

**CHOICE OF LAW IN IDAHO: A SURVEY
AND CRITIQUE OF IDAHO CASES**

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TABLE OF CONTENTS

I. INTRODUCTION	547
II. IDAHO CHOICE-OF-LAW JURISPRUDENCE BEFORE	
ADOPTION OF THE SECOND RESTATEMENT.....	549
A. Real and Movable Property—The <i>Situs</i> Rule	550
B. Contracts— <i>Lex Loci Contractus</i> : The Law of the Place of the Contract.....	552
C. Torts— <i>Lex Loci Delicti</i> : The Law of the Place of the Wrong	554
III. THE SECOND RESTATEMENT’S “MOST SIGNIFICANT RELATIONSHIP” TEST.....	556
A. Overview of the Process of Determining the Most Significant Relationship	558
B. Idaho Torts Cases under the Second Restatement.....	560
C. Idaho Contracts Cases under the Second Restatement	568
1. Choice-of-Law Contractual Provisions Are Enforceable under Idaho Case Law and the Second Restatement	568
2. Choice-of-Law Decisions Where Parties Made No Contractual Provision	571
D. Conflicting Statutory Schemes.....	577
IV. IDAHO CHOICE-OF-LAW STATUTES	580
A. Uniform Commercial Code Choice-of-Law Provisions.....	580
B. Other Statutory Provisions	581
1. Borrowing Statute for Statutes of Limitations	581
2. Corporate Entity Governing Law	581
3. Personal Property Ownership.....	581
4. Family and Decedents Estate Law Statutes.....	582
5. Statutes Limiting Contractual Choice of law	582
VI. CONCLUSION	583

I. INTRODUCTION

After a long spree of gambling and inebriation across the border, Clovas Rader left Jackpot, Nevada and the casino bar Cactus Pete’s in his rear view mirror as he headed home to Idaho. Cactus Pete’s benefitted from the protection of Nevada law shielding bars from lawsuits of parties injured by drivers who got drunk at the bars.¹ Idaho law, however, did recognize such tort claims.² Rader collided with and

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1. Hamm v. Carson City Nugget, Inc., 450 P.2d 358, 359 (Nev. 1969). Although Nevada had a statute prohibiting the sale of liquor to a drunken person, there was no civil cause of action for third-party victims. Such law is often referred to as “dram-shop” liability or legislation. See *Estates of Braun v. Cactus Pete’s, Inc.*, 107 Idaho 484, 486, 690 P.2d 939, 941 (Ct. App. 1984) *vacated*, 108 Idaho 798, 702 P.2d 836 (1985).

killed Mustie and Becky Braun, Idaho residents headed in the other direction to work, also at a Nevada Casino. The wrongful death lawsuit by the children and estates of the Brauns came down to a litigation coin toss—would Nevada or Idaho dram shop law apply? The Idaho District Court in Twin Falls County applied Nevada law and granted summary judgment in favor of Cactus Pete's. The Idaho Court of Appeals reversed and applied Idaho law in favor of the Brauns.³ But the Idaho Supreme Court held in a terse opinion that Nevada's anti-dram shop law applied to the Idaho suit.⁴ *Estates of Braun v. Cactus Pete's* epitomizes the challenges of choosing the applicable law and the unpredictable results of litigation where two or more states' laws might apply.

When multiple states' or nations' laws converge in a single lawsuit, a court must decide whether to apply the law of the forum (court's home state) or the law of another relevant jurisdiction. "Choice of law" is at once a legal term of art and a succinct, accurate description of a crucial occurrence in interstate litigation. The term used here generally refers to a body of law regarding determination of which jurisdiction's law to apply when a legal conflict involves a jurisdiction other than the forum.⁵ Dean William Prosser, author of a celebrated torts treatise, described choice of law as "a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."⁶ There is little, if any, scholarship that focuses on Idaho jurisprudence regarding choice of law. This article is intended to provide a useful resource for the judge or practitioner who must navigate choice of law's "dismal swamp." A brief summary of practitioner tips is included at the conclusion of the article.

This article surveys and summarizes all Idaho cases in which Idaho courts have had to choose between applying Idaho law or another jurisdiction's law. The quantity of reported appellate decisions in Idaho is sparse, and thus an attempt at a broad survey of choice-of-law cases is possible.⁷ This survey covers cases decided by Idaho state courts and posted on Westlaw before January 2013. Although Idaho's state appellate courts create controlling choice-of-law precedent because choice of law is a state law topic,⁸ the article also mentions some trial court decisions from Idaho's federal district court that exemplify careful and effective analysis. The survey touches on on federal cases that are particularly illustrative of

2. *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980).

3. *Estates of Braun*, 107 Idaho at 486, 690 P.2d at 941, vacated, 108 Idaho 798, 702 P.2d 836 (1985).

4. *Estates of Braun v. Cactus Pete's, Inc.*, 108 Idaho 798, 801, 702 P.2d 836, 839 (1985).

5. Choice of law is invariably treated academically as subset of the larger doctrine of conflict of laws. Conflict of laws also focuses on jurisdiction, recognition of judgments, and the relationship between federal and state law. This article and survey does not address those other subjects.

6. PROSSER ON TORTS 971 (1953). Rare is the law review article that does not quote Prosser's vivid imagery as a sort of fanfare announcing the author's brave venturing into this academic topic. Even appellate opinions wrestling with choice of law have quoted the passage. See *Sturiano v. Brooks*, 523 So. 2d 1126, 1130 (Fla. 1988) (Grimes, J. concurring).

7. In some jurisdictions, scholars publish annual surveys of conflict-of-law decisions. E.g., James P. George & Stephanie K. Marshall, *Conflict of Laws*, 64 SMU L. REV. 175 (2011); Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291 (2012).

8. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

choice-of-law analysis—including exemplary and problematic analyses—and issues typical to litigation involving multiple jurisdictions.

A forum state controls choice of law on several levels. Judicially created common law in choice-of-law cases makes up only part of Idaho's choice-of-law rules. In some cases specific choice-of-law statutes direct that a certain state's laws be applied.⁹ Choice of law is also controlled by parties who include choice-of-law clauses in contracts.

Overall, this article is a survey of case law but also explains esoteric choice-of-law principles to a practitioner audience. The article organizes choice-of-law rules by the general substantive areas of torts, contracts, and property, categories that have long provided the framework for choice of law. It begins with analysis of choice-of-law decisions using traditional rules before the development of modern approaches. Then, the majority of this article surveys Idaho courts' use of the Restatement (Second) of Conflict of Laws ("Second Restatement") since its judicial adoption around 1970, in chiefly chronological order. A brief summary of Idaho choice-of-law statutory provisions follows. Finally, the survey discusses the potential for changes and improvements to Idaho's choice-of-law jurisprudence.

II. IDAHO CHOICE-OF-LAW JURISPRUDENCE BEFORE ADOPTION OF THE SECOND RESTATEMENT

Prior to the 1970s, Idaho courts followed the traditional rules of choice of law, most of which can be recapitulated in the Latin phrase *lex loci*—"the law of the place." Traditional rules were rigid and based on the location of a particular event underlying the litigation. Although the rules were rigid in themselves, courts applying them developed elaborate exceptions and escape mechanisms.¹⁰ These allow flexibility in the form of characterizing the conflicts or the subject matter of the legal dispute in such a way as to make different rules apply. Traditional rules are summarized in the first Restatement of Conflict of Laws, and Idaho cases appear to have followed the traditional rules consistent with other jurisdictions. Because choice-of-law cases made before the adoption of the more flexible Second Restatement are implicitly overruled, they have no precedential value. However, older cases are useful to the contemporary jurist or advocate to illustrate the policies that were served (or overlooked) under the traditional rules, the many exceptions and escape mechanisms that eventually led to the erosion of the traditional rules,¹¹ and the continuing difficulties of choosing applicable law even under a

9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law"). For a description and references to specific Idaho statutes affecting choice of law, see Part IV, *infra*.

10. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 177 (3d ed. 2001) (describing the traditional approach as summarized by the first RESTATEMENT OF CONFLICT OF LAWS (1934). For example, Georgia still follows *lex loci delicti* (law of the place of injury) for torts, but often uses a "public policy exception." *Bailey v. Cottrell, Inc.*, 721 S.E.2d 571, 573 (Ga. 2011).

11. See PETER HAY, PATRICK J. BORCHERS & SYMEON SYMEONIDES, CONFLICT OF LAWS §§ 2.16, 2.17 at 79–88 (5th ed. 2010).

more flexible analysis. Also, several jurisdictions in the United States maintain the traditional rules.¹²

A. Real and Movable Property—The *Situs* Rule

The general and historically consistent choice-of-law rule regarding real property is, “the validity and effect of a conveyance of an interest in land and the nature of the interest which is transferred are determined by the law which would be applied by the courts of the *situs*, and those courts almost invariably apply their own law.”¹³ Choice of law regarding movable property nowadays is generally covered by the Uniform Commercial Code (“U.C.C.”), which was first adopted in Idaho in 1967,¹⁴ around the same time that the Second Restatement was being drafted and adopted by states like Idaho. The Second Restatement explains,

By reason of the almost universal adoption of the [U.C.C.] by States of the United States, local law rules with respect to non-gratuitous conveyances (Title A) and encumbrances (Title B) of interests in movables will henceforth be uniform in most respects throughout the United States and choice of law problems involving them will arise only infrequently.¹⁵

Nevertheless, a few Idaho cases before 1967 illustrate the underlying issues that inform U.C.C. policies and choice-of-law problems in general and thus are worth visiting here.

In *Hannah v. Vensel*,¹⁶ the Idaho Supreme Court addressed a mortgage default dispute involving land in Idaho’s Canyon County. The mortgage contract had been made in Pennsylvania. The court explained the rule and the exception.

In the first place, it seems to be a well-established principle of law that every contract in the nature of a deed or a mortgage or other incumbrance affecting real property is subject exclusively to the laws of the state or government within whose jurisdiction the real estate is situated. A contract of this kind is an exception to the general rule that a contract must be construed and interpreted by the law of the place where the contract was made.¹⁷

In other words, courts apply the law of the place where the contract was made unless it is a contract regarding real property.¹⁸ The discussion of the real property exception to the contracts rule in *Hannah* illustrates an oft-used tactic to escape rigid traditional choice of law rules. The appellant had urged “that this contract should be tested and construed by the law of Pennsylvania, the state where the contract was made and executed.”¹⁹ But the court rejected the *contract* argument and

12. Ten states still follow the traditional rules for torts, and twelve follow them for contracts cases. See HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.21 at 96.

13. *Id.* § 19.2 at 1232; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971). The rule is also referred to by the Latin phrases *lex situs* and *lex loci reistae*. BLACK’S LAW DICTIONARY 932 (8th ed. 2004).

14. See IDAHO CODE ANN. § 28-1-101 (2012); Act of 1967, ch. 161, 1967 Idaho Laws 351.

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, topic 3, intro. note (1971).

16. *Hannah v. Vensel*, 19 Idaho 796, 800, 116 P. 115, 116 (1911).

17. *Id.*

18. *Id.*

19. *Id.*

followed the situs rule for *real property* quoted above.²⁰ A contrast to the situs rule for real property comes from a case where Idaho's Supreme Court applied Idaho law to the equivalent of modern default and deficiency judgments, after a mortgage foreclosure sale occurred on Utah property.²¹ The debtors had become Idaho residents before the foreclosure and the sale took place under a Utah court's decree of foreclosure—so the debt had become a personal judgment rather than a real property encumbrance.²²

An excellent illustration of the elaborate interaction of traditional rules, their exceptions, the role of characterization, and the elusive nature of conflict-of-laws issues is the case *Massey-Ferguson, Inc. v. Talkington*.²³ A Kinsley, Kansas equipment dealer sold a tractor to a local buyer who agreed to make installment payments and keep the tractor in the town of Kinsley. The buyer only made one installment payment and sold the tractor to an innocent Idaho resident, who ultimately owed the purchase money he borrowed to an Idaho bank.²⁴ The tractor's manufacturer had been assigned the original installment note and repossessed the tractor from the Idaho buyer. At a bench trial, the Idaho buyer prevailed in proving he was a bona fide purchaser and recovered the tractor and money for loss of use and its depreciation.²⁵ On appeal, the Idaho Supreme Court applied a Kansas statute, which gave superior title to a bona fide purchaser, in contrast to Idaho's statute, which made a specific exception to the bona fide subsequent purchaser of "farm implements and machinery."²⁶

Although the majority opinion seemed to avoid confronting the conflict of Kansas and Idaho laws, two justices dissented, opining that other Idaho statutes should apply. Ultimately, the dissent would have deemed the Kansas buyer only as having conditional title to the tractor, which he sold to the Idaho buyer. The dissent concluded, "Respondent's title to this property should be judged on the basis of Idaho law,"²⁷ citing the rule that "the law of the actual situs of the property governs the validity of a transfer of movables,"²⁸ and "[t]he situs of the property, and not the *lex loci contractus*, determines the validity of such sales."²⁹

Thus, by construing the subject matter of the lawsuit as a personal property dispute, rather than a contract suit, the dissent would have reached a different choice of law and a different litigation outcome under the traditional rules.³⁰ The *Talkington* case illustrates well that the rigid formal rules did not guarantee certainty, and that parties or courts could (and can still) invoke different choice-of-law rules by characterizing the dispute in different substantive areas of law.

20. *Id.* at 801–02, 116 P. at 117–18.

21. *Am. Mut. Bldg. & Loan Co. v. Kesler*, 64 Idaho 799, 137 P.2d 960 (1943).

22. *Id.* at 800, 137 P.2d at 961.

23. *Massey-Ferguson, Inc. v. Talkington*, 88 Idaho 501, 513, 401 P.2d 790, 798 (1965).

24. The chain of contract assignments and tractor possession in the case is rather elaborate, but it suffices to say that it involved two used car dealers and a traveling salesman.

25. *Talkington*, 88 Idaho at 510, 401 P.2d at 796.

26. IDAHO CODE ANN. § 64-805 (1964) (repealed).

27. *Talkington*, at 797, 88 Idaho at 512.

28. *Id.* at 513, 401 P.2d at 798 (quoting 15 C.J.S. *Conflict of Laws* § 18d(1) and RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 257).

29. *Id.* at 513, 401 P.2d at 798 (quoting *Van Ausdler Hoffman Piano Co. v. Jain*, 39 Idaho 563, 228 P. 342, 345 (1924)).

30. *Id.*

B. Contracts—*Lex Loci Contractus*: The Law of the Place of the Contract

The classic approach to determining which jurisdiction's law applies to a contract dispute is to follow the law of the place of the contract.³¹ In contrast to most modern approaches, the intention of the parties over which jurisdiction's law might apply used to have no express role in the determination. However, a court could give effect to party intent by emphasizing a different locus in the *lex loci* rule—for instance, the place of performance instead of the place of forming the contract.³² Prior to the adoption of the U.C.C., many choice-of-law issues arose in cases of foreclosure of chattel mortgages³³ under states' differing statutes, or other attempts to collect from collateral that had been moved among different states. Such was the case in *Talkington*, discussed above.³⁴

In *Meier & Frank Co. v. Bruce*,³⁵ a defendant's husband had made multiple "joint and several" promissory notes while the couple was living in Portland, Oregon. She argued that the creditor on the promissory notes could not collect from her "sole and separate property."³⁶ The couple had moved to Idaho, where a contract making a wife joint and severally liable for her husband's debts would be void under the "common-law disability of a married woman to enter into a contract."³⁷ In Oregon, such a contract was valid.³⁸ In a dissenting opinion, Chief Justice Budge explained the general *lex loci contractus* rule and the exceptions, quoting a contemporary treatise:

I readily concede that as a general proposition, in the conflict of laws and under the comity of states, the *lex loci contractus* determines the contract, and the *lex fori* determines the remedy, but, as Professor Minor has clearly pointed out, there are the following well-defined exceptions to the rule:

- “(1) Where the enforcement of the foreign law would contravene some established and important policy of the state of the forum;
- (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such en-

31. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 358 (1934). The law of the place of contract may refer to where the contract was made. See, e.g., *Milliken v. Pratt*, 125 Mass 374, 382 (1878). It may also refer to where the contract was performed. See, e.g., *Pritchard v. Norton*, 106 U.S. 124, 136 (1882). Obviously, these variants of the rule can lead to different results. The First Restatement provides both rules, depending on what is in dispute. Under section 332, the law of the place of contracting determines the validity and effect of a contract regarding capacity, form, mutual assent, consideration and other contract formation issues. Under section 358, the "law of the place of performance of the promise" governed disputes over how the contract was performed.

32. E.g., *Pritchard v. Norton*, 106 U.S. 124 (1882) (applying the law of the place of performance for the apparent purpose of validating a contract and protecting party expectations).

33. "A mortgage on goods purchased on installment, whereby the seller transfers title to the buyer but retains a lien securing the balance." BLACK'S LAW DICTIONARY 1032 (8th ed. 2004). The dictionary also explains, "Chattel mortgages have generally been replaced by security agreements, which are governed by Article 9 of the UCC." *Id.*

34. See also *Hare v. Young*, 26 Idaho 682, 683, 146 P. 104, 105 (1915) (addressing a chattel mortgage covering livestock). This case is also discussed in Part III.D.3, *infra*.

35. *Meier & Frank Co. v. Bruce*, 30 Idaho 732, 742, 168 P. 5, 8 (1917) *overruled by* *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976) (holding that a married woman's judgment creditor may collect from her separate property).

36. *Id.* at 736, 168 P. at 6.

37. *Id.* (citing *Bank of Commerce v. Baldwin*, 12 Idaho 202, 85 P. 497 (1906)).

38. *Id.* (citing *First Nat'l Bank v. Leonard*, 59 P. 873 (Or. 1900)).

forcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature; and (5) where the question relates to real property.” Minor on Conflict of Laws, section 5, p. 9.³⁹

Justice Budge would have employed exception number one and declined to apply the permissive Oregon law to the contracts because it was against settled Idaho policy.⁴⁰ Ultimately, the majority decided that the Oregon debts could be collected from the married woman who had moved to Idaho, memorably stating, “There is nothing wicked or immoral or contrary to public policy in permitting a wife’s separate property to become liable for the payment of her husband’s debts or the community debts.”⁴¹ A frequent choice-of-law problem at that time was the question of enforceability of contracts made by a married woman who moves from a state that allows her to contract into a state with a common-law rule disabling her.⁴² It was also common for a choice-of-law issue to come down to a court’s choice of either the rigid *lex loci* rule or an exception or re-characterization.⁴³

In another case involving a debt collection effort, *Van Ausdle Hoffman Piano Co. v. Jain*, a plaintiff sought to recover possession of a piano it sold from Spokane, Washington and delivered to a resident of Moscow, Idaho under a conditional sale contract.⁴⁴ The contract was negotiated and signed in Moscow. The defendant in the case was not the piano’s purchaser, but a barber who employed the piano purchaser and had taken a pledge of the piano as security for a loan the barber made to his employee (the piano purchaser) for a purchase of oil stocks.⁴⁵ However, the loans between the barber and the piano purchaser were made months before the piano purchase contract.⁴⁶ Nevertheless, the barber kept possession of the piano at his house. The conflict was that Idaho law did not require a conditional, (i.e. secured) sales contract for a musical instrument to be recorded, but a Washington statute did.⁴⁷ Application of Idaho law would likely have made the conditional piano sale contract enforceable regardless of recordation, and would have given the piano seller’s claim to the security priority over the barber’s claim. The defendant barber argued that the sales contract was void under Washington law. The court did not directly acknowledge the conflict between the jurisdictions’ laws and implicitly applied the Washington statute to the analysis. But the Idaho Supreme Court then held the recordation statute could not be raised by the barber. The barber was an existing creditor of the purchaser and took the piano merely as collateral for a pre-existing debt, rather than as a bona fide purchaser, and the Washington statute did

39. *Id.* at 742, 168 P. at 8.

40. *Id.*

41. *Id.* at 740, 168 P. at 7.

42. *E.g.*, *Milliken v. Pratt*, 125 Mass. 374, 374 (1878); *Int’l Harvester Co. of Am. v. McAdam*, 124 N.W. 1042, 1042 (1910).

43. *See, e.g.*, *Massey-Ferguson, Inc. v. Talkington*, 88 Idaho 501, 512, 401 P.2d 790, 797 (1965).

44. *Van Ausdle Hoffman Piano Co. v. Jain*, 39 Idaho 563, 566, 228 P. 342, 342 (1924).

45. *Id.*

46. *Id.* at 568, 228 P. at 343.

47. *Id.* (quoting a Washington recording statute without citation). The Washington statute had been interpreted by Washington courts to require recordation in the county where the vendee resided.

not require filing against such a creditor.⁴⁸ The result was that the seller recovered the piano.

Although there was a conflict between the laws of Idaho and Washington regarding recordation, the *Jain* court's analysis could be a technique in avoiding the choice-of-law issue by ultimately finding no real conflict in the result.⁴⁹ Even when the court applied Washington law, it yielded the same result as would application of the law of the forum and the law of the place of contracting—Idaho. The supreme court later acknowledged the concept of a “false conflict” in *Rungee v. Allied Van Lines, Inc.*,⁵⁰ where it also first adopted the Second Restatement approach to choice-of-law problems.

C. Torts—*Lex Loci Delicti*: The Law of the Place of the Wrong

The law of the place of the wrong applied under the classic approach to torts cases, and this rule was generally cited by Idaho courts prior to 1968. But, as with *lex loci contractus*, the place might change depending on what aspect or locus of a tort claim is being scrutinized. For this reason, under the First Restatement, there were distinct rules for the place where the wrong was committed,⁵¹ the place where the injury was suffered,⁵² the interpretation of intent,⁵³ and which jurisdiction's standard of care would apply, among other things.⁵⁴

A claim from a personal injury suffered in Oregon was pursued in Idaho courts in *Hooker v. Schuler*,⁵⁵ but the case did not present any remarkable choice-of-law issues because Oregon and Idaho tort law on the last clear chance rule were consistent. The court implicitly followed the *lex loci delicti* rule, citing “laws of Oregon on contributory negligence.”⁵⁶

In *Preece v. Baur*,⁵⁷ Idaho's federal district court, exercising diversity jurisdiction, applied negligence law of Utah because that was the place where the harm occurred.⁵⁸ The Utah resident plaintiffs hired an Idaho dealer to install appliances

48. *Id.*; see also R. L. M. & G. H. P., Annotation, *Conflict of Law as to Conditional Sale of Chattels*, 57 A.L.R. 535 (1928).

49. Under another influential choice-of-law approach known as Governmental Interest Analysis, the conflict in *Jain* might be termed a “false conflict.” A legal dictionary describes three types of false conflict, and the conflict in *Jain* likely matches the second: “2. The situation in which, although a case has a territorial connection to two or more states whose laws conflict with one another, there is no real conflict because one state has a dominant interest in having its law chosen to govern the case—hence there is no real conflict.” BLACK'S LAW DICTIONARY 319 (8th ed. 2004); see also HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.9 at 27–30. Note that the false conflict concept is *not* part of the Second Restatement analysis. See Part III.B., *infra*.

50. *Rungee v. Allied Van Lines, Inc.*, 92 Idaho 718, 721, 449 P.2d 378, 381 (1968) (noting that on one issue the case “presents a ‘false conflict’ because the basic policies of Florida and Idaho are the same in providing that their courts may award attorney fees to an insured who finds it necessary to sue his insurer”). For more discussion of the “false conflict” concept, see *infra* text accompanying note 329.

51. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (“... the state where the last event necessary to make an actor liable for an alleged tort takes place”).

52. “The law of the place of wrong determines whether a person has sustained a legal injury.” *Id.* § 378.

53. *Id.* § 379.

54. *Id.* § 380.

55. *Hooker v. Schuler*, 45 Idaho 83, 84, 260 P. 1027, 1028 (1927).

56. *Id.* (“[W]e find both jurisdictions largely in accord on these questions, and find adequate support for our defense in the decisions of both states.”)

57. *Preece v. Baur*, 143 F. Supp. 804 (D. Idaho 1956).

58. *Id.* at 805.

in their home.⁵⁹ Plaintiffs alleged that negligent installation caused a fire in the home and sought recovery for mental distress.⁶⁰ The court determined to apply Utah law because “[t]he alleged negligent acts or omissions of the defendants took place in Utah, and consequently their liability is determined by the law of that state.”⁶¹ Based on Utah’s law disallowing recovery for fright alone, the court granted a motion to strike portions of the complaint alleging mental damages. The case is notable simply because if the claim had been brought or the parties had categorized the claim as a breach of contract or warranty, a different choice-of-law rule and body of law might apply since Idaho was apparently the place of contracting. The Idaho cases *Preece*, *Talkington*, and others illustrate that where there is a choice-of-law issue, the applicable law—and possibly the outcome—can be altered by characterizing a dispute as sounding in either contract or tort or property.⁶² Although this characterization technique created more dramatic results under the rigid classic *lex loci* approach to choice of law, it still has some effect using the more modern Second Restatement approach.⁶³

Before the adoption of the U.C.C. and its provisions for security interests that could be recognized nationwide, state courts applied a common law rule of comity regarding chattel mortgages formed in other states.⁶⁴ In a 1962 case, the Idaho Supreme Court explained,

The rule of comity recognized by nearly all of the states of the Union is generally stated as follows: “By the great weight of authority . . . the lien . . . properly perfected by recordation or filing or otherwise, and according to the law of the state in which it was executed and the property covered was found at the time, continues to have priority even after the removal of the property . . . to another state, over the rights and claims acquired in such latter state of purchasers from or creditors of the mortgagor or conditional vendee”⁶⁵

Under this rule of comity, a Utah conditional seller of an automobile was not required to record its lien within Idaho vehicle registration records.⁶⁶

59. *Id.* at 806.

60. *Id.* at 807.

61. *Id.* at 805. The court quoted the rule from 11 AM.JUR., *Conflict of Laws*, § 182: “Whether an act is the legal cause of another’s injury is determined by the law of the place of the wrong.”

62. To illustrate characterization as a choice-of-law gimmick, HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 3.4 at 124, provides the example of Arkansas “telegraph cases.” Arkansas law provided a tort remedy for mental anguish when telegraphs were negligently transmitted. *Id.* When suit was brought by plaintiffs living in Arkansas against out-of-state telegraph companies, the courts treated the suits as tort suits and applied Arkansas law under *lex loci delicti* to allow recovery; when such suits were brought by outsiders against Arkansans, the courts treated them as contract cases where such remedies were not allowed. *Id.*

63. See HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 3.5 at 148–49. “Subject matter characterization continues to be the natural and necessary starting point for the analysis of any conflicts case,” but the “most significant relationship” inquiry under the Second Restatement should not be determined by the type of case, the hornbook notes. *Id.*

64. See 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 190 (John H. Merrill et al., eds. 1887) (discussing the common law application of comity towards commercial transactions between sister states).

65. *Pac. Fin. Corp. v. Axelsen*, 84 Idaho 70, 74, 368 P.2d 430, 432 (1962).

66. *Id.*

In *Hare v. Young*, the court again analyzed the enforceability of a security interest—in a herd of sheep.⁶⁷ The court’s explanation of the rule of comity was not thorough but stated that “comity requires that the state to which the property is removed recognize and adopt the *lex loci contractus*,” and that the party seeking comity bears the burden of showing where the contract was made and where the property subject to the lien, etc. was at that time.⁶⁸ Comity was also discussed and applied in a conflicts case in 2008 by the Idaho Supreme Court.⁶⁹

III. THE SECOND RESTATEMENT’S “MOST SIGNIFICANT RELATIONSHIP” TEST

The American Law Institute’s Restatement (Second) of Conflict of Laws⁷⁰ was born of a “revolution” in conflict of laws.⁷¹ It went beyond restating common law rules and posited a progressive method for deciding choice-of-law cases.⁷² The theory of the Second Restatement is that a flexible balancing of considerations should be used by courts to determine which state has the most significant relationship to a case, and then to apply that state’s law. The Second Restatement’s underpinning theories are (1) interest analysis and policy determination, which discern and weigh policy interests of the states whose laws appear to conflict; (2) localization of issues, which attempts to connect the legal conflict to a certain geography; and (3) “more importantly, through its ‘approach’ to aid in the development of rules.”⁷³ As a hornbook explains, “the Second Restatement’s approach provides a

67. *Hare v. Young*, 26 Idaho 682, 684, 146 P. 104, 105 (1915).

68. *Id.* at 687, 146 P. at 105–06.

69. *Athay v. Stacey (Athay II)*, 146 Idaho 407, 420, 196 P.3d 325, 338 (2008). *See infra* text accompanying note 140.

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

71. *See generally* SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE OF LAW REVOLUTION: PAST, PRESENT, AND FUTURE* (2006). In another article, Professor Symeonides succinctly described the revolution: “The choice of law revolution caught fire in the 1970s, spread in the 1980s, and declared victory in the 1990s, leading to the demolition of the centuries-old choice of law system, at least in tort and contract conflicts.” Symeon C. Symeonides, *Oregon’s Choice of Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 206 (2007).

72. HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.14 at 58–59. (“Beyond restating, the work also aspired to be a guide for the future, an aspect that clearly distinguishes it from the First Restatement as well as from Restatements in other fields of law.”) The work also addresses conflict-of-laws subjects broader than choice of law.

73. *Id.* § 17.24 at 844 n.1. This hornbook is an essential resource for in-depth research on choice of law. Chapter Two Part IV on “The Scholastic Revolution,” Part V on the Second Restatement, and Chapter Three on “Determining the Applicable Law” are particularly relevant to choice of law. The index and table of cases are thorough and accessible. The appendices have useful tools, including a guide to using Westlaw resources, such as specific databases, and tips for using computerized searches for conflict-of-law cases and articles. There is also a table of Restatement citations—which refers to Restatement sections and comments. There are similar tables for uniform codes, the U.S. Constitution, the U.S. Code, and state statutes.

Another treatise of historical interest (though of limited current practical interest) is EDWARD S. STIMSON, *CONFLICT OF LAWS* (1963), which was authored while Stimson was a Professor of Law at the University of Idaho in Moscow. Professor Stimson memorably wrote in his preface, “Conflict of Laws is the physics of the law. It deals with the applicability of law in time and space. When its principles are properly understood it can be as scientific as the laws of physics.” *Id. Preface*. Stimson’s preface noted inconsistency in the law but hoped that conflict of laws would soon become an orderly, as if scientific, system, and that his book would hasten its arrival. Ironically, in 1963, the nascent judicial revolution in American choice of law was just beginning to make choice of law even more unpredictable. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.17 at 74–78.

basis from which courts can create a body of specific rules covering specific situations.”⁷⁴ This requires that the number of judicial precedents increase “before patterns become discernible, the application of the approach gains in consistency, and rules with precedent value emerge.”⁷⁵ A review of the case law shows that this ideal has been challenging to attain in Idaho.

The Second Restatement contains no set of choice-of-law commandments carved in stone, and Idaho courts have not historically demonstrated a religious adherence even to its very flexible structure. Some language in Idaho appellate cases indicates that courts have not adopted the entirety of the Second Restatement but will conservatively adopt the Second Restatement’s principles one at a time as the judicial occasions present themselves. For example, the Idaho Supreme Court stated in a 1995 case, “Although never adopted in full, this Court has opted in favor of applying the most significant relationship test set forth in the Restatement (Second) of Conflict of Laws (the Restatement).”⁷⁶ Again in a 1996 case, the court stated, “In *Cerami-Kote, Inc. v. Energywave Corp.* . . . we approved of the rule set forth in the Restatement (Second) of Conflict of Laws section 187.”⁷⁷ This perhaps indicates a misunderstanding that the Second Restatement should be treated as other Restatements may be treated at times—as persuasive secondary authority stating discrete rules *a la carte*, rather than as a comprehensive analytical system for determining the “most significant relationship.” Yet in other cases, the court seems to have recognized a broader adoption of the Second Restatement, at least for contracts and torts.⁷⁸ There are apparently no cases since the adoption of the Second Restatement where Idaho courts have expressly rejected any particular provision of the Second Restatement, so it is probably safe to assume that the Restatement Second as a whole has been adopted for contracts and torts, where conflict-of-laws issues most often arise.

Practitioners and judges, however, may not always get good bearings from the Second Restatement as a Polaris for navigating the “quaking quagmire” of choice of law, because both its initial approach and ultimate goal of determining the most significant relationship is inherently and intentionally ambiguous.⁷⁹ Also, case law from Idaho’s and other jurisdictions’ appellate courts have sometimes applied the Second Restatement erroneously and inconsistently. A scholar reviewing Texas law found great inconsistencies in judicial applications of the Second Restatement, stating it “has the irony of dominating the field while bewildering its users. The result

74. HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 17.24 at 844.

75. *Id.* § 2.14 at 69.

76. *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, 651, 889 P.2d 82, 85 (1995).

77. *Ward v. Puregro Co.*, 128 Idaho 366, 368, 913 P.2d 582, 584 (1996). In another example, one Idaho Justice recognized the Second Restatement while misnaming the “most significant relationship” test: “[i]n *Johnson v. Pischke*, 108 Idaho 19, 700 P.2d 19 (1985), this Court adopted and applied the ‘most significant contacts’ analysis found in the Restatement (Second) of Conflict of Law for tort cases.” *Barringer v. State*, 111 Idaho 794, 807, 727 P.2d 1222, 1235 (1986) (Bistline, J. opinion on reh’g).

78. *E.g.*, *DeMeyer v. Maxwell*, 103 Idaho 327, 329, 647 P.2d 783, 785 (Ct. App. 1982) “We adopt the ‘most significant relationship’ test in Idaho for the determination of which state’s law is applicable in a tort action.”

79. For this reason, many scholars initially criticized it harshly, including the reproach that it was “legal impressionism.” *See generally* Friedrich K. Juenger, *How Do You Rate A Century?*, 37 WILLAMETTE L. REV. 89, 108 (2001); HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.14 at 68.

is a set 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."⁸⁰

A. Overview of the Process of Determining the Most Significant Relationship

The Second Restatement approach necessarily begins with classifying a legal action as a tort, a contract, or some other discrete type of dispute. Within these legal categories, the Second Restatement also contemplates more particular actions, such as torts from personal injury to fraud to defamation.⁸¹ Based on the type of action or the legal issue, the Second Restatement has specific sections that provide presumptions of which law to apply (with degrees of tentativeness). These presumptions accompany a list of relevant categories of contacts to be considered in discovering the most significant relationship. For example, section 146 regarding personal injury torts seems to provide a rebuttable presumption: "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 section 6 to the occurrence and the parties. . . ."⁸² Along with such presumptive starting points, the Second Restatement lists contacts to be considered, such as the places where events occurred and where parties and relationships are centered.⁸³ As a court considers the relevant contacts, section 6 is a refrain to every analysis. Section 6 guides the court toward the most significant relationship by setting out the broad value goals applicable to choice-of-law issues in any category of law:

- (1) A court, subject to constitutional restrictions,⁸⁴ will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (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,

80. 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, 490-91 (2004).

81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-55 (1971).

82. *Id.* § 146.

83. For example, section 145 lists contacts for torts in general; section 188, for contracts. For unique issues, more particular contacts may be provided, as in section 148, where the places of making, receiving, and relying on a misrepresentation are listed for fraud actions.

84. Choice of law may raise constitutional due process concerns in some cases. The U.S. Supreme Court has held, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). A proper "most significant relationship" analysis under the Second Restatement will almost invariably lead to a result that conforms to that standard.

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.⁸⁵

The Second Restatement assigns no particular weight to either the contacts listed for particular actions or the value goals listed in section 6(2)(a)–(g). The Second Restatement itself recognizes that some of the factors of section 6(2) will often “point in different directions” and any rule necessarily accommodates conflicting values.⁸⁶

Regarding real property, the Second Restatement generally provides a black-letter rule for application of the “law that would be applied by the courts of the situs.”⁸⁷ The Hay hornbook offers this insight about the Second Restatement’s flexibility and the difference between how it was intended to be applied and how it often is applied:

Finally, in the remaining and most difficult cases, the Restatement does not even attempt to enunciate presumptive rules. It simply provides a non-exclusive, non-hierarchical list of the factual contacts or connecting factors that should be “taken into account” by the judge in choosing the applicable law. This choice is to be made “under principles stated in section 6” by “taking into account the above factual contacts “according to their relative importance with respect to the particular issue.” *This language [found in sections 145 and 188] suggests that the policy part of this analysis should carry more weight than the evaluation of the factual contacts.* Yet, courts have tended to do it the other way around by first focusing on the factual contacts listed in the pertinent Restatement section and then, if ever, on the policies of section 6.⁸⁸

This observation is generally descriptive of the Idaho cases summarized below. Hay also points out that some courts erroneously determine the most significant relationship by simply counting contacts.⁸⁹

Finally, another notable principle embodied in the Second Restatement’s approach is that the most significant relationship is to be determined regarding each particular legal issue.⁹⁰ In sum, an ideal analysis under the Second Restatement, where no statutory directive applies, will systematically consider the presumption and the contacts provided in order to weigh the policy considerations provided in section 6. These policy considerations give significance to the contacts and will most likely lead the court to its “most significant relationship” destination.

85. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

86. *Id.* § 6 cmt. (c).

87. *See generally id.* §§ 223–42. Sections applicable to movable property and succession issues are also relatively fixed rules, though the Second Restatement maintains in these sections the “most significant relationship” ideal. *See id.* §§ 245–55 and 260–65. Idaho courts have not addressed these sections, and it is unclear whether they would be adopted.

88. HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.14 at 67–68 (emphasis added).

89. *Id.* § 2.14 at 68.

90. This judicial practice is referred to by choice-of-law scholars as “dépeçage” and is expressly allowed under the Second Restatement. For example, sections 145 and 188 provide the most significantly related law applies “with respect to that issue.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971).

B. Idaho Torts Cases under the Second Restatement

Idaho courts first employed the Second Restatement in *DeMeyer v. Maxwell*.⁹¹ In this injury case, the Idaho Supreme Court avoided applying an Oregon motorist guest statute⁹² by weighing the contacts and factors in determining the most significant relationship was with Idaho. Two Idaho residents were driving home from Seattle when their car left the road in Oregon; the passenger was killed, and her estate brought a negligence action against the driver.⁹³ Under the classic *lex loci* approach, Oregon law would apply as the law of the place where the accident occurred. The Oregon guest statute would have prevented any recovery for the injured plaintiffs, passengers in the defendant's car. The court focused heavily on section 6 of the Second Restatement, which it referred to as the "general rule,"⁹⁴ before considering the contacts listed in section 145. It was not a close decision under the Second Restatement's provisions, and the court's conclusions seem unquestionably true to the ultimate purpose of a "most significant relationship" inquiry: "as concerns the application of a guest statute, the fact all parties to this suit are domiciled in Idaho and the relationship between them is centered in Idaho outweighs the fact the injury and conduct leading to the injury occurred in Oregon."⁹⁵

In two cases from 1984 and 1986, the Idaho Supreme Court considered choice-of-law issues where a third-party defendant argued that an employee in a worker's compensation suit was comparatively negligent.⁹⁶ *Runcorn v. Shearer Lumber Products* applied Idaho law to questions of worker's compensation and comparative negligence laws without referring to the Second Restatement.⁹⁷ An employee of a Spokane Washington Boiler company was injured by steam released from an adjacent boiler while doing repairs inside a lumber mill's boiler in Elk City, Idaho.⁹⁸ A jury apportioned fault as ten percent to the plaintiff employee, thirty percent to the Washington employer, and sixty percent to the Idaho lumber mill.⁹⁹ Washington law barred third-party defendants (in this case, the lumber mill) from raising the negligence or liability of employers liable under worker's compensation laws.¹⁰⁰ Also, Washington law held the "employer or its insurer has an automatic lien or subrogation rights to the third-party recovery for the amount of the compensation benefits paid."¹⁰¹ Washington courts themselves had disparaged this

91. *DeMeyer v. Maxwell*, 103 Idaho 327, 329, 647 P.2d 783, 785 (Ct. App. 1982) ("We adopt the 'most significant relationship' test in Idaho for the determination of which state's law is applicable in a tort action").

92. Guest statutes limited recovery of passenger plaintiffs from defendant drivers, often by requiring breach of a heightened standard of care. When such laws were popular, choice-of-law jurisprudence across the U.S. abounded with decisions wherein courts grapple with guest statutes and often successfully avoid the application of another state's guest statute in order to allow recovery of a plaintiff who resides in the forum. *E.g.*, *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969); *Kennedy v. Dixon*, 439 S.W.2d 173, 178 (Mo. 1969).

93. *DeMeyer*, 103 Idaho at 328, 647 P.2d at 785.

94. *Id.* at 329, 647 P.2d at 785.

95. *Id.* at 330, 647 P.2d at 786.

96. *Barringer v. State*, 111 Idaho 794, 797, 727 P.2d 1222, 1225 (1986); *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 391, 690 P.2d 324, 326 (1984).

97. *See Runcorn*, 107 Idaho at 395-97, 690 P.2d at 330-35.

98. *Id.* at 391, 690 P.2d at 326.

99. *Id.* at 392, 690 P.2d at 327.

100. *Id.* at 395, 690 P.2d at 330.

101. *Id.*

rule, but there was no legislation changing it.¹⁰² In contrast, an Idaho statute allowed “the injured employee and/or the subrogated employer [to] hold a third party liable in tort for damages.”¹⁰³ Finding the Idaho law superior, the *Runcorn* court held that the Idaho statute applied, and also held that the surety of the thirty-percent-negligent Washington employer could not enforce a subrogation lien under Idaho law.¹⁰⁴ At the close of these conclusions, the court explained its choice of applicable law:

It is possible that in a different set of circumstances we might choose to apply Washington law as the appropriate law when confronted by a conflict of laws. However, in this case both plaintiffs and defendant are Idaho residents. The tort took place in Idaho. Idaho has strong interests and policies which would be undermined by the application of the less equitable Washington laws. Therefore, we choose to apply the law of Idaho, the forum state.¹⁰⁵

This choice-of-law analysis appeared to be an afterthought for the court, which had an obvious judicial preference for Idaho’s more “equitable” law on the issue. Because the *Runcorn* decision does not specify what choice-of-law system it used, it is hard to say whether the Idaho Supreme Court considered it such an easy choice of law case that citation to specifics of the Second Restatement were unnecessary, or whether it was some other thought process, such as what one scholar calls “Currie-inspired misapplications.”¹⁰⁶ In spite of this apparent shooting from the hip, the same result could easily have been sustained under a more systematic balancing of contacts and policies in determining the most significant relationship under the Second Restatement, including its sections on worker’s compensation conflicts in sections 181 and 182, which provide wide flexibility even where other states’ laws could apply.

Barringer v. State followed *Runcorn* as a “controlling precedent”¹⁰⁷ on similar issues, although it cited other case law and specific provisions in the Second Restatement supporting its analysis. *Barringer* was a wrongful death case involving multiple parties in Washington and Idaho.¹⁰⁸ Suit was brought by the family of a Washington resident truck driver who worked for a Washington corporation and was killed on the Lewiston grade in Idaho while trying to use a runaway truck ramp.¹⁰⁹ The State of Idaho filed a third-party complaint against the driver’s employer for indemnification and contribution, and the employer corporation raised

102. *Id.* (citing *Courtright v. Sahlberg Equipment, Inc.*, 563 P.2d 1257, 1260 (Wash. 1977)).

103. *Id.* (citing IDAHO CODE ANN. § 72-223 (2012)).

104. *Id.* at 396, 690 P.2d at 331.

105. *Id.*

106. See George, *supra* note 80, at 492. Brainerd Currie was a proponent of a choice-of-law approach known as “Governmental Interests” Analysis or Theory, which nihilistically rejected choice-of-law rules and provided a system for justifying the choice-of-forum law. See HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.9 at 28–29. There is also a choice-of-law methodology aptly called the “Better Law” approach developed by Professor Robert A. Leflar. See generally HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.13 at 56–62.

107. *Barringer v. State*, 111 Idaho 794, 798, 727 P.2d 1222, 1226 (1986).

108. *Id.* at 795, 727 P.2d at 1223.

109. *Id.*

the defense of its immunity under Washington worker's compensation law.¹¹⁰ The Washington Department of Labor ("Washington DOL") intervened and filed a lien on any settlement the Barringer family received.¹¹¹ The trial court applied Idaho law and subrogated the Washington DOL's right to reimbursement under Idaho Code section 72-223(3).¹¹² Such subrogation had also been a potential concern to the parties in *Runcorn*.¹¹³ The court found this case very similar to *Runcorn* and analyzed the contacts, interests, and contrasts between Idaho's loss-distributing policy and Washington's "less equitable" and "extreme approach" of "barring any negligence to be attributed to the employer and no reduction in the surety's right of reimbursement from the tort recovery."¹¹⁴ The supreme court held that Idaho law applied to the issue, stating its analysis was supported by a variety of choice-of-law approaches: "We conclude that Idaho as the forum state has the most significant interest in having its law applied under a 'comparative impairment,' 'weighing of interests' or 'better law' analysis."¹¹⁵

Both *Barringer* and *Runcorn* demonstrate how the layers of complexity collide when two states' laws, judiciaries, legislatures, and public and business interests come into play. Adding the somewhat elaborate Second Restatement analysis on top of that complexity can seem like overkill, as it may have seemed to the court in *Runcorn* and *Barringer* as it created its own pastiche methodology. Ideally, however, the Second Restatement is a tool to sort through such complexity and apply the law with the most significant relationships to the dispute.

In another wrongful death suit after a tragic plane crash, the Idaho Supreme Court had to determine applicability of Idaho or Saskatchewan law to issues of worker's compensation and the wrongful death statute of limitations in *Johnson v. Pischke*.¹¹⁶ One party argued that an Idaho aviation statute¹¹⁷ required application of Idaho law, but the court found that it was only jurisdictional and did not control the substantive law to be applied. Instead, the court used the Second Restatement analysis, which it misnamed the "most significant contacts test."¹¹⁸ This misnomer is troubling because it emphasizes *contacts*, where the correct analysis should view contacts, without particular weight to any one, in light of broader policy interests and *relationships* to the law. However, the *Johnson* court's decision is an exemplar of the analytical process and balancing of these factors. The court had to determine on appeal whether Idaho or Saskatchewan law applied to resolve the issue of employer immunity from third-party injury claims under Saskatchewan Workers'

110. *Id.*

111. *Id.* at 798, 727 P.2d at 1224.

112. *Id.*

113. *Id.* at 797, 727 P.2d at 1225.

114. *Id.*

115. *Id.* at 799, 727 P.2d at 1227.

116. *Johnson v. Pischke*, 108 Idaho 397, 400, 700 P.2d 19, 22 (1985).

117. IDAHO CODE ANN. § 21-207 (2012). Entitled "Jurisdiction over crimes and torts," the statute provides: "All crimes, torts and other wrongs committed by or against an airman or passenger while in flight over this state *shall be governed by the laws of this state*; and the question whether damage occasioned by or to an aircraft while in flight over this state constitutes a tort, crime or other wrong by or against the owner of such aircraft, shall be determined by the laws of this state" (*emphasis added*).

118. *Johnson*, 108 Idaho at 399-400, 727 P.2d at 21-22. For more on the misuse of the Second Restatement by simple counting of contacts, see Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 21-22 (1984); HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.14 at 68.

Compensation Law.¹¹⁹ There was also a wrongful death statute of limitation issue.¹²⁰ Considering the policy factors of section 6 and the tort contacts of section 145, the court affirmed the trial court's reasoning that Saskatchewan had a more significant interest in controlling compensation of injured workers, that the defendants could "justifiably" assume they would be immune, and that applying Idaho law would subvert Saskatchewan's policy regarding employer coverage.¹²¹

Statute of limitations issues were resolved differently for different defendants.¹²² Wrongful death claims were brought against both the pilot of the plane and the plane manufacturer, and the suit was brought after the expiration of both the one-year Saskatchewan statute of limitations and Idaho's two-year time limit.¹²³ For the defendant pilot whose relationship with the plaintiffs was based in Saskatchewan, where all resided, the court concluded that the Saskatchewan time limit applied, noting no relationship or regular business in Idaho.¹²⁴ However, for the defendant plane manufacturer, Cessna, a relationship with Saskatchewan did not outweigh the relationship with Idaho.¹²⁵ The court quoted the Second Restatement's section 175: "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."¹²⁶ The court considered this presumption and also weighed five other places with a relationship to the parties and the suit: (1) the aerial search after the crash was done at Idaho's expense; (2) any tortious manufacturing defect would have occurred in Kansas, Cessna's place of business; (3) the destination was Boise; and stops were made in (4) North Dakota and (5) Montana.¹²⁷ The court concluded, "Cessna's corporate accountability did not cease at the Kansas border . . . Among the places discussed, none has a *more* significant relationship to the issue before us than Idaho, the place of injury."¹²⁸ Of the policy concerns of protection of defendants and courts against stale claims, "It is the Idaho courts' resources which are being expended; if Idaho chooses to open its judicial system to actions brought within two years, then no other jurisdiction has grounds to object."¹²⁹ In this case, the flexibility of the Second Restatement helped the Idaho court serve the significant interests of the forum state.

In the case used as an introductory illustration in this article, *Estates of Braun v. Cactus Pete's, Inc.*,¹³⁰ the Idaho Supreme Court declined to apply forum law to allow Idaho resident plaintiffs to recover from a Nevada casino. The court quoted section 6 and section 145 in the same way that it did in *Johnson*, and of ultimate importance was the policy factor of section 6(2)(c): "the relevant policies of other

119. *Johnson*, 108 Idaho at 401, 700 P.2d at 23.

120. *Id.* at 399, 700 P.2d at 21.

121. *Id.* at 401, 700 P.2d at 23.

122. *Id.* at 402, 700 P.2d at 24.

123. *Id.*

124. *Id.* at 401, 700 P.2d at 23.

125. *Id.* at 402, 700 P.2d at 24.

126. *Id.* (emphasis by the court).

127. *Id.*

128. *Id.* (emphasis by the court).

129. *Id.* at 403, 700 P.2d at 25.

130. *Estates of Braun v. Cactus Pete's, Inc.*, 108 Idaho 798, 800, 702 P.2d 836, 838 (1985).

interested states and the relative interests of those states in the determination of the particular issue.”¹³¹ The court explained:

Although it is true that the accident itself occurred just inside Idaho, north of the Nevada border, and that the drivers and passenger involved in the accident were Idaho residents, it must be remembered that the plaintiffs here seek to recover for allegedly negligent acts committed solely in the State of Nevada by a Nevada casino, incorporated in the State of Nevada. The public policy of the State of Nevada . . . prohibits the imposition of civil liability upon a tavern keeper. Since all of the allegedly negligent conduct of the defendant Cactus Pete's occurred in the State of Nevada, to impose liability based upon Idaho standards would result in an extra-territorial application of Idaho's negligence laws to businesses and activities which, by Nevada standards, are not subject to civil liability.¹³²

This reasoning coincided with the trial court's assessment of the applicability of Nevada's law against dram shop liability.¹³³

But this was a particularly close choice-of-law case, highlighted by a dissenting opinion and the supreme court's reversal of the Idaho Court of Appeals decision. The Court of Appeals had held that Idaho law should apply, highlighting that “Idaho is the domicile of the plaintiffs and the defendant Rader. Idaho is also the place of injury.”¹³⁴ Also, “Nevada's policy of protecting the economic interests of casino owners is less significant where the particular casino is located so as to attract and accommodate Idaho patrons.”¹³⁵ An Arizona court facing similar issues disagreed with the majority in the Idaho Supreme Court's decision in *Braun*, pointing out that it was an outlier among decisions from other jurisdictions, and quoting Justice Huntley's dissent in *Braun*.¹³⁶ Unlike in some cases discussed in this article, *Braun*'s Second Restatement analysis was sound, though other courts may have differed on the weight to be given to certain contacts and policy factors, resulting in different outcomes. That the “most significant relationship” approach could lead to different outcomes recalls the “legal impressionism” criticism of the Second Restatement from its earliest adoption, but choice of law jurisprudence has always struggled to draw “the right line between excess of rigidity . . . and excess of flexibility.”¹³⁷

In *Grover v. Isom*,¹³⁸ the Idaho Supreme Court applied Oregon law even though all parties were Idaho residents. The plaintiff sued her oral surgeon and nurse anesthetist after she suffered a stroke during oral surgery performed in Ontario, Oregon. The trial court had denied a motion to add a punitive damages claim and excluded records of discipline by the Oregon Board of Dentistry.¹³⁹ The court methodically acknowledged the contacts of section 145, which all pointed to Ore-

131. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (1971)).

132. *Id.* (citations omitted)

133. *Estates of Braun v. Cactus Pete's, Inc.*, 107 Idaho 484, 488, 690 P.2d 939, 943 (Ct. App. 1984) *vacated*, 108 Idaho 798, 702 P.2d 836 (1985).

134. *Id.*

135. *Id.*

136. *Hoeller v. Riverside Resort Hotel*, 820 P.2d 316, 322 (Ariz. Ct. App. 1991)

137. HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.14 at 62 (quoting Kahn-Freund, *General Problems of Private International Law*, 143 RECUEIL DES COURS 139, 468 (1974–III)).

138. *Grover v. Isom*, 137 Idaho 770, 773, 53 P.3d 821, 824 (2002).

139. *Id.* at 772, 53 P.3d at 823.

gon except for the parties' domicile,¹⁴⁰ and then each policy concern of section 6, and easily concluded that Oregon law should apply on these issues. Despite performing the "most significant relationship" analysis, the court reiterated the former *lex loci* rule: "As a general rule, a victim should recover under the system in place where the injury occurred."¹⁴¹ The court also favored this predictability, stating that "it is a simple policy that the place of the injury should generally govern the choice of law."¹⁴² But the court still addressed whether the substantive laws of Oregon and Idaho were really in conflict.

On claims of punitive damages in medical malpractice cases, Oregon law required a plaintiff to show the defendant acted outside the scope of his practice and with malice.¹⁴³ Although it acknowledged the issue was moot in light of the jury's verdict awarding nothing to the plaintiff, the court pointed out that punitive damages laws are substantive.¹⁴⁴ This statement implies a rule that a court applies forum law to "procedural" issues. This is consistent with the Second Restatement's principle that "A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."¹⁴⁵ However, the Second Restatement avoids reference to the loaded labels of "procedure" or "substance," explaining,

These characterizations, while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as "procedural" or "substantive," regardless of what purposes were involved in the earlier classifications To avoid encouraging errors of that sort, the rules stated in this Chapter do not attempt to classify issues as "procedural" or "substantive." Instead they face directly the question whether the forum's rule should be applied.¹⁴⁶

But the substance-procedure dichotomy persists in choice of law.¹⁴⁷ In *Grover*, regarding the trial court's decision to follow Oregon law providing privilege for the Oregon Board of Dentistry disciplinary records, the court reasoned that

140. *Id.* at 774, 53 P.3d at 825 ("The only factor that justifies the application of Idaho law is that the parties are Idaho residents. Every other factor supports the application of Oregon law.")

141. *Id.* at 773, 53 P.3d at 824. *Cf.* *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, 651, 889 P.2d 82, 85 (1995) ("Of these contacts [in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971)], the most important in guiding this Court's past decisions in tort cases has been the place where the injury occurred.") The court in *Grover* and *Seubert* could have also cited and relied on the presumption provided in section 146, "[i]n an action for a personal injury, 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" RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

142. *Grover*, 137 Idaho at 773, 53 P.3d at 824.

143. *Id.* at 774, 53 P.3d at 825 (citing OR. REV. STAT. § 18.550 (2003) (citing a statute that was renumbered and can be found at OR. REV. STAT. § 31.740 (2010)).

144. *Id.*

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

146. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. (b) (1971); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 3.8 at 127-29.

147. *See* *Jenkins v. Armstrong World Indus., Inc.*, 643 F. Supp. 17 (D. Idaho 1985) *vacated sub nom.* *Meyer v. Armstrong World Indus., Inc.*, 820 F.2d 329 (9th Cir. 1987) (holding that under the "most significant relationship" test mandated by Texas choice-of-law rules, Idaho substantive law and Texas procedural law governed, and that an Idaho statute of limitations in Idaho Code §§ 5-219(4), 5-311 was substantive rather than procedural).

Idaho law would also make them exempt from use as evidence. But the court did not directly address privilege or evidentiary rules in the choice of law context.

*Athay v. Stacey*¹⁴⁸ is a remarkable case because, in two separate appeals, it required the Idaho Supreme Court to choose between applying an Idaho or a Utah law on (1) the standard of care specific to police during motorist pursuits, and (2) applicability of an Idaho statute to a Utah defendant on the issue of the notice required for tort claims against the government; however, the court never directly addressed these as choice-of-law issues. The case arose from an interstate police chase that began in Rich County Utah, passed through a portion of Wyoming, and ended in a collision in Bear Lake County, Idaho.¹⁴⁹ The drunk driver being pursued collided with the plaintiff, who brought suit against the Rich County, Utah and Bear Lake County, Idaho law enforcement officers who had joined in the pursuit.¹⁵⁰ The two appellate opinions indicate that the court did not perform a choice-of-law analysis because of the parties' framing of the issues on appeal.

In a decision issued on the first appeal ("*Athay I*"), the supreme court noted, "The district court conducted a choice of law analysis using the most-significant-relation test set forth in *Grover v. Isom*, and determined that Idaho law should apply. The Athays have not alleged on appeal that the district court erred in its analysis under that test."¹⁵¹ However, the court summarized the plaintiff's argument as a contention that the Utah negligence standard should also apply to a sheriff from Utah pursuing the driver into Idaho.¹⁵² The court disregarded contacts and policy considerations, unlike previous decisions using the most significant relationship test, and concluded, "The conduct causing the injury and the injury itself occurred in Idaho, not Utah. The standard of care for police chases in Utah is irrelevant. We are not at liberty to disregard the provisions of Idaho Code section 49-623 and apply Utah statutes to Sheriff Stacey when an Idaho statute provides the standard of care by which his conduct is to be judged."¹⁵³

On the second appeal ("*Athay II*"), the court considered the application of a notice of tort claims deadline under an Idaho law that required notice of claim within 180 days.¹⁵⁴ The court again seemed to affirm the trial court's choice of law analysis without addressing it,¹⁵⁵ chose to apply Idaho law as a matter of "comity," but then declined to apply the rule to the case because it was a matter of first impression.¹⁵⁶ Whether to apply the Utah analogue notice of tort claims deadline to the Utah sheriff was not addressed.

148. *Athay v. Stacey*, 146 Idaho 407, 196 P.3d 325 (2008) (*Athay II*).

149. *Athay v. Stacey*, 142 Idaho 360, 363, 128 P.3d 897, 900 (2005) (*Athay I*).

150. *Id.* at 364, 128 P.3d at 901.

151. *Id.* at 366 n. 2, 128 P.3d at 903 n.2 (citation omitted).

152. *Id.* at 366, 128 P.3d at 903.

153. *Id.*

154. *Athay II*, 146 Idaho at 419, 196 P.3d at 337 ("Idaho Code § 6-906 requires that all claims against a political subdivision or its employee arising under the provisions of the Act must be filed with the clerk of the political subdivision within one hundred eighty days.").

155. *Id.* at 421, 196 P.3d at 339 ("Based upon the most significant relation test utilized in *Grover v. Isom*, 137 Idaho 770, 772-73, 53 P.3d 821, 823-24 (2002), the district court determined that Idaho law should apply to this action.") It appears that a choice-of-law error was not directly raised on appeal, but that a defendant "asked the district court to apply Utah law under the doctrine of comity." *Id.*

156. *Id.*

The Idaho Supreme Court ostensibly applied comity to resolve this choice-of-law issue in *Athay*.¹⁵⁷ In conflict of laws, comity usually refers to “[r]ecognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens.”¹⁵⁸ Comity is understood almost universally as enforcement of a foreign state or nation’s laws inside another state’s borders. “Courts in one state will, out of comity, enforce the laws of another state when such enforcement will not violate their own laws or inflict an injury on one of their own citizens,” as one legal encyclopedia puts it.¹⁵⁹ The court held that the Idaho Tort Claims Act provision requiring a notice of claim to be filed within 180 days from the date the claim arose¹⁶⁰ was not applicable to Rich County, Utah.¹⁶¹ However, the Rich County, Utah defendants asked the court to apply the Idaho law under the principle of comity.¹⁶² Relying on comity, the Idaho Supreme Court decided that ITCA provisions could be applied to agents from other states who were defendants in an Idaho tort action.¹⁶³ Though it announced this rule, the court did not apply the Idaho notice of claim deadline to the claim against Rich County because an exception in this case would “avert injustice to the plaintiff” as it announced a new rule of law.¹⁶⁴

Declining to apply Utah’s own governmental immunity laws to a county of Utah was the reverse of comity in the usual sense: comity “is the recognition which one nation [or state] allows within its territory to the legislative, executive, or judicial acts of another nation [or state].”¹⁶⁵ Applying Utah law to the Utah defendant would likely have better served important policies, such as allowing recovery for the Idaho motorist, allowing Utah’s enacted policies to control its own liability, and allowing law enforcement and other government employees to rely on their own training, privileges, immunities, and other expectations.¹⁶⁶

Addressing a statutory tort cause of action related to securities fraud, Idaho’s Supreme Court held that where more specific Oregon securities statutes did not conflict with related Idaho law, there was no conflict in applying Oregon law, in *Houston v. Whittier*.¹⁶⁷ “In this case, the first two claims alleged in Plaintiff’s com-

157. *Athay II*, 146 Idaho at 420, 196 P.3d at 338.

158. BLACK’S LAW DICTIONARY 242 (5th ed. 1979); HAY, BORCHERS & SYMEONIDES, *supra* note 11, § 2.5, at 14; *see also* 15A C.J.S. *Conflict of Laws* § 7 (2012).

159. 15A C.J.S. *Conflict of Laws* § 8. Courts citing comity as a basis for choice of law typically apply a defendant state’s law to the defendant state. *See Lee v. Miller County, Ark.*, 800 F.2d 1372 (5th Cir. 1986) (affirming on comity grounds a Texas federal district court decision that an Arkansas county was immune from suit resulting from a helicopter crash); *University of Iowa Press v. Urrea*, 440 S.E.2d 203 (Ga. Ct. App. 1993) (holding an Iowa university publisher immune from invasion of privacy suit on comity grounds); *Beard v. Viene*, 826 P.2d 990 (Okla. 1992) (recognizing the immunity in Oklahoma of the municipality of Kansas City as a matter of comity); *Reed v. University of North Dakota*, 543 N.W.2d 106 (Minn. Ct. App. 1996) (declining jurisdiction as a matter of comity and to discourage forum shopping).

160. IDAHO CODE ANN. § 6-906 (2012).

161. The Utah statute provided a more liberal one-year period for filing a notice. UTAH CODE ANN. § 63G-7-402 (West 2012).

162. *Athay II*, 146 Idaho at 419, 196 P.3d at 337.

163. *Id.* at 421, 196 P.3d at 339.

164. *Id.*

165. 15A C.J.S. *Conflict of Laws* § 6 (2009).

166. An example of a sound application of comity in a case with a sister state as a defendant comes from a New York appellate court decision, where the court identified an “immunity by comity doctrine.” *Morrison v. Budget Rent A Car Systems, Inc.*, 230 A.D.2d 253, 265 (N.Y.S.2d 1997).

167. *Houston v. Whittier*, 147 Idaho 900, 905–06, 216 P.3d 1272, 1277–78 (2009).

plaint were neither contractual in nature nor based in tort. They were causes of action created by statute.”¹⁶⁸ Thus, the court reasoned that the Second Restatement was not clearly applicable: “Because [the Plaintiff’s] two causes of action are created by statute, the issue is not choice of law. Rather, it is whether there is a reason not to permit Plaintiff to enforce these Oregon statutory causes of action in Idaho.”¹⁶⁹ The court explicitly held that the most significant relationship test did not apply.¹⁷⁰ Instead, the court applied the limiting principle familiar in the broad range of conflict of laws—that the foreign law must not conflict with the forum state’s public policy.¹⁷¹ The Oregon statutes were harmonious with similar Idaho statutes.¹⁷² Thus, from *Houston* the rule emerges that Idaho courts will address other states’ statutory causes of action where they do not disrupt or conflict with Idaho’s policy, and the elaborate Second Restatement approach is not employed.

C. Idaho Contracts Cases under the Second Restatement

The Second Restatement altered the classic approach summarized in the First Restatement by allowing party autonomy in choosing applicable law by contract, and by supplanting the rigid *lex loci* rules with a “most significant relationship” analysis.¹⁷³ The new Restatement also abandoned the sharp distinction between issues of validity and performance, and provided customized rules for particular kinds of contracts.¹⁷⁴ Most often cited are the Second Restatement’s general provisions for contracts: section 187 which provides for the parties’ choice of applicable law, and section 188 which governs in the absence of party choice. Idaho case law related to these two fact patterns is summarized below.

1. Choice-of-Law Contractual Provisions Are Enforceable under Idaho Case Law and the Second Restatement¹⁷⁵

Section 187 of the Second Restatement provides that parties may choose the law of a particular state to govern their contract. This is true “if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”¹⁷⁶ Even if it is not such an issue, the parties may still prospectively choose the applicable law unless

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under

168. *Id.* at 906, 216 P.3d at 1278.

169. *Id.*

170. *Id.* at 907, 216 P.3d at 1279.

171. *Id.*

172. *Id.* at 908, 216 P.3d at 1280 (“[A]llowing Plaintiff to pursue these Oregon statutory causes of action in an Idaho court would not conflict with the public policy of this state. The substantive provisions of Idaho Code §§ 30-14-501, 30-14-502, and 30-14-509 are virtually identical.”).

173. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

174. *Id.* See also §§ 189–97.

175. *Id.* § 187.

176. *Id.* § 187(1).

the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.¹⁷⁷

Subsections (a) and (b) to section 187(1) embody exceptions that also existed under the classic approach.¹⁷⁸ The requirements of a “substantial relationship” and “reasonable basis” cited in section 187(1)(a) echo requirements imposed under due process standards for choice of law by the U.S. Supreme Court: “[i]n order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”¹⁷⁹

Idaho courts have consistently enforced legitimate choice-of-law contractual provisions, both under the direction of statutes or the Second Restatement.¹⁸⁰ In many reported Idaho cases, choice-of-law contractual provisions are enforced without dispute.¹⁸¹

In *Cerami-Kote, Inc. v. Energywave Corp.*,¹⁸² a case involving licensing of a proprietary roofing sealant, the Idaho Supreme Court enforced a contractual provision that the “agreement shall be interpreted, construed and governed by the laws of the state of Florida.”¹⁸³ Then, the Idaho Supreme Court applied Florida law to enforce the contract’s choice-of-venue provision.¹⁸⁴ The trial court should have dismissed the plaintiff’s contractual, tort, and statutory claims because the agreement stated that suit could not be brought in any venue other than Florida.¹⁸⁵ The Idaho Supreme Court did not remand for a dismissal so that the suit could be brought in Florida.¹⁸⁶ Instead, the court found the resulting application of Florida law by the Idaho trial court would have yielded the same result.¹⁸⁷ One commenter noted this case as an example of how a court facing a venue-selection clause might “enforce’

177. *Id.* § 187(2).

178. *Id.* § 187(1).

179. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (citing *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Alaska Packers Assn. v. Indus. Accident Comm’n*, 294 U.S. 532, 542 (1935); and *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (holding that Texas courts violated constitutional due process by applying Texas forum law to a contract between parties in New York and Mexico)).

180. *See Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 132 Idaho 754, 766 n. 3, 979 P.2d 627, 639 n.3 (1999) (“Choice of law provisions are recognized in Idaho both in commercial and noncommercial transactions.”).

181. *E.g. Markin v. Grohmann*, 280 P.3d 726, 728 (Idaho 2012). In *Markin*, the court implicitly enforced a settlement agreement’s term to be governed and interpreted under California law. The *Markin* case also address full faith and credit and enforcement of foreign judgments, other subjects often academically treated as conflict-of-laws issues. *E.g., T.J.T., Inc. v. Mori*, 152 Idaho 1, 266 P.3d 476, 479 (2011). The Idaho Supreme Court applied California law in *Mori*, and no choice-of-law question was raised on appeal. The court explained in a footnote: “The non-competition agreement contains a choice of law provision nominating California law.” *Id.*

182. *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 58, 773 P.2d 1143, 1145 (1989).

183. *Id.*

184. *Id.*

185. *Id.* at 57–58, 773 P.2d at 1143–45. The *Cerami-Kote* court considered an Idaho statute expressly allowing contractual choice of law provisions: IDAHO CODE ANN. § 28-1-105(1) (1980). The court determined that a substantial relationship existed with the chosen state as required under the statute and under constitutional due process standards. *Id.* For more on the U.C.C.’s choice-of-law provisions, *see infra* Part IV.A.

186. *Id.*

187. *Cerami-Kote*, 116 Idaho at 58, 773 P.2d at 1145.

the clause by actually refusing to enforce it, and deciding the case itself under the rules it believes the selected forum would apply.”¹⁸⁸

A phrase in a footnote of this opinion may create some confusion over the scope of the applicability of the Second Restatement. The court noted the Second Restatement would apply “in non-commercial situations,” implying that it does not apply to choice-of-law issues in commercial contexts.¹⁸⁹ A more accurate statement is that the Second Restatement’s analytical framework applies to all choice-of-law issues, commercial or not, but that courts utilizing the Second Restatement should defer to statutes (such as U.C.C. adoptions) on choice of law, as required by Second Restatement section 6(1).

Idaho courts have addressed imprecision in contractual terms regarding choice of forum and law. A forum-selection clause¹⁹⁰ should not be classified as or confused with a choice-of-law clause, as illustrated in *Barber v. State Farm Mutual Auto Insurance Co.*¹⁹¹ *Barber* presented an opportunity for the Idaho Supreme Court to distinguish between the two. At issue was whether an insured could recover around \$14,000 in attorney fees after an arbitration panel awarded the insured much more than the insurer had initially offered, as allowed by Idaho statute.¹⁹² The court found a conflict on the question between Washington case law and an Idaho statute controlling attorney fee awards after insurance arbitration. Plaintiffs argued that a vague arbitration provision contemplated application of Idaho substantive law.¹⁹³ But the court held that language in the insurance contract stating where to arbitrate and which state’s procedural rules would apply only indicated “that the clause is meant as a choice of forum clause, not a choice of law clause.”¹⁹⁴

Two Idaho cases show that a prior agreement choosing applicable law may be too narrow in scope to cover all litigation conflicts between the parties to the contract. In *Barringer v. State*¹⁹⁵ and *Runcorn v. Shearer Lumber Products, Inc.*,¹⁹⁶ the Idaho Supreme Court found that a reciprocity agreement between Washington and

188. Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 300 n. 196 (1993).

189. *Cerami-Kote*, 116 Idaho at 58 n.1, 773 P.2d at 1145 n. 1. An example of such confusion is found in a student article citing *Cerami-Kote*: “Additionally, the provisions of section 28-1-105 apply to commercial transactions. Thus, if such transaction is not deemed purely commercial, a court will likely apply either the First or Second Restatement of Conflicts.” Tyler Anderson, *An Analysis of Personal Jurisdiction and Conflict of Law in the Context of Electronically Formed Contracts*, 37 IDAHO L. REV. 477, 501 (2001) (citing *Cerami-Kote*, 116 Idaho at 58 n. 1, 773 P.2d at 1145 n. 1).

190. See 17A AM. JUR. 2d *Contracts* § 259 (2013) (“A ‘forum selection’ provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.”). By comparison, a “choice of law” contract provision “names a particular state and provides that the substantial laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated.” 17A AM. JUR.2d *Contracts* § 261 (2013).

191. *Barber v. State Farm Mutual Auto Ins. Co.*, 129 Idaho 677, 681, 931 P.2d 1195, 1199 (1997).

192. IDAHO CODE ANN. § 41-1839 (1996).

193. *Barber*, 129 Idaho at 680, 931 P.2d at 1198. The provision read, “The arbitration shall take place in the county in which the insured resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.” *Id.*

194. *Id.* at 681, 931 P.2d at 1198. The court’s “most significant relationship” analysis is discussed below.

195. *Barringer v. State*, 111 Idaho 794, 797, 727 P.2d 1222, 1225 (1986).

196. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 397, 690 P.2d 324, 332 (1984). *Barringer* cited its analysis of the same written agreement on a similar issue in *Runcorn*. *Barringer* and *Runcorn* are more thoroughly discussed in Part III.B. *supra*.

Idaho regarding which state would pay workers' compensation benefits for employees injured after crossing state lines did not extend to third-party tort actions.

2. Choice-of-Law Decisions Where Parties Made No Contractual Provision

For cases where the parties have not prospectively or validly chosen applicable law, section 188 of the Second Restatement lists key contacts to consider, in light of the policy concerns embodied in section 6, in determining the most significant relationship:

- (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in section 6.
- (2) In the absence of an effective choice of law by the parties (see section 187), the contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
 - (a) the place of contracting,
 - (b) the place of negotiation of the contract,
 - (c) the place of performance,
 - (d) the location of the subject matter of the contract, and
 - (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in sections 189-199 and 203.¹⁹⁷

For contracts in general, the Second Restatement's section 188, together with section 6, guides determination of the applicable law in the absence of an effective choice of law by the parties. The Second Restatement also provides important contacts to be weighed and more specific guidance for particular types of contracts¹⁹⁸ or issues.¹⁹⁹ Because of the high level of overlap, the contracts cases discussed below are not subcategorized, but it is noted where they involve particular issues such as insurance, attorney fees, or consumer credit lending.

Idaho's judiciary first adopted the Second Restatement in *Rungee v. Allied Van Lines*,²⁰⁰ while the Second Restatement was in proposed official draft form.²⁰¹

197. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

198. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 8, topic 1, tit. B (1979), with provisions applying to contracts for transferring land (§§ 189 and 190), movable property (§ 191), insurance (§§ 191-93), suretyship (§ 194), loan repayment (§ 195), services (§ 196), and transportation (§ 197).

199. See *id.* at tit. C. The issues covered by sections 198 to 207 range from contract construction issues to defenses such as capacity and illegality, to remedies. Section 221 covers the equitable remedy of restitution.

200. *Rungee v. Allied Van Lines*, 92 Idaho 718, 449 P.2d 378 (1968).

The parties disputed a contract to insure goods moved from Florida to Idaho.²⁰² The plaintiff had purchased insurance from the defendant moving company for belongings which were damaged, and the defendant disputed the value of the items.²⁰³ The issue on appeal was whether the plaintiff could recover attorney fees from the insurance contract dispute.²⁰⁴ After closely analyzing the application of statutes to related issues, and rejecting the procedural-or-substantive dichotomy and the rule that remedies are therefore always governed by forum law,²⁰⁵ the Idaho Supreme Court addressed whether Florida law or Idaho law on the recovery of attorney fees should apply. The *Rungee* court evaluated the contacts set out in section 188 in light of the policies in section 6, explaining:

This choice of law process involves not the mechanical jurisdiction-selecting rules of the first restatement but rather a realistic inquiry into the relationship of various laws to the particular issue to be decided. The contacts of the transactions and of the parties with various jurisdictions are weighed only as they are significant for the purposes of the laws involved.²⁰⁶

The court also acknowledged section 193, which provides that casualty insurance contracts are governed by the law of the place of the principal insured risk, but found it unhelpful because the belongings were in transit.²⁰⁷ The court also considered the presumption of section 197 favoring application of the law from which goods are sent, but found it inapposite to the statutory attorney fee issue.²⁰⁸ By addressing each contact individually and each policy consideration under section 6 individually, the court determined that Idaho law should apply and stated a firm rule for prospective application: “It is the state of destination which henceforth will have a concern for the insured’s contractual rights.”²⁰⁹

In *Unigard Insurance Group v. Royal Globe Insurance Co.*,²¹⁰ the Idaho Supreme Court reviewed a declaratory judgment establishing the order of liability among three different insurance policies.²¹¹ The insurance claims arose out of a fatal accident in Oregon in which two Nampa, Idaho residents were driving an El Camino to Nevada.²¹² The owner of the car was killed, and his personal representative later brought a wrongful death action in Oregon against the driver.²¹³ The driver was covered by various insurance policies, and Unigard asked Idaho courts to declare the priority of liability among its auto policy and Royal Globe’s compre-

201. *Id.* at 722, 449 P.2d at 382. The *Rungee* decision merits thorough description here because of its insight into the transition from the former choice-of-law rules, and because of its thorough reasoning using the new Second Restatement approach.

202. *Id.*

203. *Id.*

204. *Id.* at 721, 449 P.2d at 381.

205. *Id.* at 722, 449 P.2d at 382. The court noted that the procedural-substantive distinction invites forum shopping. *Id.*

206. *Id.* at 723, 449 P.2d at 383.

207. *Id.*

208. *Id.* at 724, 449 P.2d at 384.

209. *Id.*

210. *Unigard Ins. Group v. Royal Globe Ins. Co.*, 100 Idaho 123, 594 P.2d 633 (1979).

211. *Id.* at 124, 594 P.2d at 634.

212. *Id.* at 125, 594 P.2d at 635.

213. *Id.*

hensive business and catastrophe policies.²¹⁴ Royal Globe characterized the suit as a tort, arguing that Oregon law should apply because it was the place of injury.²¹⁵ But the Idaho Supreme Court made a distinction: “What is involved here is not an action in tort to establish liability, but rather a declaratory judgment action involving interpretation of written contracts of insurance.”²¹⁶ The court recited section 188 of the Second Restatement, including the listed contacts in section 188(2).²¹⁷

The court acknowledged that Idaho was the place of negotiation and issuance of the insurance contracts, the principal location of the risk, the locality of ownership for the El Camino, the domicile and residence and place of business of the insured, and the forum of the declaratory judgment action.²¹⁸ Thus, with little difficulty, the court determined that Idaho law should apply.²¹⁹ The court then relied on the language of the contracts regarding “other insurance,” as Idaho precedent directed,²²⁰ rather than an Oregon rule regarding mutually repugnant other insurance clauses.²²¹

The Idaho Supreme Court utilized the Second Restatement’s “most significant relationship test” to determine that Idaho, rather than Oregon, law also governed a contractual indemnity issue in *Seubert Excavators, Inc. v. Anderson Logging Co.*²²² The court quoted both the contacts listed in section 145 related to torts, and the contacts in section 188 related to contracts, but determined that the question was of contract because liability had been established in an underlying tort lawsuit and the question then was whether the defendant was “entitled to indemnification pursuant to the subcontract agreement.”²²³ The court noted that although the contract was to be performed in Oregon, it was negotiated and executed in Idaho between two Idaho corporations.²²⁴ The court also considered many of section 6’s policy concerns, including party expectations, predictability and uniformity, the two states’ interests related to the indemnity contract and the worker’s compensation scheme, and the policy interest of compensating the killed worker’s beneficiaries.²²⁵

In *State Farm v. Robinson*, the parties conceded that Florida law applied and the Idaho Supreme Court noted its agreement by stating that this was consistent with a “most significant relationship” analysis, and noted several contacts.²²⁶ Although there is no Second Restatement analysis, the case is interesting and useful in showing how an Idaho court, after determining that another jurisdiction’s law applies, determines what the other jurisdiction’s law holds.²²⁷

214. *Id.*

215. *Id.*

216. *Id.* at 126, 594 P.2d at 636.

217. *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1969).

218. *Unigard*, 100 Idaho at 126, 594 P.2d at 636.

219. *Id.* at 127, 594 P.2d at 632.

220. *Id.* at 128, 594 P.2d at 638.

221. *Id.* at 128 n.2, 594 P.2d at 638 n. 2.

222. *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, 889 P.2d 82 (1995).

223. *Id.* at 651–52, 889 P.2d at 85–86. This case demonstrates that the litigation technique of characterizing the dispute as one substantive type of claim instead of another persists under the more modern Second Restatement. *Id.*

224. *Id.* at 652, 889 P.2d at 86.

225. *Id.* at 653, 889 P.2d at 87.

226. *State Farm Mut. Auto. Ins. Co. v. Robinson*, 129 Idaho 447, 926 P.2d 631 (1996).

227. *Id.* at 450, 926 P.2d at 634. The court reasoned: “In determining the law of Florida, we will look first to decisions of the Florida Supreme Court. If there are none, we will look to the decisions of the

After determining that a contractual forum-selection clause was not a choice-of-law provision,²²⁸ the Idaho Supreme Court in *Barber v. State Farm* analyzed the most significant relationship.²²⁹ The court first defined the differences between Washington and Idaho laws by their practical effects and underlying policies.²³⁰ After rejecting the forum-selection clause as a choice of law, the court noted the Second Restatement's provision under section 193 that the law of the state which is the principal location of the insured risk will be applied "unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied."²³¹ Although the car accident at issue occurred in Oregon, and the plaintiffs had since moved to Idaho, the court placed strong weight on where the plaintiffs' motorhome was garaged and that the premiums were calculated on that basis.²³² The court also followed the *Rungee* lead and thoroughly analyzed the contract factors of section 188 as they related to policy factors under section 6(2)(a)–(g).²³³ It appeared to be an easy decision to reverse the trial court (which had relied on the forum selection clause) considering that "Idaho had no relationship to the parties at the time the contract was formed or at the time liability under the policy of insurance arose."²³⁴ Although the facts did not conflict in pointing to the most significantly related jurisdiction, *Barber* exemplifies, as good as any other Idaho appellate court decision, a sound analysis following the Second Restatement in a contracts case.

The Idaho Supreme Court again determined that Idaho had the most significant relationship to a disputed insurance policy in *Ryals v. State Farm Mutual Automobile Insurance Co.*²³⁵ An Idaho insured sought a declaratory judgment that she was entitled to uninsured motorist coverage under her policy.²³⁶ The car accident occurred in New York, which had a no-fault law that prevented her from suing.²³⁷ The court held, however, that the suit did not sound in tort but was a declaratory action seeking an interpretation of the contract between the Idaho driver and her insurer.²³⁸ New York law defining uninsured motorists did not apply; otherwise, it may have been dispositive.²³⁹ The court briefly cited factors pointing to the plaintiff's home state of Idaho.²⁴⁰ The court, however, did not specify any section of the Second Restatement, but cited the factually parallel *Unigard* decision, which had analyzed the factors of section 188.²⁴¹ The court did not consider the policy consid-

Florida district courts of appeal. In the event of conflict between the district courts of appeal on a question, we will be guided by the majority view, if any, among these courts. If there is no majority view, we will attempt to discern how the Florida Supreme Court would have resolved the conflict." *Id.*

228. See *supra* Part III.C.1.

229. *Barber v. State Farm Mut. Auto. Ins. Co.*, 129 Idaho 677, 681, 931 P.2d 1195, 1199 (1997).

230. *Id.* at 682, 931 P.2d at 1200.

231. *Id.* at 681, 931 P.2d at 1199 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 193 (1969)).

232. *Id.* at 681, 931 P.2d at 1199.

233. *Id.*

234. *Id.* at 682, 931 P.2d at 1200.

235. *Ryals v. State Farm Mut. Auto. Ins. Co.*, 134 Idaho 302, 1 P.3d 803 (2000).

236. *Id.* at 304, 1 P.3d 805.

237. *Id.*

238. *Id.* at 305, 1 P.3d 806.

239. *Id.*

240. *Id.*

241. *Id.*

erations embodied in section 6.²⁴² The brief analysis in *Ryals* could be perceived as a cursory and deficient choice-of-law analysis. But in another way, because it relied directly on the holding of *Unigard*, it may be evidence that the Second Restatement is indeed leading to formulation of efficient choice-of-law rules, at least with regard to actions for declaratory judgments over insurance disputes.

The Idaho Supreme Court also overlooked the Second Restatement's axial section 6 in *Sword v. Sweet*.²⁴³ Stating that it was applying the "most significant relationship test," the court held that Indiana contract law applied in determining whether the parties' alleged oral postnuptial agreement regarding temporary maintenance and a division of property was enforceable.²⁴⁴ The oral agreement was not enforceable under Indiana law on either the statute of frauds, or the requirement of court approval of property settlements, or the failure of one party's equitable grounds for enforcing the contract.²⁴⁵ The court noted that the contacts of section 188(2) pointed to Indiana, where "[a] large part of the performance" took place, "much of the subject matter of the contract was located . . . and, the parties were domiciled."²⁴⁶ Although the court cited section 6, it did not analyze any of those factors, perhaps indicating that the court considered the case an easy choice of law decision and that discussing policy concerns was unnecessary. Another explanation for the court's terse examination is that it did not appreciate the intended process of the Second Restatement approach—which requires illuminating the contacts' significance by the light of the section 6 policy factors.

A recent case, *Carroll v. MBNA Am. Bank*, is one of Idaho courts' most thorough discussions of choice of law in a contract case.²⁴⁷ *Carroll* presented a credit card holder's challenge to an arbitration award in favor of a bank.²⁴⁸ The Idaho Supreme Court's reasoning unfortunately seems to begin by overlooking an important fundamental principle stated in section 6: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."²⁴⁹ The credit card agreements of two Idaho consumers contained clauses selecting Delaware law and a Delaware forum.²⁵⁰ At issue was an Idaho statute which unequivocally invalidated provisions in credit card and similar agreements that purported to elect a venue, or "(a) That the law of another state shall apply; (b) That the buyer or debtor consents to the jurisdiction of another state."²⁵¹ The court acknowledged the statutory prohibition as one preventing parties from choosing law other than Idaho.²⁵² It then performed a "most significant relationship" analysis, citing *Seubert* and sections 188 and 195, a provision related particularly to lending contracts.²⁵³

242. *Ryals*, 134 Idaho 302, 1 P.3d 803.

243. *Sword v. Sweet*, 140 Idaho 242, 246, 92 P.3d 492, 496 (2004).

244. *Id.*

245. *Id.* at 248–49, 92 P.3d at 498–99.

246. *Id.*

247. *See Carroll v. MBNA Am. Bank*, 148 Idaho 261, 220 P.3d 1080 (2009).

248. *Id.*

249. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).

250. *Carroll*, 148 Idaho at 265, 220 P.3d at 1084.

251. IDAHO CODE ANN. § 28-41-201 (2009).

252. *Carroll*, 148 Idaho at 266, 220 P.3d at 1085.

253. *Id.* at 267, 220 P.3d at 1086. Section 195 provides, "The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice

In spite of the Idaho statute, the court concluded that Delaware law should apply.²⁵⁴ Great weight was given to the contact of the bank's base in Delaware where "the formulation of the terms and conditions of the agreements took place . . . under the assumption that they would be governed by Delaware law."²⁵⁵ The court also considered the contracts' statutorily invalid attempts to apply Delaware law in discerning the parties' expectations: "the parties originally attempted to form the agreements under Delaware law, as indicated by the inclusion of the choice of law clauses."²⁵⁶ Indeed, party expectations are a policy factor to be considered under the Second Restatement's section 6, and *Carroll* is a rare Idaho case that closely addresses the overriding policy factors of section 6.²⁵⁷ However, the court strained to evade statutory prohibition of such choice-of-law clauses by, at once, not expressly enforcing the "Delaware law" terms in the adhesion contracts (as it otherwise would under section 187 as a valid expression of party intent) but ultimately enforcing the parties' "intent" to use Delaware law.²⁵⁸ As evidence of this intent, the court referenced the same illegal contractual provisions to justify protecting the parties' expectations under section 6(2)(d).²⁵⁹ As much as *Carroll* might indicate a faulty decision by the state's highest court,²⁶⁰ it also illustrates the difficulty of choice-of-law analysis: many analytical mechanisms and sometimes contradictory interests have to be synchronized and reconciled. One turn early on can lead down strange paths in the quagmire of choice of law.

An unreported Idaho federal case, *Boise Tower Associates, LLC v. Washington Capital Joint Master Trust*,²⁶¹ illustrates a thorough and sound choice-of-law analysis. The court analyzed choice-of-law questions *sua sponte*²⁶² as it considered various pre-trial motions. The analysis considered contract and tort causes of action among various parties and events in Washington and Idaho and concluded that under the Second Restatement's "most significant relationship" test, using the factors in section 188 for contract claims and section 145 for torts, Washington law should

of law by the parties, by the local law of the *state where the contract requires that repayment be made*, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." (emphasis added). The *Carroll* court likely misinterpreted the italicized language as "where the bank is located." The *Carroll* opinion neither identified where MBNA bank was located nor where the contract required the payment actually be made. MBNA was headquartered in Wilmington, Delaware at some point. But in 2006, it was acquired by Bank of America, which is headquartered in Charlotte, North Carolina. See *Merger History*, MBNA, BANK OF AMERICA (2012), <http://message.bankofamerica.com/heritage/#/merger-history/mbna>.

254. *Carroll*, 148 Idaho at 267, 220 P.3d at 1086.

255. *Id.*

256. *Id.*

257. *Id.* at 265–66, 220 P.3d at 1085–86.

258. *Id.* at 265–67, 220 P.3d at 1084–86.

259. *Carroll*, 148 Idaho at 267, 220 P.3d at 1086 ("Application of Delaware law would fulfill these policies because the parties formed the agreements with the expectation that Delaware law would apply.").

260. The *Carroll* opinion was strongly criticized by an eminent conflict of laws scholar in Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 259–60 (2010). "[B]oth the court's analysis and the result are problematic," the article concluded as it described the oversights and strained logic of *Carroll*. *Id.*

261. *Boise Tower Assoc., LLC v. Wash. Capital Joint Master Trust*, 2006 WL 1749656 (D. Idaho June 22, 2006). Although this case does not have precedential value, it is a valuable illustration and therefore merits review.

262. *Id.* at *1.

apply.²⁶³ The applicable law was not a close issue, but the case bears reading for its analysis not only of the various contacts, but also the underlying policy interests of the states connected to those contacts through the lens of section 6. For example, the court considered that a business tort at issue was a conduct-regulating tort, and therefore, that the place where the conduct occurred was an especially weighty factor.²⁶⁴

In a later decision on the *Boise Tower* case, the federal district court also addressed attorney fees in a contract dispute, holding that the law of the state whose substantive law applies to the contract should also apply to attorney fee questions:²⁶⁵

Attorney fee statutes, especially when they enlarge the rights of litigants to a commercial contract dispute, should not be applied based upon the choice of forum or the choice of attorney. To do so would promote forum shopping among those litigants that could avail themselves of diversity jurisdiction in Idaho when their particular agreement did not contain a provision awarding attorney fees to a prevailing party and further assuming that under the law of their state, fees would not be otherwise recoverable.²⁶⁶

This reasoning and holding is basically consistent with the Idaho Supreme Court's decision in *Rungee*,²⁶⁷ which determined an attorney fee issue by analyzing the entire contract and relevant contacts and applying the law with the most significant relationship, determined by the broader analysis, to the attorney fee issue.

D. Conflicting Statutory Schemes

Idaho appellate courts have had occasion to address choice-of-law questions where parties argue that statutory provisions from different states should be applied to the case. These decisions cannot be placed in the traditional conflicts categories, and the courts' analyses have varied—from applying an adapted “most significant relationship” approach to using an entirely different, “false conflicts” analysis.

The Idaho Supreme Court applied a “significant contacts” test to a criminal evidentiary question in *State v. Jones*.²⁶⁸ A murder defendant argued that a recorded phone call to him in Washington from his wife in Idaho should be suppressed under a Washington law prohibiting the recording of telephone conversations without consent of both parties.²⁶⁹ Idaho law required consent of only one party. The court

263. *Id.* at *6–12.

264. *Id.* at *10–11. “As discussed under the choice of law section on punitive damages, Washington would have the greatest interest in having its laws applied to the allegations in the First Amended Complaint as opposed to the laws of Idaho. This is because that is where the center of the relationship was between the parties and where the conduct occurred.” *Id.*

265. *Boise Tower Assoc., LLC v. Wash. Capital Joint Master Trust Mortg. Income Fund*, 2007 WL 4355815 (D. Idaho Dec. 10, 2007).

266. *Id.* at *5.

267. *Rungee v. Allied Van Lines, Inc.*, 92 Idaho 718, 449 P.2d 378 (1968).

268. *State v. Jones*, 125 Idaho 477, 486–87, 873 P.2d 122, 131–32 (1994).

269. *Id.* at 486, 873 P.2d at 131 (citing WASH. REV. CODE ANN. § 9.73.030(1)(a) (LexisNexis 2012)).

cited to its prior decision in *Johnson v. Pischke*,²⁷⁰ and referred to the “significant contacts test,” but did not cite to any provisions within the Second Restatement. It described this two-step analysis:

First, the court must examine certain significant “contacts” with each state having an interest in the issue according to the relative importance of the contacts to the particular issue. Second, the court must examine the contacts in light of the principles underlying the area of law and the law of the relative jurisdictions.²⁷¹

The court’s citation to *Johnson* indicates it likely adapted the contacts to be considered as those used for torts listed in the Second Restatement section 145, and all the contacts the court considered pointed to Idaho: “the call originated in Idaho and was supervised and recorded by Idaho police officials in order to obtain evidence concerning a murder that occurred in Idaho.”²⁷² The court then also considered the relevant privacy protection policies of Idaho and Washington, “promoting the protection of justified expectations,” as well as certainty, predictability, and uniformity—such as would be considered in a “most significant relationship” analysis under section 6.²⁷³ The court determined that the policy interests of both states were served by applying Idaho law and held the evidence obtained from the interstate call recording was admissible.²⁷⁴

Although the court could have been more helpful in establishing precedent with explanation of its methodology, it is apparent from the citation to *Johnson v. Pischke* that the court intended a Second Restatement “most significant relationship” analysis.²⁷⁵ *State v. Jones* demonstrates the adaptability and flexibility of the Second Restatement analysis.²⁷⁶ Had the court more closely consulted the Second Restatement, it likely would not have needed such extended examination. Under section 138 “[t]he local law of the forum determines the admissibility of evidence, except as stated in §§ 139-141.”²⁷⁷ Or the court could have made its own bright-line rule in this unique case that Idaho defendants being tried for Idaho crimes cannot assert privacy rights provided by other states.²⁷⁸ In doing so, the court might also have pointed out that this was not a traditional choice-of-law case because states do not enforce the criminal laws of another state, even those laws that protect suspects.

270. *Johnson v. Pischke*, 108 Idaho 397, 399–400, 700 P.2d 19, 21–22 (1985).

271. *Jones*, 125 Idaho at 477, 486–87, 873 P.2d at 122, 131–32.

272. *Id.* at 487, 873 P.2d at 132.

273. *Id.*

274. *Id.*

275. *Johnson*, 108 Idaho at 402, 700 P.2d at 24.

276. *Jones*, 125 Idaho at 487, 873 P.2d at 132.

277. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 138–41 (1971) (addresses privilege, integration of contracts, and the parol evidence rule).

278. For an example where audio recording of an interstate phone call had substantive rather than evidentiary import, see *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006). In *Kearney*, plaintiffs in California alleged in a civil suit that a financial institution’s Georgia office violated a California law similar to Washington’s in *Jones*. The California Supreme Court, employing the governmental interest choice-of-law analysis, held that the California statute prohibiting recording of telephone conversation without consent of all parties applied to conversation in which only one party was in California; Georgia statutes prohibiting recording of telephone conversation without consent of one party applied to conversation in which only one party was in Georgia; and California law applied to determine whether recording of conversations constituted an unlawful invasion of privacy tort.

The Idaho Court of Appeals employed a methodology other than the Second Restatement in deciding a choice-of-law question in *Wise v. Arnold Transfer & Storage*.²⁷⁹ Although it cited a previous Idaho case that applied a “most significant relationship” analysis,²⁸⁰ it also relied on that case’s reference to government interest analysis, which determines if there is a “false conflict.” The court concluded, after closely scrutinizing the two statutory schemes and the exclusive remedy rule, that Idaho and New Mexico worker’s compensation law were not in conflict.²⁸¹ Interestingly, had the court chosen to review the Second Restatement, it would have provided a bright-line rule about which state’s worker’s compensation law applied—the law of the state of the insured.²⁸² Because of the court’s citation to a case (*Rungee*) which purported to use both a Second Restatement and a governmental interest “false conflict” analysis, it is unclear whether, in future cases where there is a possible conflict of worker’s compensation statutes, Idaho courts should apply the Second Restatement’s worker’s compensation rules or not.²⁸³

It is critical for advocates and the trial court to spot choice-of-law issues early and address them explicitly. This was apparent in *Parker v. Idaho State Tax Commission*,²⁸⁴ a tax enforcement case that raised marital property issues. The issue in this case was whether a wife living in Idaho owed Idaho income taxes on her community share of one-half of her husband’s earnings from his job in Nevada.²⁸⁵ Nevada was a separate property state without state income tax.²⁸⁶ The trial court applied Idaho law.²⁸⁷ On appeal, the Parkers argued that the district court should have applied Nevada law so that all of David’s earnings would be not be subject to Idaho taxes.²⁸⁸ But the Supreme Court ruled that the Parkers did not previously raise the choice-of-law issue and the trial court did not address it, so the Supreme and declined to address it on appeal.²⁸⁹ The lesson to be taken from *Parker* is that choice-of-law issues need to be raised near the outset of litigation. On a similar theme, an unpublished Idaho federal district court also demonstrates that choice-of-law issues need to be addressed early on.²⁹⁰ In *Wells Cargo*, the district court denied a party an opportunity to pursue further discovery to support its choice-of-law argument on a motion for summary judgment.²⁹¹ The court held that the “opportunity to do such discovery” was “during jurisdictional discovery” and had therefore passed.²⁹²

279. *Wise v. Arnold Transfer & Storage*, 109 Idaho 20, 24, 704 P.2d 352, 356, (Ct. App. 1985).

280. *Id.* at 22, 704 P.2d at 354 (citing *Rungee*, 92 Idaho at 721-22, 449 P.2d at 381-82).

281. *Id.* at 25, 704 P.2d at 357.

282. Restatement Second § 184.

283. See *infra*, note 329 and accompanying text for a discussion of judicial blending of Second Restatement with governmental interest (“false conflict”) approaches.

284. *Parker v. Idaho State Tax Comm’n*, 148 Idaho 842, 846, 230 P.3d 734, 738 (2010), reh’g denied (Apr. 29, 2010).

285. *Id.* at 844, 230 P.3d at 736.

286. *Id.*

287. *Id.* at 845, 230 P.3d at 737.

288. *Id.* at 846, 230 P.3d at 738.

289. *Id.*

290. *Wells Cargo, Inc. v. Transp. Ins. Co.*, 1:08-CV-00491-BLW, 2011 WL 3489993 (D. Idaho Aug. 10, 2011)

291. *Id.* at *4.

292. *Id.* at *1.

IV. IDAHO CHOICE-OF-LAW STATUTES

Idaho's legislature has created specific statutory directives to be applied in various contexts. Below, many of these statutes are highlighted as a non-exhaustive overview.

A. Uniform Commercial Code Choice-of-Law Provisions

Idaho's adoption of the Uniform Commercial Code allows contracting parties to agree on which law will apply, so long as that law "bears a reasonable relation" to the transaction.²⁹³ Prior to the 2008 revision of the U.C.C., the U.C.C.'s general provision allowing party choice was codified as section 1-105 (section 28-1-105 in the Idaho Code). According to the drafters of the new U.C.C. choice-of-law rule, the new provision in section 1-301 affords greater party autonomy but also has components designed to protect consumers.²⁹⁴ It does not appear that Idaho courts have directly addressed the newly adopted section 28-1-301, but there are many useful commentaries on the former section 1-105 and the new section 1-301.²⁹⁵

If no law is chosen, then Idaho's U.C.C. terms control.²⁹⁶ On certain issues, various provisions in the U.C.C. provide overriding directives for which law applies. These include the following choice-of-law provisions: (1) rights of creditors against sold goods;²⁹⁷ leases;²⁹⁸ bank deposits and collections;²⁹⁹ funds transfers;³⁰⁰ letters of credit;³⁰¹ investment securities;³⁰² and perfection, the effect of perfection or nonperfection, the priority of security interests, and agricultural liens.³⁰³ U.C.C. Article 9 also has a provision for determining the location of a debtor.³⁰⁴

293. IDAHO CODE ANN. § 28-1-301 (2012).

294. See IDAHO CODE ANN. § 28-1-301 (2012) (Summarizing changes of former law). Section 1-301 addresses contractual designation of governing law somewhat differently than does former Section 1-105. Former law allowed the parties to any transaction to designate a jurisdiction whose law governs if the transaction bears a "reasonable relation" to that jurisdiction. Section 1-301 deviates from this approach by providing different rules for transactions involving a consumer than for non-consumer transactions, such as "business to business" transactions).

295. See, e.g., Robert A. Brazener, Annotation, *What constitutes "reasonable" or "appropriate" relation to a transaction within the meaning of Uniform Commercial Code § 1-105(1)* 63 A.L.R.3d 341 (2012)(Originally published in 1975); Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, in 38 U.C.C.L.S. 195 (2006), updated version available at <http://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf> (last visited Apr. 12, 2013) (pages 6-8 discussing the distinctions among the former § 1-105, the initial revision in § 1-301, and the version of § 1-301 promulgated in 2008).

296. IDAHO CODE ANN. § 28-1-301(a) (2012).

297. § 28-2-402.

298. §§ 28-12-105, 106.

299. § 28-4-102.

300. § 28-4-638.

301. § 28-5-116.

302. § 28-8-110.

303. §§ 28-9-301 through 307.

304. § 28-9-307. Official comment no. 2 explains, "[T]he location of the debtor determines the jurisdiction whose law governs perfection of a security interest." Debtor's location also governs priority of a security interest in intangible collateral. "This section determines the location of the debtor for choice of law purposes, but not for other purposes."

B. Other Statutory Provisions

1. Borrowing Statute for Statutes of Limitations

The viability of interstate causes of action in many cases depends on Idaho Code section 5-239, which states the following regarding statutes of limitations:

When a cause of action has arisen in another state . . . and by the laws thereof an action thereon can not there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.³⁰⁵

The Idaho Supreme Court explained in *Miller v. Stauffer Chemical Co.* that this “borrowing” statute contradicts the common law rule “that the forum normally applies its own statutes of limitations to actions before it,”³⁰⁶ and that the purpose of the statute is “to promote uniformity of limitation periods and to discourage forum shopping by requiring the trial court to ‘borrow’ the statute of limitations of the jurisdiction that the legislature has determined bears the closest relationship to the action, usually the jurisdiction where the action arose.”³⁰⁷ The *Miller* court rejected a constitutional challenge to the borrowing statute and argued that it violated equal protection and rights to travel, following U.S. Supreme Court reasoning on the subject.³⁰⁸

2. Corporate Entity Governing Law

An Idaho statute allows a limited liability company to incorporate using another state’s LLC statute as the LLC’s governing law.³⁰⁹ The commentary explains, however, “this approach does not switch the limited liability company’s governing law to that of another state, but instead takes the provisions of another state’s law and incorporates them by reference into the contract among the members.”³¹⁰ Idaho statutes have similar provisions regarding which laws govern other business entities.³¹¹

3. Personal Property Ownership

Regarding personal property ownership, Idaho Code section 55-401, entitled “Conflict of laws” provides that “if there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner

305. § 5-239.

306. *Miller v. Stauffer Chemical Co.*, 99 Idaho 299, 301, 581 P.2d 345, 347 (1978).

307. *Id.* at 302, 581 P.2d at 348.

308. *Id.* at 304, 581 P.2d at 350 (quoting *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 559-60 (1920)).

309. § 30-6-106 (commentary) (2012).

310. *Id.*

311. *E.g.*, § 53-3-106, which states that law governing partnerships depends on location of chief executive office. Section 30-1-747 provides how certain Idaho statutes (§§ 30-1-743, 30-1-745 and 30-1-746) are applicable to foreign corporations.

and is governed by the law of his domicile.”³¹² According to Westlaw annotations, this law is seldom cited.³¹³

4. Family and Decedents Estate Law Statutes

Conflicts of law in family law are generally covered in Idaho’s adoption of uniform statutes, including the Uniform Child Custody Jurisdiction and Enforcement Act³¹⁴ and the Uniform Interstate Family Support Act,³¹⁵ which has been adopted in all fifty states.³¹⁶ Choice-of-law questions regarding wills, estates, and probate are addressed in Idaho’s adoption of the Uniform Probate Code.³¹⁷ Another interesting statute provides for the validity of documents of gift giving anatomical donations.³¹⁸ Broader issues of conflict of laws (such as jurisdiction and enforcement) in these areas, especially family law, arise frequently and are complex, and no attempt to address them is made in this article.

5. Statutes Limiting Contractual Choice of law

Some Idaho statutes provide that contractual choice-of-law clauses cannot avoid the enforcement of certain Idaho laws.³¹⁹ For instance, a statute controlling choice-of-law provisions in “computer information agreements” generally applies Idaho law and makes choice-of-law provisions in such contracts voidable in certain circumstances.³²⁰ In many other cases, variation by agreement and incorporation of another state’s laws is expressly allowed.³²¹

V. PRACTICAL SUMMARY FOR PRACTITIONERS

In litigation, whenever a party or property is located or an event has occurred outside the forum state, attorneys should examine early whether another state’s law might apply to the case. Early choice-of-law issue spotting will enable the litigator to perform essential discovery to get at all the relevant contacts. It follows that an advocate needs to identify the most favorable law and make an argument that the

312. § 55-401.

313. Only three cases have cited the statute: *Barthel v. Johnston*, 92 Idaho 94, 437 P.2d 366 (1968); *Vansickle v. Hazeltine*, 29 Idaho 228, 158 P. 326 (1916); *Matter of Estate of Ashe*, 114 Idaho 70, 753 P.2d 281 (Ct. App. 1988).

314. §§ 32-11-201 through 405.

315. §§ 7-1001 through 1062. Section 7-1046 covers choice of law and provides generally that the controlling law comes from the state where the support orders were initially issued. Section 7-1043 governs registration of orders for enforcement.

316. Kurtis A. Kemper, Annotation, *Construction and Application of Uniform Interstate Family Support Act*, 90 A.L.R.5th 1 (2012) (originally published in 2001).

317. §§ 15-2-101 through 1001. Section 15-2-401 provides that part four of title 15, covering exempt property and allowances, “applies to the estate of a decedent who dies domiciled in this state.” Section 15-2-506 provides choice-of-law rules for the law determining validity of execution, and § 15-2-602 provides for choice of law as to meaning and effect of wills. *See also* § 15-3-408. Controlling law on a power of attorney is found in § 15-12-107.

318. § 39-3420.

319. *E.g.*, § 49-1632 (“The applicability of this chapter [on car dealer licensing] shall not be affected by a choice of law clause in any franchise, agreement, waiver, novation, or any other written instrument.”); *see also* §§30-1-743, -745, and -746.

320. § 29-116.

321. *E.g.*, §§ 10-1503(a), 30-6-106; *see supra* Part IV.A.

favorable law has the most significant relationship and should be applied. Early issue spotting, analysis, and preparation can help a litigant use motions early on to narrow or reinforce claims. At the appeal stage, it is usually too late to effectively raise and argue choice-of-law issues.³²² The award of attorney fees is likely to be controlled by the same state's law chosen as the applicable substantive law,³²³ absent a controlling contractual provision.

When researching and developing a choice-of-law argument, attorneys may find that reading the Second Restatement itself, with its useful indices, appendices, and commentaries is highly worthwhile. Also, because case law can be erratic, litigators may have success in distinguishing precedent or even arguing that a prior decision could have better performed the proper Second Restatement "most significant relationship" analysis.

In transactional work, attorneys must be knowledgeable of the differences and interactions among choice-of-forum, choice-of-venue, and choice-of-law provisions. There is a dynamic body of law regarding the enforceability of these provisions, and the effective transactional lawyer must stay informed.³²⁴ Most contracts, even those that appear to be only intrastate, should probably include choice-of-law clauses to eliminate the risk of foreign laws being applied to the agreement to unpredictable effects.

VI. CONCLUSION

The Second Restatement approach was intended to foster development of firm and specific choice-of-law rules, according to its drafters.³²⁵ In the approximately forty years since Idaho courts adopted the Second Restatement, clear patterns of rules for Idaho choice-of-law jurisprudence have not emerged. This survey of case law demonstrates that Idaho appellate courts have inconsistently applied the Second Restatement's analytical process. Idaho appellate courts also, on occasion, resort to analysis outside the Second Restatement when it would profit them to instead look more closely at the Second Restatement's provisions.³²⁶

Nevertheless, the most serious problem with choice of law in Idaho is not as much the occasional glitch in applying the Second Restatement's elaborate³²⁷ "most

322. See, e.g., *Athay I*, 142 Idaho 360, 366 n. 2, 128 P.3d 897, 903 n.2 (2005); *Parker v. Idaho State Tax Comm'n*, 148 Idaho 842, 846, 230 P.3d 734, 738 (2010).

323. See *Rungee v. Allied Van Lines, Inc.*, 92 Idaho 718, 723, 449 P.2d 378, 383 (1968); *Boise Tower Assoc., LLC v. Washington Capital Joint Master Trust Mortg. Income Fund*, 2007 WL 4355815 (D. Idaho Dec. 10, 2007).

324. See, e.g., Dale J. Gilsinger, Annotation, *Enforceability of Floating Forum Selection Clauses*, 39 A.L.R.6th 629 (2008); Marjorie A. Shields, Annotation, *Permissive or Mandatory Nature of Forum Selection Clauses Under State Law*, 32 A.L.R.6th 419 (2008); Thomas Fusco, Annotation, *Effect, on application of 28 U.S.C.A. § 1404(a) or forum non conveniens in diversity case, of contractual provision fixing forum for enforcement or laws governing interpretation—post-Bremen cases*, 123 A.L.R. Fed. 323 (1995).

325. See generally Reese, Willis L.M. *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 16–21 (1977).

326. E.g., *Athay II*, 146 Idaho 407, 419, 196 P.3d 325, 337 (2008); *Wise v. Arnold Transfer & Storage Co., Inc.*, 109 Idaho 20, 24, 704 P.2d 352, 356 (1985); *Barringer v. State*, 111 Idaho 794, 799, 727 P.2d 1222, 1227 (1986).

327. George, *supra* note 80, at 491 ("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.")

significant relationship” analysis, but rather the small number of choice-of-law decisions in the appellate courts. For one, this creates an echo chamber for the slight technical errors in following the multi-step and multi-factor analysis required of the Second Restatement. An even greater challenge is that the scant number of decisions prevents the development of a thorough body of precedent and rules. Indeed, Idaho federal courts sitting in diversity jurisdiction seem to have more facility and experience with the Second Restatement. If the Idaho Supreme Court has made errors in following the Second Restatement, it is not alone among state high courts.³²⁸ Even without misapplications of the Second Restatement, Idaho has not developed and is unlikely to develop more concrete or specific rules to be applied to the great majority of cases, as envisaged by Professor Reese, the Second Restatement’s chief architect.

It seems that Idaho choice-of-law jurisprudence is in part hindered by an unfortunate cycle. The cycle is caused by attorneys unfamiliar with choice of law who unskillfully argue the issues before trial courts or fail to preserve the choice-of-law issues entirely. Then the appellate courts determining the most significant relationship decide the issues based on a limited framing of the issue or limited record, using faulty precedent from its own decisions and other jurisdictions. Or, as it is the court’s prerogative, it uses its own interpretation of how the Second Restatement approach is to work. The lower courts then strain to apply the precedent—skipping the axial section 6 or applying a “false conflicts” or “comity” analysis to new cases brought by ever more baffled attorneys. Blending the “false conflict” theory with the Second Restatement is a pervasive problem in many states. This type of misstep was explained well in a Texas opinion addressing one party’s argument that there was only a “false conflict” between two states laws.³²⁹ “The ‘False Conflicts’ analysis was developed by Brainerd Currie, who believed that the process of choosing the governing law ought to be analyzed according to the purposes behind that law. Under the ‘False Conflicts’ approach, a false conflict occurs when only one state has a true interest in the dispute.”³³⁰ The Texas court then aptly explained why it would decline that method and not blend it with the Second Restatement:

328. *Id.* at 493. Professor George concluded, “Texas state and federal courts apply the wrong choice of law test one out of five times. *Id.* This is not to say that they apply the test wrong—they sometimes do—but that they apply the wrong test.” *Id.* The “wrong test” often involves elements of the governmental-interest analysis test which has never been adopted by Texas. *Id.* at 493–98.

The author of this article has noticed some influence of governmental interest analysis in Idaho cases. In *Rungee v. Allied Van Lines, Inc.*, the court referred to a “false conflict,” which is quintessentially a term of the governmental interest analysis. *Rungee v. Allied Van Lines, Inc.*, 92 Idaho 718, 721, 449 P.2d 378, 381 (1968). Another stark example is a case discussed in Part II.B. *Wise v. Arnold Transfer & Storage Co., Inc.*, 109 Idaho 20, 22, 704 P.2d 352, 354 (1985). There, the Idaho Court of Appeals noted a party’s “false conflict” argument as it considered worker’s compensation issues. *Id.* The court never cited the Second Restatement or attempted to determine the most significant relationship. Instead, it analyzed the issues under both Idaho and New Mexico law and found them similar on every meaningful issue. *Id.* Generally, the “most significant relationship” analysis of the Second Restatement requires the court to determine one body of law that has the most significant relationship to each issue, regardless of whether another state’s law is similar, and so the agreement or disagreement of the two bodies of law is not controlling. Ultimately, a false conflict where another state does not have a policy interest at stake will not lead to non-forum law under the Second Restatement because the relationship will not be significant.

329. *Vanderbilt Mortg. & Fin., Inc. v. Posey*, 146 S.W.3d 302, 318–19 (Tex. App. 2004).

330. *Id.* (citing George, *supra* note 80, at 511).

While the “False Conflicts” doctrine has important influence in the governmental policy analysis contained in the Second Restatement, we do not believe it should be used to determine whether a conflict exists. If the “False Conflicts” doctrine is used to determine whether a conflict exists, it may very well supplant the Second Restatement as the test to determine the conflicts of law. We note that the governmental interest factor is an important component of the test in the Second Restatement, but it must be considered in connection with the other factors contained in the Restatement.³³¹

Idaho was an early adopter of the innovative Second Restatement, and Idaho courts may want to innovate again. One option is for Idaho to consider a statutory system, such as one similar to the recently adopted Oregon statutory scheme for choice-of-law rules regarding contracts,³³² or Louisiana’s choice-of-law statutes for torts.³³³ These statutes seem to have been developed with a keen sense of conflict-of-laws theory, and of both the shortfalls and strengths of the Second Restatement. For instance, Oregon Revised Statute section 15.430 provides a list of claims that are simply governed by Oregon law.³³⁴ But for the more vexing questions of product liability claims, section 15.435 provides for more intricate considerations of the contacts and policies related to the product and injury.³³⁵ According to the architect of the Oregon statutes, the rules represent “a new breed of smart, evolutionary choice-of-law rules that would preserve the methodological accomplishments of the revolution while restoring a proper equilibrium between certainty and flexibility.”³³⁶ Time will tell if Oregon’s statutory scheme has achieved a Hegelian synthesis of the perpetual problems of either too much rigidity in rules or too much flexibility in “approaches.”

If Idaho’s legislature enacted laws similar to Oregon’s on choice of law, this would create a challenge to learn but could benefit Idaho’s courts and attorneys by providing a more straightforward body of law. Another way to improve Idaho choice-of-law jurisprudence is to strengthen legal education and scholarship behind choice of law and the Second Restatement, and to increase scrutiny of aberrational applications so that the “most significant relationship” test can be fine-tuned in Idaho’s courts.

331. *Id.*

332. OR. REV. STAT. ANN. §§ 15.300–15.380 (West 2012). These statutes govern contracts and choice of law. *See also* Symeon C. Symeonides, *Oregon’s Choice of Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 206 (2007); OR. REV. STATUTES ANN. §§ 15.400–15.360 (West 2012). These statutes govern torts and “noncontractual claims.” Professor Symeonides is a prolific scholar on choice of law, and he drafted the Oregon Acts.

333. *See also* Symeon C. Symeonides, *Louisiana’s New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 678 (1992); Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?*, 83 TUL. L. REV. 1041 (2009).

334. OR. REV. STAT. ANN. § 15.430 (West 2012). For example, subsection (7) provides that Oregon law governs “actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law.”

335. OR. REV. STAT. ANN. § 15.435 (West 2012).

336. Symeon C. Symeonides, *Oregon’s New Choice of Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 971 (2009).