysis with purported Restatement applications. Because there is a national tendency to misapply the Second Restatement,⁵⁵² it may be that having one out of five cases decided under Currie's interest analysis is about right. But before accepting these misapplications as inherent to modern choice-of-law analysis, consider the consequences. Although some of these interest-analyzed decisions produce the same results as the Second Restatement would, some invariably will not. Overlooked choice-of-law components will change the outcome in

the general property principle.

551. The permanent injunction was directed to defendants' violations of both federal and Texas law in their inappropriate use of Presley's name and likeness. *Elvis Presley Enters., Inc.*, 950 F. Supp. at 802. The court denied damages under both federal and Texas law, and the opinion fails to state what damages might have been available under Tennessee law. *Id.* Plaintiff's victory with the permanent injunction was lessened by the fact that defendants had agreed to the injunction at trial. *Id.* at 801.

552. *See supra* notes 7, 187-90.

some cases, often on summary judgment. This Article has attempted to detect some possible outcome-determinative instances, but in many, it will not be possible because the court's record will be developed differently. Not only will the interest-analyzing court perceive facts differently, but parties also will capitulate and fail to pursue Second Restatement elements that do not end up in the calculation.

Third, test-mixing aside, interest analysis is a bad choice-of-law method when used in its pure form. If Texas courts must use interest analysis, we should opt for Professor Weintraub's approach, which includes other elements such as avoiding unfair surprise to the parties.⁵⁵³ Of the many difficulties of pure interest analysis, foremost is the difficulty of ascertaining the pertinent interests in every case. Some laws have clearly delineated boundaries, both in subject matter and territorial application. Most do not. Interest-analyzing courts are prone to unwarranted assumptions, such as State X's statute of repose being intentionally limited to companies residing in State X.⁵⁵⁴ Because the determination of interests is essential to Currie's approach—the test goes nowhere without it—courts often must deduce foreign states' interests without adequate foundation.

Fourth, in spite of this Article's criticism of interest analysis as a choice-of-law method, that analysis has merit as one element in a multifactored test. In particular, Professor Weintraub is correct to caution against applying a foreign law without considering its content and purpose,⁵⁵⁵ any more than one would with forum law. But in doing so, lawyers and judges should not impute legal purposes or speculate about them. If the law's purpose is unclear, that law should be neutrally applied to any fact pattern satisfying the constitutional requirement of reasonable relation.⁵⁵⁶

553. WEINTRAUB, *supra* note 3, at 352-53.

554. *See Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (discussed *supra* Part IV.B.1.c).

555. WEINTRAUB, *supra* note 3, at 349.

556. The Constitution requires a reasonable relation between the dispute and the state whose law is being applied. *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930) (holding that Texas law cannot be applied to a contract formed outside of Texas that is not to be performed in Texas without denying due process of law); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (ruling that choice of law requires a state to have a significant contact, creating state interests such that the choice of law is neither arbitrary nor fundamentally unfair).

APPENDIX A

TEXAS CHOICE-OF-LAW CASES FROM *GUTIERREZ* THROUGH 2002

Texas Supreme Court and Court of Criminal Appeals citations are in large and small capitals, denoting their precedential status.

1979

GUTIERREZ V. COLLINS, 583 S.W.2d 312 (Tex. 1979)

HUNT V. COASTAL STATES GAS PRODUCING CO., 583 S.W.2d 322 (Tex. 1979)

Bravo v. Tex. Farmers Ins. Co., 584 S.W.2d 573 (Tex. Civ. App.—El Paso 1979, no writ)

Braddock v. Taylor, 592 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.)

Walker v. Assoc. Fin. Serv. Corp., 588 S.W.2d 416 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.)

Melton v. Borg-Warner Corp., 467 F. Supp. 1003 (W.D. Tex. 1979)

Hayward v. S.W. Ark. Elec. Coop. Corp., 476 F. Supp. 1008 (E.D. Tex. 1979)

Dickinson v. Auto Ctr. Mfg. Co., 594 F.2d 523, 527 n.7 (5th Cir. 1979)

Dittman v. First Fid. Mortgage Co., 609 F.2d 1006 (5th Cir. 1979)

1980

ROBERTSON V. ESTATE OF MCKNIGHT, 609 S.W.2d 534 (Tex. 1980)

Baird v. Bell Helicopter Textron, 491 F. Supp. 1129 (N.D. Tex. 1980)

Fleeger v. Clarkson Co., 86 F.R.D. 388 (N.D. Tex. 1980)

Lockwood Corp. v. Black, 501 F. Supp. 261 (N.D. Tex. 1980), *aff'd*, 669 F.2d 324 (5th Cir. 1982)

N.Y. Life Ins. Co. v. Baum, 617 F.2d 1201, 1204 (5th Cir. 1980)

1981

First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 808-09 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)

Smith v. Bidwell, 619 S.W.2d 445 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.)

Lincoln Bank & Trust Co. v. Webb, 620 S.W.2d 174, 177 (Tex. Civ. App.—San Antonio 1981, no writ)

Citibank, Ass'n v. London, 526 F. Supp. 793, 805 (S.D. Tex. 1981)

Whitley v. Hartford Accident & Indem. Co., 532 F. Supp. 190 (N.D.

Tex. 1981)

Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744 (5th Cir. 1981)

Budge v. Post, 643 F.2d 372 (5th Cir. 1981)

Crim v. Int'l Harvester Co., 646 F.2d 161 (5th Cir. 1981)

Ellis v. Great S.W. Corp., 646 F.2d 1099 (5th Cir. 1981)

Long Island Trust Co. v. Dicker, 659 F.2d 641 (5th Cir. 1981)

Harville v. Anchor-Wate Co., 663 F.2d 598 (5th Cir. 1981)

1982

Duncan v. Cessna Aircraft Co., 632 S.W.2d 375 (Tex. App.—Austin 1982), *rev'd*, 665 S.W.2d 414 (Tex. 1984)

Gen. Am. Life Ins. Co. v. Rodriguez, 641 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1982, no writ)

Mostek Corp. v. Chemetron Corp., 642 S.W.2d 20 (Tex. App.—Dallas 1982, writ dismissed w.o.j.)

SISKIND V. VILLA FOUND. FOR EDUC., INC., 642 S.W.2d 434 (Tex. 1982)

Becker v. Computer Serv. Corp., 541 F. Supp. 694 (S.D. Tex. 1982)

Hines v. Tenneco Chems., Inc., 546 F. Supp. 1229 (S.D. Tex. 1982)

Cox v. McDonnell-Douglas Corp., 665 F.2d 566 (5th Cir. 1982)

Lockwood Corp. v. Black, 669 F.2d 324 (5th Cir. 1982)

Danner v. Staggs, 680 F.2d 427 (5th Cir. 1982)

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

1983

DAVIS V. STATE, 645 S.W.2d 288, 291-92 & n.5 (Tex. Crim. App. 1983)

McCarver v. Trumble, 660 S.W.2d 595 (Tex. App.—Corpus Christi 1983, no writ)

Kutka v. Temporaries, Inc., 568 F. Supp. 1527 (S.D. Tex. 1983)

N.Y. Life Ins. v. Baum, 700 F.2d 928 (5th Cir. 1983)

Vaz Borralho v. Keydrill Co., 696 F.2d 379 (5th Cir. 1983)

Bailey v. Dolphin Int'l, Inc., 697 F.2d 1268 (5th Cir. 1983), *rehearing den.*, 710 F.2d 837 (5th Cir. 1983)

Vaz Borralho v. Keydril Co., 710 F.2d 207 (5th Cir. 1983)

Maher v. Zapata Corp., 714 F.2d 436 (5th Cir. 1983)

James v. Bell Helicopter Co., 715 F.2d 166 (5th Cir. 1983)

1984

- DUNCAN v. CESSNA AIRCRAFT CO., 665 S.W.2d 414 (Tex. 1984)
Cessna Fin. Corp. v. Morrison, 667 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1984, no writ)
Couch v. Chevron Int'l Oil Co., 672 S.W.2d 16 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)
In re Contests of City of Laredo to Adjudication of Water Rights in Middle Rio Grande Basin and Contributing Tex. Tributaries, 675 S.W.2d 257 (Tex. App.—Austin 1984, writ ref'd n.r.e.)
Commercial Credit Equip. Corp. v. West, 677 S.W.2d 669 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.)
Velde v. Swanson, 679 S.W.2d 627 (Tex. App.—Houston [1st Dist.] 1984, no writ)
COUCH v. CHEVRON INT'L OIL CO., 682 S.W.2d 534 (Tex. 1984)
San Benito Bank & Trust Co. v. Rio Grande Music Co., 686 S.W.2d 635 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)
Austin Elcon Corp. v. Avco Corp., 590 F. Supp. 507 (W.D. Tex. 1984)
In re Geophysical Serv., Inc., 590 F. Supp. 1346 (S.D. Tex. 1984)
Morris v. L.T.V. Corp., 725 F.2d 1024 (5th Cir. 1984)
Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984)
Levine v. CMP Publ'n, Inc., 738 F.2d 660 (5th Cir. 1984)
Life of Am. Ins. Co. v. Aetna Life Ins. Co., 744 F.2d 409 (5th Cir. 1984)

1985

- Cal Growers, Inc. v. Palmer Warehouse & Transfer Co., 687 S.W.2d 384 (Tex. App.—Houston [14th Dist.] 1985, no writ)
Seth v. Seth, 694 S.W.2d 459 (Tex. App.—Fort Worth 1985, no writ)
InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)
Ismail v. Ismail, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)
Tex. Commerce Bank N.A. v. Interpol 80 Ltd. P'ship, 703 S.W.2d 765 (Tex. App.—Corpus Christi 1985, no writ)
Ossorio v. Leon, 705 S.W.2d 219 (Tex. App.—San Antonio 1985, no writ)
Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D. Tex. 1985), *rev'd*, 799 F.2d 1000 (5th Cir. 1986)
Tidelands Royalty "B" Corp. v. Gulf Oil Corp., 611 F. Supp. 795 (N.D. Tex. 1985)
Ritzmann v. Weekly World News, 614 F. Supp. 1336 (N.D. Tex. 1985)

Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368 (5th Cir. 1985)
 McMillan Bloedel Ltd. v. Flintkote Co., 760 F.2d 580 (5th Cir. 1985)
 Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985)
 Rosenberg v. Celotex Corp., 767 F.2d 197 (5th Cir. 1985)
 Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985)
 Randall v. Arabian Am. Oil Co, 778 F.2d 1146 (5th Cir. 1985)

1986

Garcia v. Total Oilfield Serv., Inc., 703 S.W.2d 411 (Tex. App.—Amarillo 1986), *aff'd*, 711 S.W.2d 237 (Tex. 1986)
 Wall v. Noble, 705 S.W.2d 727, 733 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.)
 Great Nat'l Life Ins. Co. v. Davidson, 708 S.W.2d 476 (Tex. App.—Dallas 1986), *rev'd*, 737 S.W.2d 312 (Tex. 1987)
 Christensen v. Integrity Ins. Co., 709 S.W.2d 724 (Tex. App.—Houston [14th Dist.]), *rev'd*, 719 S.W.2d 161 (Tex. 1986)
 TOTAL OILFIELD SERV. INC. V. GARCIA, 711 S.W.2d 237 (Tex. 1986)
 Miller v. Miller, 715 S.W.2d 786 (Tex. App.—Austin 1986, writ ref'd n.r.e.)
 Hilsher v. Merrill Lynch Pierce Fenner & Smith, Inc., 717 S.W.2d 435 (Tex. App.—Houston [14th Dist.] 1986, no writ)
 Am. Nat'l Ins. Co. v. Huckleberry, 638 F. Supp. 233 (N.D. Tex. 1986)
 Moorhead v. Mitsubishi Aircraft Int'l Inc., 639 F. Supp. 385 (E.D. Tex. 1986)
 Singer v. Lexington Ins. Co., 658 F. Supp. 341 (N.D. Tex. 1986)
 McClelland Eng'r, Inc., v. Munusamy, 784 F.2d 1313 (5th Cir. 1986)
 Austin v. Servac Shipping Line, 794 F.2d 941 (5th Cir. 1986)
 U.S. v. Mercantile Nat'l Bank, 795 F.2d 492 (5th Cir. 1986)
 Atl. Mut. Ins. Co. v. Truck Ins. Exch., 797 F.2d 1288 (5th Cir. 1986)
 Faloona v. Hustler Magazine, Inc., 799 F.2d 1000 (5th Cir. 1986)
 Lee v. Miller County, Ark., 800 F.2d 1372 (5th Cir. 1986)

1987

Williams v. Home Indem. Co., 722 S.W.2d 786 (Tex. App.—Houston [14th Dist.] 1987, no writ)
 Vartanian Family Trust No. 1 v. Galstian Family Trust, 724 S.W.2d 126 (Tex. App.—Dallas 1987, no writ)
 DeSantis v. Wackenhut Corp., 732 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987), *rev'd*, 793 S.W.2d 670 (Tex. 1990)
 DAVIDSON V. GREAT NAT'L LIFE INS. CO., 737 S.W.2d 312 (Tex. 1987)
 Am. Home Assurance Co. v. Safway Steel Prods. Co., Inc., 743 S.W.2d

693 (Tex. App.—Austin, 1987, writ denied)
RICHARDSON v. STATE, 744 S.W.2d 65 (Tex. Crim. App. 1987)
TOMPKINS v. STATE, 774 S.W.2d 195, 215-16 (Tex. Crim. App. 1987),
aff'd per curiam, 490 U.S. 754 (1989)
Dorety v. Avondale Shipyards, 672 F. Supp. 962 (S.D. Tex. 1987)
McClure v. Duggan, 674 F. Supp. 211 (N.D. Tex. 1987)
Abston v. Levi Strauss & Co., 684 F. Supp. 152 (E.D. Tex. 1987)
Johansen v. E.I. DuPont DeNemours & Co., 810 F.2d 1377 (5th Cir.
1987)
Kucel v. Walter E. Heller & Co., 813 F.2d 67 (5th Cir. 1987)
Tennimon v. Bell Helicopter Textron, Inc., 823 F.2d 68 (5th Cir. 1987)
(per curiam)
Coakes v. Arabian Am. Oil Co., 831 F.2d 572 (5th Cir. 1987)
Am. Int'l Trading Corp. v. Petroleos Mexicanos, 835 F.2d 536 (5th Cir.
1987)

1988

Hawkins v. State, 745 S.W.2d 511 (Tex. App.—Fort Worth 1988, writ
ref'd)
Crisman v. Cooper Ind., 748 S.W.2d 273 (Tex. App.—Dallas 1988,
writ denied)
Commercial Credit & Control Data Corp. v. Wheeler, 756 S.W.2d 769
(Tex. App.—Corpus Christi 1988, writ denied)
Knops v. Knops, 763 S.W.2d 864 (Tex. App.—San Antonio 1988, no
writ)
DESANTIS v. WACKENHUT CORP., 793 S.W.2d 670 (Tex. 1988)
Adams v. Learjet Corp., 711 F. Supp. 1374 (N.D. Tex. 1988)
Kneeland v. NCAA, 650 F. Supp. 1047 (W.D. Tex. 1988)
InterFirst Bank Clifton v. Fernandez, 844 F.2d 279 (5th Cir.), *aff'd on
rehearing*, 853 F.2d 292 (5th Cir. 1988)
In re Chanel Fin., Inc., 102 B.R. 549 (Bankr. N.D. Tex. 1988)
Longden v. Sunderman, 123 F.R.D. 547, 555-56 (N.D. Tex. 1988)

1989

Cook v. Frazier, 765 S.W.2d 546 (Tex. App.—Fort Worth 1989, no
writ)
Duff v. Union Tex. Petroleum Corp., 770 S.W.2d 615 (Tex. App.—
Houston [14th Dist.] 1989, no writ)
Creavin v. Maloney, 773 S.W.2d 698 (Tex. App.—Corpus Christi
1989, writ denied)
Jackson v. S.P. Leasing Co., 774 S.W.2d 673 (Tex. App.—Texarkana

1989, writ denied)

Thomas C. Cook, Inc. v. Rowhanian, 774 S.W.2d 679 (Tex. App.—El Paso 1989, writ denied)

Brown Servs., Inc. v. Fairbrother, 776 S.W.2d 772 (Tex. App.—Corpus Christi 1989, no writ)

Aerospatiale Helicopter Corp. v. Universal Health Servs., Inc., 778 S.W.2d 492 (Tex. App. —Dallas 1989, no writ)

Res. Sav. Assoc. v. Neary, 782 S.W.2d 897 (Tex. App.—Dallas 1989, writ denied)

Uniwest Mortgage Co. v. Dadecor Condos., Inc., 877 F.2d 431 (5th Cir. 1989)

Sommer Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989)

In re First RepublicBank Sec. Litig., Nos. 3-88-0641-H, 3-88-1251-H, 1989 WL 108795 (N.D. Tex 1989)

1990

Perry v. Aggregate Plant Prods. Co., 786 S.W.2d 21 (Tex. App.—San Antonio 1990, writ denied)

Osborn v. Kinnington, 787 S.W.2d 417 (Tex. App.—El Paso 1990, writ denied)

Stine v. Koga, 790 S.W.2d 412 (Tex. App.—Beaumont 1990, writ dism'd by agr.)

DESANTIS V. WACKENHUT CORP., 793 S.W.2d 670 (Tex. 1990)

Trailways, Inc. v. Clark, 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, writ denied)

Ramirez v. Lagunes, 794 S.W.2d 501 (Tex. App.—Corpus Christi 1990, no writ)

Georgetown Assoc. Ltd. v. Home Fed. Sav. & Loan Assoc., 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd w.o.j.)

Husband v. Pierce, 800 S.W.2d 661, 663 (Tex. App.—Tyler 1990, orig. proceeding).

State Nat'l Bank v. Academia, Inc., 802 S.W.2d 282 (Tex. App.—Corpus Christi 1990, writ denied)

Adams v. Gates Learjet Corp., 711 F. Supp. 1374 (N.D. Tex. 1990)

Cimino v. Raymark Ind., Inc., 739 F. Supp. 328 (E.D. Tex. 1990)

Interwest Med. Corp. v. Longterm Care Found. of Am., 748 F. Supp. 467 (N.D. Tex. 1990)

Motorola, Inc. v. Hitachi, Ltd., 750 F. Supp. 1319 (W.D. Tex. 1990)

Caton v. Leach Corp., 896 F.2d 939 (5th Cir. 1990)

Transco Leasing Corp. v. United States, 896 F.2d 1435 (5th Cir. 1990)
W.R. Grace & Co. v. Cont'l Cas. Co., 896 F.2d 865 (5th Cir. 1990)
Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242 (5th Cir. 1990)

1991

TEXACO REF. & MKTG., INC. v. ESTATE OF DAU VAN TRAN, 808 S.W.2d 61 (Tex. 1991)
Centex Corp. v. Dalton, 810 S.W.2d 812 (Tex. App.—San Antonio 1991), *rev'd*, 840 S.W.2d 952 (Tex. 1992)
Bard v. Charles R. Myers Ins. Agency, Inc., 811 S.W.2d 251 (Tex. App.—San Antonio 1991), *rev'd*, 839 S.W.2d 791 (Tex. 1992)
Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50 (Tex. 1991)
Transportes Aeros Nacionales, S.A. v. Downey, 817 S.W.2d 393 (Tex. App.—Houston [1st Dist.] 1991, writ *dism'd*)
Hefner v. Republic Indem. Co. of Am., 773 F. Supp. 11, 13 (S.D. Tex. 1991)
Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991)
Pruitt v. Levi Strauss & Co., 932 F.2d 458 (5th Cir. 1991), *abrogated on other grounds by*, Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc., 55 F.3d 181 (5th Cir. 1995)

1992

Lutheran Bhd. v. Kidder Peabody & Co., Inc., 829 S.W.2d 300 (Tex. App.—Texarkana 1992, writ granted), *set aside*, 840 S.W.2d 384 (Tex. 1992)
Tex. Employer's Ins. Assoc. v. Borum, 834 S.W.2d 395 (Tex. App.—San Antonio 1992, writ denied)
Bd. of County Comm'r v. Amarillo Hosp. Dist., 835 S.W.2d 115 (Tex. App.—Amarillo 1992, no writ)
Chase Manhattan Bank v. Greenbrier N. Section II, 835 S.W.2d 720 (Tex. App.—Houston [1st Dist.] 1992, no writ)
Belger v. Sweeney, 836 S.W.2d 752 (Tex. App.—Houston [1st Dist.] 1992, writ denied)
Keene Corp. v. Gardner, 837 S.W.2d 224 (Tex. App.—Dallas 1992, writ denied)
Adobe Res. Corp. v. Newmont Oil Co., 838 S.W.2d 831 (Tex. App.—Houston [14th Dist.] 1992, writ denied)
Keene Corp. v. Caldwell, 840 F.2d 715 (Tex. App.—Houston [14th Dist.] 1992, no writ)
Lee v. Delta Airlines, Inc., 797 F. Supp. 1362 (N.D. Tex. 1992), *aff'd*,

- Lee v. Allen, 32 F.3d 566 (5th Cir. 1994)
- Castillo v. Santa Fe Shipping Corp., 827 F. Supp. 1269 (S.D. Tex. 1992)
- Huddy v. Fruehauf Corp., 953 F.2d 955 (5th Cir. 1992) (per curiam); *cert. denied*, 506 U.S. 828 (1992)
- Resolution Trust Corp. v. Northpark Joint Venture, 958 F.2d 1313 (5th Cir. 1992); *cert denied*, Dannis v. Resolution Trust Corp., 506 U.S. 1048 (1993)
- Arochem Corp. v. Wilomi, Inc., 962 F.2d 496 (5th Cir. 1992)
- Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134 (5th Cir. 1992)
- In re* Bailey Pontiac, Inc., 139 B.R. 629 (N.D. Tex. 1992)
- In re* Consol. Capital Equities Corp., 143 B.R. 80 (Bankr. N.D. Tex. 1992)

1993

- Ralston Purina Co. v. McKendrick, 850 S.W.2d 629 (Tex. App.—San Antonio 1993, writ denied)
- GEN. CHEM. CORP. V. DE LA LASTRA, 852 S.W.2d 916 (Tex. 1993)
- ALVARADO V. STATE, 853 S.W.2d 17 (Tex. Crim. App. 1993)
- Hollander v. Capon, 853 S.W.2d 723, 727 (Tex. App.—Houston [1st Dist.] 1993, writ denied)
- Autin v. Daniel Bruce Marine, Inc., 862 S.W.2d 208 (Tex. App.—Beaumont 1993, no writ)
- Keene Corp. v. Rogers, 863 S.W.2d 168 (Tex. App.—Texarkana 1993, no writ)
- Lawrenson v. Global Marine Inc., 869 S.W.2d 519, 525 (Tex. App.—Texarkana 1993, writ denied)
- Neo Sack, Ltd. v. Vinmar Impex, Inc., 810 F. Supp. 829 (S.D. Tex. 1993)
- Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338 (E.D. Tex. 1993)
- Karl Rove & Co. v. Thornburgh, 824 F. Supp. 662 (W.D. Tex. 1993)
- Chevalier v. Animal Rehab. Ctr., Inc., 839 F. Supp. 1224 (N.D. Tex. 1993)
- Thomas v. Chase Manhattan Bank, N.A., 994 F.2d 236 (5th Cir. 1993)

1994

- Bergman v. Bergman, 888 S.W.2d 580 (Tex. App.—El Paso 1994, no writ)
- Hull & Co., Inc. v. Chandler, 889 S.W.2d 513 (Tex. App.—Houston

[14th Dist.] 1994, writ denied)

Unocal Corp. v. Dickinson Res., Inc., 889 S.W.2d 604 (Tex. App.—Houston [14th Dist.] 1994, writ denied)

Lozano v. GPE Controls, 859 F. Supp. 1036 (S.D. Tex. 1994)

Landry v. A-Able Bonding, Inc., 870 F. Supp. 715 (E.D. Tex. 1994),
rev'd in part on other grounds, 75 F.3d 200 (5th Cir. 1996)

Am. Star Ins. Co. v. Girdley, 12 F.3d 49 (5th Cir. 1994)

Indus. Indem. Co. v. Chapman & Cutler, 22 F.3d 1346 (5th Cir. 1994)

Nat'l Union Fire Ins. v. CNA Ins. Co., 28 F.3d 29, 32 n.3 (5th Cir. 1994)

1995

Busse v. Pac. Cattle Feeding Fund No. 1, Ltd., 896 S.W.2d 807 (Tex. App.—Texarkana 1995, writ denied)

AG Volkswagen v. Valdez, 897 S.W.2d 458 (Tex. App.—Corpus Christi 1995, orig. proceeding), *overruled sub nom.*, 909 S.W.2d 900 (Tex. 1995)

FORD MOTOR CO. v. LEGGAT, 904 S.W.2d 643 (Tex. 1995)

Weatherly v. Deloitte & Touche, 905 S.W.2d 642 (Tex. App.—Houston. [14th Dist.] 1995, writ *dism'd w.o.j.*)

VOLKSWAGEN, A.G. v. VALDEZ, 909 S.W.2d 900 (Tex. 1995) (*per curiam*)

CPS Int'l, Inc. v. Dresser Indus., Inc., 911 S.W.2d 18 (Tex. App.—El Paso 1995, writ denied)

Bellinger v. Purcell, 914 S.W.2d 630 (Tex. App.—San Antonio 1995),
rev'd, 940 S.W.2d 599 (Tex. 1997)

Toubaniaris v. Am. Bureau of Shipping, 916 S.W.2d 21, 23 (Tex. App.—Houston [1st Dist.] 1995, no writ)

Hill v. Perel, 923 S.W.2d 636 (Tex. App.—Houston [1st Dist.] 1995, no writ)

Parra v. Larchmont Farms, Inc., 932 S.W.2d 68 (Tex. App.—El Paso 1995), *rev'd on other grounds*, 941 S.W.2d 93 (Tex. 1997)

St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 888 F. Supp. 1372 (S.D. Tex. 1995), *aff'd*, 78 F.3d 202 (5th Cir. 1996)

Ctr. for Marine Conservation v. Brown, 905 F. Supp. 383 (S.D. Tex. 1995)

Baker v. Bell Helicopter/Textron, Inc., 907 F. Supp. 1007 (N.D. Tex. 1995)

DeAguiar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995), *cert. denied*, 516 U.S. 865 (1995)

1996

- Feazell v. Mesa Airlines, Inc., 917 S.W.2d 895 (Tex. App.—Fort Worth 1996, writ denied)
- X.L. Ins. Co., Ltd. v. Hartford Accident & Indem. Co., 918 S.W.2d 687 (Tex. App.—Beaumont 1996, writ *dism'd*)
- Bartley v. Budget Rent-A-Car Corp., 919 S.W.2d 747 (Tex. App.—Amarillo 1996, writ denied)
- Dawson-Austin v. Austin, 920 S.W.2d 776 (Tex. App.—Dallas 1996), *rev'd on other grounds*, 968 S.W.2d 319 (Tex. 1998)
- Dankowski v. Dankowski, 922 S.W.2d 298 (Tex. App.—Fort Worth 1996, writ denied)
- Vizcarra v. Roldan, 925 S.W.2d 89 (Tex. App.—El Paso 1996, no writ)
- Salazar v. Coastal Corp., 928 S.W.2d 162 (Tex. App.—Houston [14th Dist.] 1996, no writ)
- Smith v. Foodmaker, Inc., 928 S.W.2d 683 (Tex. App.—Fort Worth 1996, no writ)
- Gardner v. Best W. Int'l Inc., 929 S.W.2d 474, 479 (Tex. App.—Texarkana 1996, writ denied)
- Parra v. Larchmont Farms, Inc., 942 S.W.2d 6 (Tex. App.—El Paso 1996), *rev'd*, 941 S.W.2d 93 (Tex. 1995)
- MINN. MINING & MFG. CO. v. NISHIKA, LTD., 955 S.W.2d 853 (Tex. 1996) (*per curiam*)
- Thyssen Steel Co. v. M/V Kavos Yerakas, 911 F. Supp. 263 (S.D. Tex. 1996)
- Nunez v. Hunter Fan Co., 920 F. Supp. 716 (S.D. Tex. 1996)
- Amoco Chem. Co. v. Tex Tin Corp., 925 F. Supp. 1192 (S.D. Tex. 1996)
- Carroll v. Jaques, 927 F. Supp. 216 (E.D. Tex. 1996)
- Snyder General Corp. v. Great Am. Ins. Co., 928 F. Supp. 674 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998)
- Elvis Presley Enters., Inc. v. Capece, 950 F. Supp. 783 (S.D. Tex. 1996)
- King v. Douglas, 973 F. Supp. 707 (S.D. Tex. 1996)
- Landry v. A-Able Bonding, Inc., 75 F.3d 200 (5th Cir. 1996)
- St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 78 F.3d 202 (5th Cir. 1996)
- In re* Air Disaster at Ramstein Air Base, Germany on 8/29/90, 81 F.3d 570, *amended*, Perez v. Lockheed Corp., 88 F.3d 340 (5th Cir. 1996)

1997

- PURCELL V. BELLINGER, 940 S.W.2d 599 (Tex. 1997)
Owens-Corning Fiberglas Corp. v. Martin, 942 S.W.2d 712 (Tex. App.—Dallas 1997, no writ)
BDO Seidman v. Miller, 949 S.W.2d 858 (Tex. App.—Austin 1997, pet. dismiss'd w.o.j.)
Turford v. Underwood, 952 S.W.2d 641 (Tex. App.—Beaumont 1997, no pet.)
MINN. MINING & MFG. CO. V. NISHIKA, LTD., 953 S.W.2d 733 (Tex. 1997)
Lemmon v. United Waste Sys., Inc., 958 S.W.2d 493 (Tex. App.—Fort Worth 1997, pet. denied)
Holden v. Capri Lighting, Inc., 960 S.W.2d 831 (Tex. App.—Amarillo 1997, no writ)
Kazi v. Dubai Petroleum Co., 961 S.W.2d 313 (Tex. App.—Houston [1st Dist.] 1997), *withdrawn and superseded by*, 12 S.W.3d 71 (Tex. 2000)
Perez v. Alcoa Fujikura, Ltd., 969 F. Supp. 991 (W.D. Tex. 1997)
In re Arbitration Between Trans Chem., Ltd. and China Nat. Mach. Imp. and Exp. Corp., 978 F. Supp. 266 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998)

1998

- In re Estate of Rhymer*, 969 S.W.2d 126 (Tex. App.—Beaumont 1998, no pet.)
Reading & Bates Const. Co. v. Baker Energy Res. Corp., 976 S.W.2d 702 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)
GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403 (Tex. App.—Corpus Christi 1998, pet. denied)
DAVIDSON V. STATE, 977 S.W.2d 708 (Tex. App.—Fort Worth 1998), *rev'd*, 25 S.W.3d 183 (Tex. Crim. App. 2000)
Wagner v. Hughes Wood Prods., Inc., 979 S.W.2d 84 (Tex. App.—Beaumont 1998), *aff'd*, 18 S.W.3d 202 (Tex. 2000)
Toubaniaris v. Am. Bureau of Shipping, 981 S.W.2d 858 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)
Young v. Am. Bureau of Shipping, No. 01-96-00870-CV, 1998 WL 285901 (Tex. App.—Houston [1st Dist.] June 4, 1998, no pet.)
Barnes v. Forest Hills Inv., Inc., 11 F. Supp. 2d 699 (E.D. Tex. 1998)
Streber v. Hunter, 14 F. Supp. 2d 978 (W.D. Tex. 1998), *aff'd*, 221 F.3d 701 (5th Cir. 2000)
Fina, Inc. v. ARCO, 16 F. Supp. 2d 716 (E.D. Tex. 1998), *rev'd*, 200 F.3d 266 (5th Cir. 2000)

- Motts v. M/V Green Wave, 25 F. Supp. 2d 771 (S.D. Tex. 1998)
 TV-3, Inc. v. Royal Ins. Co. of Am., 28 F. Supp. 2d 407 (E.D. Tex. 1998)
 U.S. for Varco Pruden Bldgs. v. Reid & Gary Strickland Co., 161 F.3d 915 (5th Cir. 1998)

1999

- Pellow v. Cade, 990 S.W.2d 307, 313 (Tex. App.—Texarkana 1999, pet. denied)
 STIER V. READING & BATES CORP., 992 S.W.2d 423 (Tex. 1999)
 Ahumada v. Dow Chem. Corp., 992 S.W.2d 555, 558 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)
 OWENS-CORNING V. CARTER, 997 S.W.2d 560 (Tex. 1999)
 Pittsburgh Corning Corp. v. Walters, 1 S.W.3d 759 (Tex. App.—Corpus Christi 1999, pet. denied)
 Ford Motor Co. v. Aguiniga, 9 S.W.3d 252 (Tex. App.—San Antonio 1999, pet. denied)
 Torrington Co. v. Stutzman, 36 S.W.3d 511 (Tex. App.—Beaumont 1999), *aff'd in part, rev'd in part, and remanded*, 46 S.W.3d 829 (Tex. 2000)
 Houston Cas. Co. v. Certain Underwriters at Lloyd's London, 51 F. Supp. 2d 789 (S.D. Tex. 1999), *aff'd*, 252 F.3d 1357 (5th Cir. 2000)
 Amoco Prod. Co. v. Hydroblast Corp., 90 F. Supp. 2d 727 (N.D. Tex. 1999), *aff'd*, 226 F.3d 642 (5th Cir. 2000)
 Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694, 716 (5th Cir. 1999)
In re Prof'l Investors Ins. Group, Inc., 232 B.R. 870 (Bankr. N.D. Tex. 1999)

2000

- DUBAI PETROLEUM CO. V. KAZI, 12 S.W.3d 71 (Tex. 2000)
 Lockheed Martin Corp. v. Gordon, 16 S.W.3d 127 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)
 Bridas Corp. v. Unocal Corp., 16 S.W.3d 893 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)
 HUGHES WOOD PRODS., INC. V. WAGNER, 18 S.W.3d 202 (Tex. 2000)
 Gonzalez v. State, 21 S.W.3d 595 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 45 S.W.3d 101 (Tex. Crim. App. 2000)
 DAVIDSON V. STATE, 25 S.W.3d 183 (Tex. Crim. App. 2000) (en banc)
 Saint Paul Surplus Lines Ins. Co. v. Geo Pipe Co., 25 S.W.3d 900 (Tex. App.—Houston [1st Dist.] 2000, no pet.)

- In re Estate of Garcia-Chapa*, 33 S.W.3d 859 (Tex. App.—Corpus Christi 2000, no pet.)
Tullis v. Georgia-Pacific Corp., 45 S.W.3d 118 (Tex. App.—Fort Worth 2000, no. pet.)
TORRINGTON CO. v. STUTZMAN, 46 S.W.3d 829 (Tex. 2000)
Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000)
Spence v. Glock, Ges.m.b.H., 227 F.3d 308 (5th Cir. 2000)

2001

- Intevep, S.A. Research & Tech. Support Establishment v. Sena, 41 S.W.3d 391 (Tex. App.—Dallas 2001, no pet.)
Young Ref. Corp. v. Pennzoil Co., 46 S.W.3d 380 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)
LONG DISTANCE INT'L, INC. v. TELEFONOS DE MEX., S.A. DE C.V., 49 S.W.3d 347 (Tex. 2001)
Sanchez *ex rel.* Estate of Galvan v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643 (Tex. App.—Corpus Christi 2001, pet. granted, judgm't vacated w.r.m.)
Rush v. Barrios, 56 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)
Holley v. Grigg, 65 S.W.3d 289 (Tex. App.—Eastland 2001, no pet.)
Gilcrease v. Tesoro Petroleum Corp., 70 S.W.3d 265 (Tex. App.—San Antonio 2001, pet. denied)
United States *ex rel.* Wilkins v. N. Am. Constr. Corp., 173 F. Supp. 2d 601 (S.D. Tex. 2001)
McLennan v. Am. Eurocopter Corp., Inc., 245 F.3d 403 (5th Cir. 2001)
Jackson v. W. Telemarketing Corp. Outbound, 245 F.3d 518 (5th Cir. 2001)

2002

- MONSANTO CO. v. BOUSTANY, 73 S.W.3d 225 (Tex. 2002)
Compaq Computer Corp. v. LaPray, 79 S.W.3d 779 (Tex. App.—Beaumont 2002, pet. granted)
Exxon Corp. v. Breezevale Ltd., 82 S.W.3d 429 (Tex. App.—Dallas 2002, pet. denied)
VEGA v. STATE, 84 S.W.3d 613 (Tex. Crim. App. 2002)
Nat'l W. Life Ins. Co., v. Rowe, 86 S.W.3d 285 (Tex. App.—Austin 2002, pet. filed)
IN RE J.D. EDWARDS WORLD SOLUTIONS CO., 87 S.W.3d 546 (Tex. 2002)
Chickasha Cotton Oil Co., v. Houston Gen. Ins. Co., No. 05-00-01789-CV, 2002 WL 1792467 (Tex. App.—Dallas May 2, 2002, no

pet.)

In re Norplant Contraceptive Prod. Liab. Litig., 215 F. Supp. 2d 795
(E.D. Tex. 2002)

Mayo v. Hartford Life Ins. Co., 220 F. Supp. 2d 714 (S.D. Tex. 2002),
aff'd, 354 F.3d 400 (5th Cir. 2004).

Schneider Nat'l Transp. v. Ford Motor Co., 280 F.3d 532 (5th Cir.
2002)

Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002)

APPENDIX B

**Cases Citing Additional Second Restatement Sections
(by topic)**

This appendix lists Texas state cases and federal cases in the Fifth Circuit applying the Texas choice-of-law rule that considered topic-specific sections of the Restatement (Second). A listing here does not indicate good or bad use of the cited sections—only that they were considered. Some cases are listed more than once because they used multiple specific sections in different subject areas. The Restatement (Second) section is noted parenthetically after each case.

* Starred cases also used some aspect of Currie's interest analysis.

*Additional Sections Cited Favorably***1. Torts***a. Fraud*

Lutheran Bhd. v. Kidder Peabody & Co., Inc., 829 S.W.2d 300
(Tex. App.—Texarkana 1992, writ granted) (§ 148)

Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134 (5th
Cir. 1992) (§ 201)

Weatherly v. Deloitte & Touche, 905 S.W.2d 642 (Tex. App.—
Houston [14th Dist.] 1995, pet. denied) (§ 148)

b. Defamation/Invasion of Privacy

Becker v. Computer Scis. Corp., 541 F. Supp. 694 (S.D. Tex.
1982) (§§ 152, 153)

Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984)
(§ 153)

Faloon v. Hustler Magazine, Inc., 799 F.2d 1000 (5th Cir.
1986) (§ 153)

Levine v. CMP Publ'ns, Inc., 738 F.2d 660 (5th Cir. 1984) (§ 150)

Ritzmann v. Weekly World News, Inc., 614 F. Supp. 1336
(N.D. Tex. 1985) (§§ 150, 153)

*Faloon v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D.
Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986) (§ 153)

c. Personal Injury/Wrongful Death

*Torrington v. Stutzman, 46 S.W.3d 829, 848 (Tex. 2000) (§ 178)

*Trailways, Inc. v. Clark, 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, writ denied) (§ 175)

*Transco Leasing Corp. v. United States, 896 F.2d 1435 (5th Cir. 1990) (applied § 178, mistakenly cited as § 175)

d. Workers Compensation (including conflicts with personal injury/wrongful death claims)

Osborn v. Kinnington, 787 S.W.2d 417 (Tex. App.—El Paso 1990, writ denied) (§ 184)

Lee v. Delta Airlines, Inc., 797 F. Supp. 1362 (N.D. Tex. 1992), *aff'd*, 32 F.3d 566 (5th Cir. 1994) (§ 184)

Parra v. Larchmont Farms, Inc., 932 S.W.2d 68 (Tex. App.—El Paso 1995), *rev'd on other grounds*, 941 S.W.2d 93 (Tex. 1997) (§§ 183, 184)

Hughes Wood Prods., Inc. v. Wagner, 18 S.W.3d 202 (Tex. 2000) (§ 184)

e. Tortious Conduct

CPS Int'l, Inc. v. Dresser Indus., Inc., 911 S.W.2d 18 (Tex. App.—El Paso 1995, writ denied) (§ 156)

f. Contribution

Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50 (Tex. 1991) (§ 173)

2. Contracts

a. Life Insurance

Nat'l W. Life Ins. Co. v. Rowe, 86 S.W.3d 285 (Tex. App.—Austin 2002, no pet.) (§ 192)

b. Employment Law

DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990) (§ 196)

Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50 (Tex. 1991) (§ 196)

Salazar v. Coastal Corp., 928 S.W.2d 162 (Tex. App.—Houston [14th Dist.] 1996, no writ) (§ 196)

Nunez v. Hunter Fan, 920 F. Supp. 716 (S.D. Tex. 1996) (§ 196)

Perez v. Alcoa Fujikura, Ltd., 969 F. Supp. 991 (W.D. Tex. 1997) (§ 196)

Young v. Am. Bureau of Shipping, 1998 WL 285901 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (§ 196)

*Pruitt v. Levi Strauss & Co., 932 F.2d 458 (5th Cir. 1991),
abrogated on other grounds by, Floors Unlimited, Inc.
v. Fieldcrest Cannon, Inc., 55 F.3d 181 (5th Cir. 1995)
(§ 196)

c. Negotiable Instruments

Cessna Fin. Corp. v. Morrison, 667 S.W.2d 580 (Tex. App.—
Houston [1st Dist.] 1984, no writ) (§ 214)

d. Restitution

Caton v. Leach Corp., 896 F.2d 939 (5th Cir. 1990) (§ 221)

e. Contracts for Land Transfer

Cook v. Frazier, 765 S.W.2d 546 (Tex. App.—Fort Worth
1989, no writ) (§ 189)

*Texas Commerce Bank N.A. v. Interpol 80 Ltd. P'ship, 703
S.W.2d 765 (Tex. App.—Corpus Christi 1985, no writ)
(§ 189)

f. Capacity to Contract

*Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D.
Tex. 1985), *rev'd*, 799 F.2d 1000 (5th Cir. 1986) (§ 198)

3. Property

a. Land Transfer

Cook v. Frazier, 765 S.W.2d 546 (Tex. App.—Fort Worth
1989, no writ) (§ 189)

Pellow v. Cade, 990 S.W.2d 307, 313 (Tex. App.—Texarkana
1999, no pet.) (§ 223)

*Texas Commerce Bank N.A. v. Interpol 80 Ltd. P'ship, 703
S.W.2d 765 (Tex. App.—Corpus Christi 1985, no writ)
(§ 189)

b. Judgment Exemptions

Bergman v. Bergman, 888 S.W.2d 580 (Tex. App.—El Paso
1994, no writ) (§ 132)

4. Family Law

a. Section 169 Spousal Immunity

Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980)
(§ 169)

Lee v. Delta Airlines, Inc., 797 F. Supp. 1362 (N.D. Tex. 1992), *aff'd*, 32 F.3d 566 (5th Cir. 1994) (§ 169)

5. Corporations

Maher v. Zapata Corp., 714 F.2d 436 (5th Cir. 1983) (§ 302)

Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368 (5th Cir. 1985) (§ 302)

Amoco Chem. Co. v. Tex Tin Corp., 925 F. Supp. 1192 (S.D. Tex. 1996) (§§ 148, 307, and 309)

6. Procedural Issues

a. Privilege

Davis v. State, 645 S.W.2d 288, 291-92 & n.5 (Tex. Crim. App. 1983) (§§ 137, 138)

Ford Motor Co. v. Leggat, 904 S.W.2d 643 (Tex. 1995) (§§ 138, 139)

Vega v. State, 84 S.W.3d 613 (Tex. Crim. App. 2002) (§§ 138, 139)

Davidson v. State, 25 S.W.3d 183 (Tex. Crim. App. 2000) (en banc) (§§ 138, 139)

b. Burden of Proof

DeSantis v. Wackenhut Corp., 732 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987), *rev'd*, 793 S.W.2d 670 (§§ 133, 134)

c. Proof of Foreign Law

Houston Cas. Co. v. Certain Underwriters at Lloyd's London, 51 F. Supp. 2d 789 (S.D. Tex. 1999) (§ 136)

d. Judgment Exemptions

Bergman v. Bergman, 888 S.W.2d 580 (Tex. App.—El Paso 1994, no writ) (§ 132)

Additional Sections Declined

Duncan v. Cessna Aircraft Co., 632 S.W.2d 375 (Tex. App.—Austin 1982), *rev'd*, 665 S.W.2d 414 (Tex. 1984) (declined § 170)
Monsanto Co. v. Boustany, 73 S.W.2d 225 (Tex. 2002) (declined § 142)
*Abston v. Levi Strauss & Co., 684 F. Supp. 152 (E.D. Tex. 1987) (declined § 196)

