TEXAS CONFLICTS LAW: THE STRUGGLE TO GRASP THE MOST SIGNIFICANT RELATIONSHIP TEST

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I. INTRODUCTION

Predictability and uniformity of result are guiding principles in conflict-of-laws methodology.[1] However, conflict-of-laws rules have long evaded predictable and uniform application.[2] Texas is no exception. Over the past fifty years, Texas choice-of-law doctrine has, like many other state's, undergone major change—moving from a First Restatement *lex loci* approach to a Second Restatement most significant relationship test.[3] Fundamentally, choice of law requires that a court before which a suit is pending be willing to interpret and apply another forum's law. The unavoidable reality of choice of law, regardless of the choice-of-law rule, is that the court deciding whether to apply another forum's law is at the same time deciding whether to undertake increased work.

Given its nature, the choice-of-law inquiry evades uniform application of any analysis, even when formulation of the test appears black and white. The early *lex loci* approach, a choice-of-law doctrine that on its face should result in highly predictable determinations, was eviscerated by courts (through both outright exceptions as well as more subtle manipulation) nearly to extinction.[4] Several decades ago, Texas joined the movement against the perceived "bad results" of the *lex loci* test.[5] Now undisputedly a "Second Restatement forum," the changing landscape of Texas choice of law, coupled with the inherently nebulous nature of a choice-of-law inquiry, has left different Texas courts improperly evaluating factors—at least in

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[1] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (1971).

[2] *See* William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1199–200 (1997).

[3] *See infra* Part II.D.

[4] *See* Richman & Riley, *supra* note 2, at 1199–200.

[5] *See infra* Part II.D.

light of the choice-of-law test they claim to follow.[6] The struggle to frame the theoretical justification for conflict-of-laws rules, and the constantly evolving ideologies that accompany it, do little to help the litigant attempting to anticipate a court's choice-of-law decision. With the ultimate goal of helping the Texas litigant better prepare for and anticipate the choice-of-law inquiry, this article examines the evolution of Texas conflict of laws and the current paradigm in light of the past methods that shaped it.

II. THE THREE PRINCIPAL CHOICE-OF-LAW TESTS

American jurisprudence and Texas law are dominated by three major choice-of-law theories: (1) *lex loci*; (2) the interest analysis; and (3) the most significant relationship test.[7] While numerous variations of the three major theories have been promulgated, conflict of law's evolution is embodied by the three distinct tests.[8] Chronologically, the three systems emerged as listed above.[9] Each theory reflects a different ideological approach to conflict of laws, and the later two theories are largely fashioned to address the perceived deficiencies of their predecessors.[10] While each approach has distinct characteristics, the theories are related and all share common elements.[11] Any attempt to make sense of Texas's current choice-of-law rule necessitates at minimum a cursory understanding of these three main concepts. Each will be addressed in turn, followed by a tracking of their application in Texas as a microcosm of their evolution at a national level.

A. The Lex Loci *Approach*

Lex loci is the traditional approach to choice of law.[12] Meaning "law of the locality," traditional *lex loci* divides the law into four principal areas and focuses on where a particular event occurred or a particular thing exists.[13]

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[6] *Id.*

[7] 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, 502 (2004).

[8] *See id.*

[9] *See id.* at 502–27.

[10] *See id.* at 509.

[11] *See id.* at 502.

[12] James Audley McLaughlin, *Conflict of Laws: The Choice of Law* Lex Loci *Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 957–58 (1991).

[13] *Id.* at 962–63.

For torts: *lex loci delicti* (law of the place where the wrong occurred);[14] for contracts: *lex loci contractus* (law of the place of contracting);[15] for real property: *lex rei sitae* (law of the place where the property is situated);[16] and for family law: *lex loci domicilii* (law of the domicile).[17] In this manner, the law of the place of injury controls.[18] *Lex loci* concepts in American jurisprudence date back to the early nineteenth century,[19] and have roots even earlier in English common law.[20] Well entrenched in the common law of the individual states by the early twentieth century, the *lex loci* approach to conflict of laws was compiled and published in the Restatement of the Law of Conflict of Laws in 1934.[21]

For several decades following the First Restatement's publication, *lex loci* continued to be the majority rule within the United States.[22] *Lex loci*'s greatest quality is its simplicity—the law of the place of injury controls.[23] However, this same quality would be its downfall. Proponents of the place-of-the-injury approach point to the stability, predictability, certainty, and ease of application afforded by the method's simplicity.[24] Yet, even before the First Restatement came onto the scene, courts were finding ways to evade the predictable and inflexible rules of the *lex loci* approach.[25] As courts began to analyze the substantive law mandated by *lex loci*, they

[14] *Id.* at 962.

[15] *Id.* at 963.

[16] *Id.*

[17] *Id.*

[18] *See id.* at 962–63.

[19] *See* McCandlish v. Cruger, 2 S.C.L. (2 Bay) 377, 377 (1802) ("That it is very evident, from the nature of the bill and acceptance, that the contract was to be performed in *Carolina;* consequently, the law of this country ought to govern this contract.").

[20] *See* George, *supra* note 7, at 503.

[21] *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 1 (1934).

[22] Jerry Doyle Miller, *At the Crossroads Crossroads*—Lex Loci Delictus *or Most Significant Relationship*, 24 BAYLOR L. REV. 359, 359 (1972).

[23] *See* Michael G. Guajardo, *Texas' Adoption of the Restatement (Second) of Conflict of Laws: Public Policy Is the Trump Card, but When Can It Be Played?*, 22 TEX. TECH L. REV. 837, 840 (1991).

[24] *See* Richman & Riley, *supra* note 2, at 1204.

[25] *Id.* at 1199–200 ("Faced with unpalatable results, traditionalist courts sometimes attempted to evade the simple, hard-and-fast rules by manipulating them or by employing conceptualistic escape devices–recharacterization, *renvoi*, and public policy. Although these evasive maneuvers produced better results in individual cases, they threatened to compromise the *First Restatement*'s vaunted virtues of simplicity, predictability, and forum neutrality.") (footnotes omitted).

increasingly employed methods such as recharacterization and renvoi to attain substantive law that they found more suitable to the specific controversy.[26] As public policy exceptions and manipulation increased, courts inevitably began a foray into altogether new tests.

B. The Interest Analysis

Beginning in the 1950s, the New York courts were the first to discard the First Restatement approach outright.[27] As the New York courts continued to struggle to formulate a viable alternative to *lex loci*, Professor Brainerd Currie put forth his "interest analysis" in 1963.[28] In sharp contrast to the *lex loci* approach that preceded it, the interest analysis requires the deciding court to analyze the policies contained in the substantive laws it is evaluating.[29] Such an inquiry is intended to, in theory, avoid the undesirable result of many *lex loci* decisions—application of the law of a forum with little actual interest in the outcome of the litigation.[30]

The endgame in analyzing the underlying purposes of the laws of implicated states is to determine which states actually have an interest in the litigation.[31] Once each implicated state's law is analyzed, the case is then characterized in one of three ways: (1) a true conflict, (2) a false conflict, or (3) an unprovided-for conflict.[32] A true conflict is a case in which multiple states have an interest in application of their law.[33] A false conflict is a case in which only one state has an interest in seeing its law applied.[34] An unprovided-for conflict is a case in which no state has an interest in application of its law to the dispute.[35] Once the dispute is properly categorized, Currie's interest analysis provides what state's law governs.[36]

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[26] *See, e.g.*, Haumschild v. Cont'l Cas. Co., 95 N.W.2d 814 (Wis. 1959); Duckwall v. Lease, 20 N.E.2d 204, 211 (Ind. App. 1939).

[27] *See, e.g.*, Auten v. Auten, 124 N.E.2d 99, 103 (N.Y. 1954).

[28] David F. Cavers et al., *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1234 (1963).

[29] *See id.* at 1215–16.

[30] *See id.* at 1217.

[31] *See* Lea Brilmayer et al., CONFLICT OF LAWS: CASES AND MATERIALS 197 (6th ed. 2011).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* Cavers et al., *supra* note 28, at 1242–43.

In the case of true and unprovided-for conflicts, the forum law is applied.[37] In the event of a false conflict, the interested state's law applies.[38] The interest analysis quickly garnered support from a number of jurisdictions.[39] However, criticisms of the interest analysis were not far behind.[40] Critics generally attack the interest analysis along one of three lines.[41] The major complaints assail the analysis' handling of true conflicts as inadequate, discount the method of identifying interests, and cite favoritism for local litigants.[42] While the interest analysis in its entirety lost steam amongst the courts, Professor Currie's analysis left an indelible mark on the choice-of-law landscape. Not only does interest-analysis terminology pervade choice-of-law theory today, it, for a majority of forums, fundamentally replaced the "jurisdiction-selecting formula with an approach that focuses on the policies and interests underlying the conflicting laws."[43]

C. The Most Significant Relationship Test

The largest number of states, including Texas, currently follow the most significant relationship test embodied by the Second Restatement.[44] Commissioned around the same time courts began to independently branch away from the First Restatement (and for the same reason), the Second Restatement was finalized in 1971.[45] The approach of the Second Restatement seemingly draws on both its predecessors. Unlike the interest analysis, the most significant relationship test provides specific factors to supplement the test's general principles depending on the type of dispute

[37] Brilmayer et al., *supra* note 31, at 197.

[38] *Id.*

[39] *See, e.g.*, Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967) ("As the forum we must consider all of the foreign and domestic elements and interests involved in this case to determine the rule applicable."); Griffith v. United Air Lines, Inc., 203 A.2d 796, 805 (Pa. 1964) ("Thus, after careful review and consideration of the leading authorities and cases, we are of the opinion that the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.") (footnote omitted).

[40] *See* Brilmayer et al., *supra* note 31, at 209.

[41] *See id.*

[42] *See id.* at 209–11.

[43] Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, but Winning the War*, 37 WILLAMETTE L. REV. 123, 126 (2001).

[44] *See* George, *supra* note 7, at 519, 525, 527.

[45] *See* Brilmayer, *supra* note 31, at 240.

(i.e. tort, contract, etc.).[46] However, as the name suggests, a determination of which state has the most significant relationship to the transaction or occurrence in question necessitates an inquiry into the states' interests in the dispute.[47] In stark contrast to the interest analysis, however, the Second Restatement identifies a number of situations in which the place of injury provides the default law.[48]

The Second Restatement approach is thus fairly characterized as a combination of territorial and interest-based analyses.[49] In combining these methodologies, the Second Restatement implements a three-tiered approach to ascertaining the applicable law in a conflict-of-laws situation.[50] The Second Restatement revolves around Section 6.[51] Ostensibly the centerpiece of the theory, Section 6 provides a list of factors to be considered in determining the applicable rule of law.[52] Notwithstanding a statutory directive as to choice of law, a court is to consider: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.[53] While the Second Restatement instructs that Section 6 is to guide all choice-of-law inquiries, the factors prescribed in Section 6 are often criticized by commentators and brushed aside by courts—calling into question the gate-keeping function of Section 6.[54]

The second tier of the most significant relationship test prescribes further factors as well as default rules to be "taken into account in applying the principles of Section 6 . . . ."[55] These guidelines are tailored to the broad

[46] *See* Guajardo, *supra* note 23, at 852.

[47] *See* William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 658 n.64 (1983).

[48] *See id.* at 655–56.

[49] *Id.* at 658 n.64.

[50] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146, 188 (1971).

[51] *See, e.g., id.* § 145(2) ("Contacts to be taken into account in applying the principles of [Section] 6 to determine the law applicable to an issues include . . . .").

[52] *Id.* § 6.

[53] *Id.*

[54] *See* Reppy, *supra* note 47, at 662 n.88.

[55] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(2), 188(2) (1971).

nature of the dispute—tort or contract.[56] The third tier applies to the specific nature of the dispute.[57] Also subject to Section 6, these sections provide default rules for specific types of claims within the broader legal categories, such as a personal injury tort action.[58] The practical effect of the Second Restatement model is that the more specific provisions often point conclusively to a forum's law based on a territorial-esque approach to choice of law. Application of the indicated law is, however, always subject to a finding of more significant interest pursuant to Section 6.[59] The trumping ability of Section 6 in light of the breadth and malleability of its factors gives courts a great deal of deference in determining the law applicable to a given dispute.

D. History of Texas Choice of Law

In many ways, the history of Texas choice of law is a microcosm of choice-of-law evolution at a national level. The doctrine of *lex loci* dates back to the earliest days of the Republic of Texas.[60] On January 1, 1841, the Supreme Court of the Republic of Texas recognized *lex loci contractus* in the resolution of a slave-ownership dispute.[61] Priscilla, one of the slaves in question, was purchased in Georgia and later brought to Texas.[62] In determining which law should apply, the court stated, "The laws of the country in which the slave Priscilla was acquired by Sledge or his wife, if they had been proved on the trial, would have governed in determining the ownership. Contracts made in a foreign country are to be expounded according to the *lex loci contractus* . . . ."[63] Similarly, Texas courts were implementing a *lex loci* approach in tort disputes well before the publication of the First Restatement.[64] In *Dusablon*, Plaintiff brought suit in Texas to recover for injuries suffered in Lordsburg, New Mexico, allegedly caused by Defendant railroad company's negligence.[65] Defendant contended that

[56] *See id.*

[57] *See id.* § 146.

[58] *Id.*

[59] *See id.* § 6.

[60] *See* Hill v. M'Dermot, Dallam 422 (Tex. 1841).

[61] *Id.*

[62] *Id.* at 420.

[63] *Id.* at 422.

[64] *See* S. Pac. Co. v. Dusablon, 106 S.W. 766 (Tex. Civ. App.—San Antonio 1907, no writ).

[65] *Id.* at 767.

because the injury occurred in New Mexico, it was improper for the Texas court to entertain jurisdiction.[66] In dismissing Defendant's contention, the *Dusablon* court noted that if a cause of action arises in the place of injury, it is irrelevant where the injured party seeks redress.[67]

Coinciding with the national movement away from the First Restatement *lex loci* approach, Texas courts began to experiment with alternative choice-of-law rules.[68] Included in these methods (and most influential among them) were several acknowledgements of the interest analysis. The interest analysis first gained traction in Justice Steakley's dissent in *Marmon v. Mustang*.[69] In *Marmon*, the court was tasked with deciding whether to apply Texas or Colorado law to wrongful death actions brought in Dallas County but arising out of a plane crash in Colorado.[70] Colorado law placed a $25,000 cap on wrongful-death recovery while Texas had no limitation.[71] While the majority acknowledged Colorado's tenuous connection to the dispute, the court nevertheless found that Colorado law applies.[72] In arguing for application of Texas law to the case, Justice Steakley referenced the influential *Babcock v. Jackson* decision from New York as well as a draft of the Second Restatement.[73] Disputing the continuing validity of *lex loci delicti*, Steakley propounded, "Their underpinnings fall away in the modern recognition of the constitutional interest of a state with substantial ties to an occurrence outside its territorial limits in the application of its own rules of law in determining the consequences of wrongful conduct."[74]

Approximately one year later, the Texas Supreme Court, this time in a majority opinion, once again referenced the interest analysis. In *Continental Oil Co. v. Lane Wood & Co.*, a dispute arose over payment for delivery of manufactured plastic pipe.[75] The sale and delivery of the pipe encompassed connections to Ohio, Oklahoma, and Texas—requiring a determination of

[66] *Id.*

[67] *Id.*

[68] *See, e.g.*, Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968).

[69] *See id.* at 188–90 (Steakley, J., dissenting).

[70] *Id.* at 183 (majority opinion).

[71] *Id.*

[72] *Id.* at 184, 187.

[73] *Id.* at 190 (Steakley, J., dissenting).

[74] *Id.* at 188.

[75] 443 S.W.2d 698, 700 (Tex. 1969).

the applicable law.[76] In holding that Texas law applies, the court couched its decision in the drapings of *lex loci*.[77] However, the court expressly provided an endorsement for interest-analysis considerations, stating, "Oklahoma's connection with the transaction is minimal and fortuitous, and it has no interest in the present controversy. We hold that the Texas law controls."[78]

Texas's abandonment of *lex loci* was solidified in 1979. Beginning with *Gutierrez v. Collins* in 1979, the Texas Supreme Court adopted the Second Restatement approach over the interest analysis and in replacement of the long-standing *lex loci* doctrine.[79] While *Gutierrez* signaled the end for *lex loci*, the transition away from *lex loci* and to the Second Restatement approach was gradual rather than sudden. In *Gutierrez,* Plaintiff sued Defendant in the District Court of El Paso for personal injuries sustained in a car wreck in Mexico.[80] The case presented the Texas Supreme Court with an opportunity to formally address the ongoing validity (or lack thereof) of the *lex loci delicti* doctrine.[81] En route to expressly abandoning the *lex loci delicti* rule, the Texas Supreme Court acknowledged its alignment with the national sentiment, stating:

> *Lex loci delicti* was at one point a universally accepted rule in American jurisprudence. It was incorporated in the Restatement (First) of Conflicts. It no longer occupies such a position of esteem. Less than half the states continue to adhere to the doctrine and the clear trend over the past fifteen years has been away from the old rule in favor of some alternative theory. When faced with the choice, more than twice as many states have abandoned *lex loci delicti* as have retained it. . . . The common law doctrine of *lex loci delicti* in this state is hereby overruled.[82]

[76] *See id.* at 701.

[77] *Id.* ("Allied then arranged for the pipe to be delivered to its trucks at Carlon's plant in Corsicana on unrestricted bills of lading consigned to Western at Texhoma, Oklahoma. The sale was thus arranged in Texas between parties doing business here. The pipe had not previously been in Oklahoma but was moved there solely for the purpose of making delivery to Western.").

[78] *Id.*

[79] 583 S.W.2d 312, 313 (Tex. 1979).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 316, 318 (footnote omitted).

While *Gutierrez* did away with *lex loci delicti*, *lex loci* theories remained in force in areas outside of tort law for at least another decade.[83] As more and more Texas courts seemingly abandoned *lex loci*, the Texas Supreme Court stepped in once again in *DeSantis v. Wackenhut Corp*.[84] *DeSantis*, a contracts case, involved a noncompetition agreement between an employer and employee.[85] The employer was a Florida corporation headquartered in Florida.[86] Additionally, the noncompetition agreement was negotiated in Florida and provided that Florida law would govern the agreement.[87] However, the agreement was signed in Texas, and it restricted the employee's work in Texas.[88] When DeSantis resigned from Wackenhut and embarked on new business ventures, Wackenhut brought suit to enforce the noncompetition agreement.[89] The court was thereby tasked with determining whether to apply Texas or Florida law in deciding the enforceability of the noncompetition agreement.[90] While the court previously abandoned *lex loci* in the tort area for the Second Restatement in *Gutierrez*, they had not yet done so for contracts. After acknowledging the history of contractual choice-of-law inquiries, the Texas Supreme Court formally adopted the Second Restatement for contract disputes.[91]

Following the three-step process outlined *supra*, the court first analyzed the agreement under Section 187, the most targeted applicable section—dealing specifically with law chosen by the parties.[92] After determining that Florida law would apply as a default under Section 187, the court then analyzed whether that result was subject to an exception determined under the factors outlined in the general contracts provision, Section 188.[93] The Section 188 factors were construed in light of the Section 6 principles.[94] Under the Second Restatement framework for contractual choice of law, the court ultimately concluded that Texas law governed the enforceability of

[83] *See, e.g.*, Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

[84] 793 S.W.2d 670 (Tex. 1990).

[85] *Id.* at 674.

[86] *Id.* at 675.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 675–76.

[90] *Id.* at 677.

[91] *Id.*

[92] *Id.* at 677–78.

[93] *Id.* at 678–79.

[94] *Id.*

the agreement.[95] However, the court went further, impliedly adopting the Second Restatement as a whole—thereby officially eliminating *lex loci* from Texas choice of law.[96] While *DeSantis* effectively ended the debate as to what choice-of-law test Texas courts are to apply, the courts' struggle to properly implement the rule had just begun.

III. THE STRUGGLE TO UNDERSTAND AND UNIFORMLY APPLY THE SECOND RESTATEMENT

While Texas is indisputably a Second Restatement state, Texas courts have struggled to understand and uniformly apply the Second Restatement analysis. The predominant erroneous tendency is to read Professor Currie's interest analysis into the Second Restatement's most significant relationship test. Confusion as to Second Restatement implementation (which most often manifests itself through a Currie-style approach) is attributable to the construction of the Second Restatement itself and is perpetuated by the manner in which the Texas Supreme Court adopted the approach.

A. The Role of the Second Restatement in its Own Misapplication

It is evident that a number of Texas courts continue to misapply the Second Restatement's most significant relationship test. However, the tendency for improper application of the Second Restatement—and specifically to incorporate interest-analysis elements into the test—is due in large part to the nature of the test itself. As discussed above, Texas's move to the Second Restatement approach resulted from growing disenchantment with the territorial approach of *lex loci* and the First Restatement over several decades, mirroring the national trend.[97] However, the Second Restatement is itself a territorial-based approach.[98] The territorial nature of the Second Restatement is evident in a number of the provisions geared toward specific areas of law, which predate the interest-centric Section 6 in the drafting of the Second Restatement.[99] The Second Restatement sections specifically dealing with both torts and contracts display favoritism to *lex loci* principles regardless of where the parties are domiciled.[100] While the

[95] *Id.* at 681.

[96] *See* Guajardo, *supra* note 23, at 837.

[97] *See supra* Part II.D.

[98] *See* Reppy, *supra* note 47, at 655.

[99] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971).

[100] *See id.* §§ 145 cmt. c, 188 cmt. e.

foundation of the Second Restatement is territorial, adoption of another wholehearted territorial approach by any forum was highly unlikely given the anti-*lex loci* sentiment at the time of the Second Restatement's publication.

To make the Second Restatement more palatable for forums looking to shed the First Restatement's *lex loci* approach, the drafters of the Restatement introduced Section 6 into the Proposed Official Drafts in 1967.[101] The intended effect of evolution from the First Restatement to the Second Restatement was to replace "a relatively small number of simple rules of general application . . . [with] a large number of relatively narrow rules that will be applicable only in precisely defined situations."[102] It was not a wholesale abandonment of *lex loci* dictates in favor of an interest analysis approach.[103] However, the addition of Section 6 has largely frustrated this intent. While the addition served to temper the territorial nature of the Second Restatement inquiry to a point digestible by many forums (including Texas), "the various presumptions of the controlling territorial factor for particular issues, or types of contracts and torts, became subject to an overriding 'laundry list' of choice of law mumbo jumbo: section 6."[104] Section 6's ambiguity allows courts to inject their own ideologies into the Second Restatement analysis and has spawned a number of interpretations as to the significance of the section.[105]

In allocating blame for misapplication of the Second Restatement, the Restatement itself must be considered the chief culprit. As discussed above, Section 6 was added to Second Restatement drafts several years after many of the narrower territorial sections.[106] Particularly problematic are Section 6(b) and (c), which direct courts to evaluate "(b) the relevant policies of the forum, [and] (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue[.]"[107] While it is unlikely that the Section 6 drafters intended to incorporate or countenance an interest-analysis approach within the Second

[101] *See* Reppy, *supra* note 47, at 657.

[102] *See* Stanley H. Fuld, *Willis L.M. Reese*, 81 COLUM. L. REV. 935, 936 (1981).

[103] *See id.*

[104] Reppy, *supra* note 47, at 657 (footnotes omitted).

[105] *See id.* at 657–59.

[106] *See supra* Part III.A.

[107] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

Restatement framework,[108] it is not difficult to understand the early courts' inclination to do so given the language of (b) and (c).

Section 6 provides the lens through which to apply the narrower, more targeted sections of the Second Restatement.[109] Generally, the targeted section applicable to the specific circumstance at issue can be directly applied.[110] However, when a court suspects a state with a "more significant relationship" exists, the principal values of choice of law, as delineated in Section 6, become the focal point of the inquiry.[111] It is in such situations that the vague nature of Section 6 principals has lead courts astray. As Professor Willis L.M. Reese, Reporter for the Second Restatement[112], explains, Section 6 is not intended to be an interest analysis: "[S]ection 6 is eclectic in that it places emphasis upon a number of policies or values. For example, in contrast to Professor Currie, who advocates a simple approach, section 6 does not tell the courts what path to follow."[113] Yet courts faced with Section 6 principles indicating divergent directions are quick to grasp on to the "interest" language within the section and revert to the more simplistic and consistent interest analysis.[114] As the Eastern District of Pennsylvania noted:

> Restatement II is suffused with many of the territorial assumptions of Restatement I, evidenced throughout its complex, three-part structure. . . . Countering these strong territorial currents are §§ 6(b) and (c), which counsel evaluating contacts through the "relevant policies of the forum and other interested states," in a manner virtually indistinguishable from Professor Currie's interest analysis.[115]

Not only does Section 6 contain language reminiscent of interest-analysis rhetoric, it was added at a time when the interest analysis was the

[108] *See* Reppy, *supra* note 47, at 665.

[109] *See* Willis L.M. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. Rev. 717, 733 (1980).

[110] *See id.*

[111] *See id.*

[112] *Id.* at 717.

[113] *Id.* at 733.

[114] *See Melville v. Am. Home Assurance Co.*, 443 F. Supp. 1064, 1084 (E.D. Pa. 1977), *rev'd*, 584 F.2d 1306 (3d Cir. 1978).

[115] *Id.* (emphasis omitted).

prevailing choice-of-law theory in many jurisdictions (including Texas), compounding the tendency to revert to a Currie interest analysis.[116] While the root of the problem is perhaps easily understood, "[b]y reading Currie-style interest analysis into the Restatement Second, some jurisdictions seem to have converted its 'most significant relation' method into an eclectic hybrid."[117] This remains the situation in a number of Texas courts.

B. Perpetuation of the Interest Analysis in Texas's Second Restatement Jurisprudence

The language of the Second Restatement (and specifically Section 6) is largely to blame for its own misapplication, and the Texas courts were caught in the quagmire early and often. Further confusing the issue, the Texas Supreme Court adopted the Second Restatement piecemeal. Replacing its *lex loci* jurisprudence over the course of more than a decade (first applying the Second Restatement to specific torts, then torts generally, and finally to contracts), the part-by-part implementation of Second Restatement choice of law left various areas of law subject to differing analysis, muddying an already brackish inquiry. The main contributor to ongoing misapplication of the Second Restatement test is *Duncan v. Cessna Aircraft Co*.[118] Misled by the Currie-esque language of Section 6, the *Duncan* court gratuitously incorporated interest-analysis considerations not intended by the Second Restatement.[119] These considerations persist in Texas choice of law.

1. *Duncan v. Cessna Aircraft Co.*

Five years after applying the Second Restatement to tort disputes in *Gutierrez*, the Texas Supreme Court was presented with the opportunity to do the same in a contract situation.[120] In *Duncan*, the dispute was based on an underlying wrongful death suit arising out of a plane crash in New Mexico.[121] The accident involved a plane manufactured by Cessna and owned by Air Plains West, Inc.[122] At the time of the crash, the plane was

[116] *See supra* Part II.D.

[117] Reppy, *supra* note 47, at 665–66 (footnote omitted).

[118] *See* 665 S.W.2d 414 (Tex. 1984).

[119] *See id.* at 421–22.

[120] *See id.* at 418.

[121] *Id.*

[122] *Id.* at 417–18.

being flown by Air Plains West's pilot Benjamin Smithson who was giving flying lessons to the only other passenger, James Parker.[123] James Parker's widow, Carolyn Duncan, brought a wrongful death suit against Air Plains West and Smithson's estate in the Federal District Court for the Northern District of Texas.[124] Eventually, the suit was settled for $90,000 following the execution of a release in which Duncan agreed to release from liability "Air Plains West, Inc., its agents, servants and employees, and the Estate of Benjamin A. Smithson, Jr., deceased, *or any other corporations or persons whomsoever responsible therefor[e], whether named herein or not . . . .*"[125]

Despite the release, Duncan and Smithson's widow later brought suit against Cessna in Texas state court.[126] Again alleging wrongful death, the widows maintained that defects in Cessna's design and manufacturing of the cockpit seats caused the deaths of their husbands.[127] Making its way to the Texas Supreme Court, the validity of the claim hinged on the effect of the release signed by Duncan on Cessna's liability.[128] The release's effect in turn hinged upon whether Texas or New Mexico law governed the dispute—New Mexico law resulting in the release of Cessna while Texas law would not have the same effect.[129] In determining the proper choice of law analysis, the court made quick work of the lingering *lex loci* approach by stating:

> [U]se of the most significant relationship approach in accordance with the general principles stated in § 6 produces reasoned choice of law decisions grounded in those specific governmental policies relevant to the particular substantive issue. Consequently, the *lex loci* rules will no longer be used in this state to resolve conflicts problems.[130]

As soon as the court adopted the most significant contacts test, however, it began to stray from the analysis prescribed by the test. As an initial matter, the opinion completely omits any inquiry into the more narrow

[123] *Id.* at 418.
[124] *Id.*
[125] *Id.*
[126] *See id.*
[127] *Id.*
[128] *Id.* at 419.
[129] *See id.* at 420.
[130] *Id.* at 421.

provisions, tort or contract, which often dictate the outcome of a choice-of-law inquiry. Rather, the court focused solely on Section 6, thereby entirely omitting a fundamental portion of the Second Restatement analysis.[131] Although this is likely a misapplication of the test, any damage done could have been mitigated by proper analysis of Section 6, given that the provision has the ability to trump all the others.[132]

Derailed by the language of the Restatement itself, the *Duncan* court attributed a number of interest-analysis elements to the Second Restatement that are not expressly prescribed by the analysis and not intended by its drafters.[133] The court's first mistake was declaring, "Some contacts are more important than others because they implicate state policies underlying the particular substantive issue."[134] While Section 6 of the Second Restatement certainly incorporates inquiry into state interests, the Section 6 factors are not limited to such an inquiry, nor does Section 6 indicate elevated importance of the state policy factors.[135] While the Second Restatement does not counsel such an approach, it is clearly one indicated by the interest-analysis theory.[136] The court shortly follows this interest-analysis incorporation with the even more flagrant claim that "[t]he beginning point for evaluating these contacts is the identification of the policies or 'governmental interests,' if any, of each state in the application of its rule."[137] Again, the Second Restatement contains no such language and, if anything, counsels against such preferential treatment of certain Section 6 factors.[138] While not from the Second Restatement, the increased importance on governmental interest is a keystone of Currie's interest analysis.[139]

A third interest analysis inquiry not encompassed by the Second Restatement that the *Duncan* court infused in its analysis is the threshold true/false conflict distinction.[140] This mistake has seemingly had the most enduring impact on Texas choice-of-law jurisprudence. Following its

[131] *See id.*

[132] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[133] *See Duncan*, 665 S.W.2d at 421.

[134] *Id.*

[135] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[136] *See* Cavers et al., *supra* note 28, at 1234.

[137] *Duncan*, 665 S.W.2d at 421.

[138] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971).

[139] *See* George, *supra* note 7, at 538.

[140] *See Duncan*, 665 S.W.2d at 422.

Section 6 analysis, the court concluded that New Mexico had no underlying interest in having its law applied in the action before the court while Texas had significant and important interests.[141] The court then characterized such a situation as a "false conflict" and stated that "it is an established tenet of modern conflicts law that the law of the interested state should apply."[142] While this may have lead to an identical result, it is not the Second Restatement inquiry. The Second Restatement makes no distinction between false and true conflicts;[143] and while the specific provisions of the Second Restatement may often reach the same result, such a determination is not dispositive of the choice-of-law analysis under the Second Restatement. The true/false conflict dichotomy is taken directly from the interest analysis and interjected in the most significant relationship test by the *Duncan* court.[144] Nearly 30 years later, a number of Texas courts continue to entertain false-conflict arguments.[145]

2. The Lasting Impact of *Duncan*

Duncan's infusion of interest-analysis methodology into an entirely distinct Second Restatement test is still alive and well today, as the following cases from various Texas courts of appeals over the past decade demonstrate. In *Vandeventer*, insureds brought claims against their insurance company for breach of contract and related claims in Tarrant County after Defendant insurance company transferred and sold disability policies to another insurer that later cancelled them.[146] Plaintiffs claimed that, as residents of South Carolina and Indiana at the time the initial policies were issued, one of those states' substantive law should control the dispute.[147] Without conducting any analysis, the Fort Worth Court of Appeals acknowledged that Texas had no significant connection to the case.[148] However, maintaining that Plaintiffs failed to demonstrate any difference between the forum's (Texas's) law and that of South Carolina

[141] *Id.*

[142] *Id.*

[143] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[144] *Duncan*, 665 S.W.2d at 422.

[145] *See, e.g.*, Ford Motor Co. v. Aguiniga, 9 S.W.3d 252 (Tex. App.—San Antonio 2009, pet. denied).

[146] Vandeventer v. All Am. Life & Cas. Co., 101 S.W.3d 703, 706–07 (Tex. App.—Fort Worth 2003, no pet.).

[147] *Id.* at 711.

[148] *See id.*

and Indiana, the court dismissed application of the law of the other states.[149] While this holding is not itself surprising, the manner in which it was accomplished improperly perpetuates the interest analysis' influence in Texas choice of law. Citing *Duncan*, the *Vandeventer* court held that "[i]n the absence of a true conflict, we need not undertake a choice of law analysis."[150] As discussed *supra*, this is an interest analysis, not a Second Restatement, concept.[151] While the two inquiries may lead to the same result, this is not an application of the proper choice-of-law rule.

Similarly, the First District of Houston Court of Appeals continues to utilize interest-analysis components incorporated in the *Duncan* opinion. In *Vinson v. American Bureau of Shipping*, an oilrig employee from Alabama brought a personal injury action against his Texas-based employer and other entities involved in the manufacture and sale of an allegedly defective derrick for an injury occurring on a rig in Singapore.[152] In the context of a *forum non conveniens* inquiry, the court perfunctorily dismissed the application of Singapore law, citing *Ford Motor Company v. Aguiniga* for the proposition that if there is no perceived conflict, a choice-of-law inquiry need not be made.[153] *Ford*, in turn, took this approach from the *Duncan* court's recitation of the true/false conflict dichotomy.[154]

Most recently, the San Antonio Court of Appeals issued a memorandum opinion relying on the interest analysis' false-conflict distinction.[155] In *Engine Components, Inc.*, the underlying dispute involved (ironically) a Cessna crash in another state.[156] A.E.R.O., an Illinois corporation, and ECI, a Delaware corporation with its principal place of business in Texas, were sued in Wisconsin on products liability theories arising from a Cessna crash in that state.[157] After ECI refused to accept A.E.R.O's tendered defense under Chapter 82 of the Texas Civil Practice and Remedies Code, A.E.R.O.

[149] *Id.* at 712.

[150] *Id.* (citing Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 419 (Tex. 1984)).

[151] *See supra* Part III.B.1.

[152] 318 S.W.3d 34, 38 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

[153] *Id.* at 51 (citing Ford Motor Co. v. Aguiniga, 9 S.W.3d 252, 260 (Tex. App.—San Antonio 1999, pet. denied)).

[154] *Ford Motor Co.*, 9 S.W.3d at 260 n. 6 (citing *Duncan*, 665 S.W.2d at 421).

[155] Engine Components, Inc. v. A.E.R.O. Aviation Co., No. 04-10-00812-CV, 2012 WL 666648 (Tex. App.—San Antonio Feb. 29, 2012, no pet.) (mem. op., not designated for publication).

[156] *Id.* at *1.

[157] *Id.*

filed suit in Texas for indemnity.[158] ECI then filed a motion for summary judgment in the Texas action, asserting that Wisconsin law applied, under which there is no right to indemnity.[159]

In its choice-of-law analysis, the San Antonio court eventually employs the most significant relationship test.[160] In determining that Wisconsin law applied, the court properly consulted the specific indemnity section of the Second Restatement in light of the general tort section and Section 6.[161] However, rather than identifying two potentially applicable laws and analyzing which governs under the Second Restatement test, the court once again goes through an interest-analysis-false-conflicts inquiry before even getting to the most significant relationship test.[162] The court cites *Duncan* for the proposition that the first issue that must be addressed in a choice-of-law analysis is whether the applicable laws differ.[163] The court further adheres to the *Duncan*-interest-analysis paradigm, stating, "Duncan held that even if the laws differ, there may not be a conflict when only one forum has an interest at stake. This is referred to as a 'false conflict.'"[164] While conducting what was ostensibly a Second Restatement analysis, the *Duncan* court improperly perpetuated a number of interest-analysis methods in Texas conflicts law.

3. *Vanderbilt v. Posey* and Recognition of the Impropriety of False Conflicts in Texas Law

Duncan's sanctioning of interest-analysis principles in the Second Restatement inquiry continues to resonate with a number of courts today.[165] However, others recognize that such a hybrid is improper and point out the potential problems in utilizing such an approach.[166] In February 1999, Texas residents Michael and Betty Posey purchased a manufactured home

[158] *Id.*

[159] *Id.*

[160] *Id.* at *4.

[161] *Id.*

[162] *Id.* at *2–3.

[163] *Id.* at*2.

[164] *Id.* (citations omitted) (citing Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 422 (Tex. 1984)).

[165] *See, e.g., id.* at *4.

[166] *See, e.g.*,Vanderbilt Mortg. & Fin., Inc. v. Posey, 146 S.W.3d 302, 309 (Tex. App.—Texarkana 2004, no pet.).

from a mobile home dealership in Denison, Texas.[167] The Poseys entered into an installment sales contract, which stated that the contract was subject to Texas law.[168] After the purchase, the contract was assigned to Vanderbilt, a Tennessee corporation with its headquarters in Tennessee.[169] After receiving correspondence from Vanderbilt during 2001 and 2002 concerning their interest rate and escrow payments, Michael and Betty Posey sued Vanderbilt in Texas state court alleging a number of deceptive trade practices under the Tennessee Consumer Protection Act concerning misrepresentations made by Vanderbilt.[170] The Poseys sued individually and on behalf of a class composed of members from forty-four states.[171]

Finding that Tennessee law applied to the claims of the entire class, the district court in Fannin County granted the motion to certify the class pursuant to Texas Rule of Civil Procedure 42(b)(4), but denied pursuant to 42(b)(2).[172] Subsequently, Vanderbilt brought an interlocutory appeal of the certification under 42(b)(4).[173] Plaintiffs cross-appealed the denial of certification under 42(b)(2).[174] In determining the propriety of class certification in *Vanderbilt*, the court is required to determine whether common questions of law or fact exist pursuant to Texas Rule of Civil Procedure 42.[175] In making the common question determination, the court recognized that, as an initial matter, it needed to undertake a choice-of-law analysis to determine the applicable law with respect to the class.[176]

Embarking on a choice-of-law analysis, the court noted that *lex loci* has been abandoned in Texas in favor of the Second Restatement's most significant relationship approach.[177] After finding that the Poseys failed to meet their burden of proving that the laws of the forty-four potentially applicable jurisdictions did not conflict, the court set forward the proper analysis of the relevant forums' laws under the most significant relationship

[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 309, 312.
[173] *Id.* at 309.
[174] *Id.*
[175] Tex. R. Civ. P. 42(a)(2).
[176] *Vanderbilt*, 146 S.W.3d at 312.
[177] *Id.* at 313.

test.[178] As discussed *supra* (and in contrast to the *Duncan* analysis), the *Vanderbilt* court provides that the potentially applicable laws must be analyzed under the three levels provided in the Second Restatement.[179] The court first directs that the competing interests of the pertinent jurisdictions must be weighed under the factors of the generally applicable section—Section 6.[180] Next, the court directs analysis of the case under Section 145, the section applying to the specific area of law at issue in the case (here, torts).[181] Finally, the court notes that the facts of the case are to be scrutinized with respect to the section of the Second Restatement pertaining to the specific context within the area of law at issue.[182] In this case, Section 148 addressing misrepresentation was implicated.[183] Finding the application of Tennessee law to the entire class unsupported, the court then turned to the Poseys' contention that the false-conflicts analysis requires application of Tennessee law.[184]

The Poseys put forward the argument that there is no conflict between Texas and Tennessee law because all Texas interests are protected under Tennessee law.[185] Recognizing this as a false-conflicts argument and noting that such an argument has support in at least one Texas court, the *Vanderbilt* court undertook a review of the false-conflicts analysis and its place (or lack thereof) in Texas conflicts law.[186] While the court in *Vanderbilt* notes that the first step in a Second Restatement analysis is determining whether the potentially applicable laws differ, it distinguishes that inquiry from the false-conflict determination of only one state having a true interest in the dispute.[187] The *Vanderbilt* court further points out that the process of choosing the governing law by analyzing the purposes behind the laws as instructed by Currie's false-conflicts approach is, while important, not determinative as to whether a conflict exists under the Second Restatement approach.[188] "Although the Second Restatement is

[178] *Id.* at 314–15.
[179] *Id.*
[180] *Id.* at 314.
[181] *Id.* at 314–15.
[182] *Id.* at 315.
[183] *Id.*
[184] *Id.* at 317.
[185] *Id.* at 318.
[186] *Id.* at 318–19.
[187] *See id.* at 314, 318–19.
[188] *Id.* at 318–319.

influenced by the 'False Conflicts' analysis, the Second Restatement, rather than the 'False Conflicts,' is the standard for choice of law in Texas."[189] Recognizing the danger in using the interest-analysis framework in conjunction with or instead of the Second Restatement approach, the court warns that "[i]f 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."[190] As *Vanderbilt* appropriately emphasizes, the interest analysis and Currie's false-conflicts identification are not the choice-of-law inquiry in Texas—and perpetuation of their terminology and approach undermines the proper Second Restatement approach unequivocally adopted in Texas over two decades ago.

IV. CONCLUSION

Texas lower courts continue to intertwine, improperly, Currie's interest analysis with the Second Restatement's most significant relationship test. Such misguided interpretation of the Second Restatement can be credited to the complexity and ambiguity of the test itself, exacerbated by the Texas Supreme Court in *Duncan*.[191] Rather than an abandonment of *lex loci* principles, the Second Restatement largely conforms to a territorial approach.[192] However, the ex post facto inclusion of Section 6, seemingly to appease *lex loci* detractors, frustrates the Restatement's objective—thereby inviting the unwarranted infusion of interest analysis into the approach. Critics of the most significant relationship test, most often pointing the finger at Section 6, assert that the analysis is result driven—offering enough malleability for a judge to choose the desired result and retroactively justify it under the framework of the test.[193]

The breadth of justifiable results under the most significant relationship test keeps (or allows) the Texas Supreme Court from scrutinizing whether the results were properly reached. The misleading language of Section 6, and resulting propensity of some lower courts to confuse choice-of-law tests, demands that the attorney understand and carefully explain to the court the parameters of the Second Restatement test—and be aware that

[189] *Id.* at 319.

[190] *Id.*

[191] Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).

[192] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[193] *See* Paul v. Nat'l Life, 352 S.E.2d 550, 553–55 (W. Va. 1986).

governmental-interest factors may be accorded weight to an extent unanticipated by the Second Restatement.