
ARTICLES

CHOICE OF LAW IN ALASKA: A SURVIVAL GUIDE FOR USING THE SECOND RESTATEMENT

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This Article looks at Alaska's method of adjudicating choice of law issues that arise in tort claims and contract disputes, and highlights some of the pitfalls associated with application of Alaska's choice of law methodology, the Second Restatement. Specifically, the Article examines tort and contract case hypotheticals that may be resolved under more than one state's laws, where those laws conflict, and attempts to determine appropriate choice of law. Both the First Restatement and the Second Restatement address these issues, and the Article traces Alaska's shift from the territorial rules of the First Restatement to the more ambiguous "most significant relationship test" of the Second Restatement. Because of its ambiguity, the Second Restatement is difficult to apply, allowing courts to interpret its provisions differently. This Article sets out both Restatements, then determines the proper method for interpreting and using the Second Restatement. The Article analyzes Alaska courts' conflict of laws decisions, along with two federal cases interpreting Alaska law, in order to determine whether the appropriate methodology has been followed. The Article concludes that the Second Restatement has not been followed correctly or consistently in Alaska, and that the Alaska courts need to adopt a more specific method of analysis to provide courts and practitioners both with structural guidance as to how the provisions of the Second Restatement are to be applied.

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Of course, the mere fact that a state supreme court cites the Second Restatement reveals little about how it will in fact decide conflicts problems. Opting for that eclectic authority may mean no more than that the judges cannot agree, or have not thought about what exactly should replace the traditional choice of law rules.

I. INTRODUCTION

In a 1985 decision, the Supreme Court of Alaska adopted the methodology advocated by the Restatement (Second) of Conflict of Laws (“Second Restatement”) for adjudicating choice of law issues in tort—the “most significant relationship” test.² Ten years later, the supreme court followed its own lead and also espoused the Second Restatement’s most significant relationship test for making choice of law determinations in contract.³ These cases revolutionized Alaska’s method of adjudicating choice of law issues by abandoning the state’s ties to the rigid territorial rules of the Restatement of Conflict of Laws (“First Restatement”). However, these cases on their own have failed to provide Alaska with a coherent approach for adjudicating choice of law issues in the future.

Disturbingly, the most noteworthy characteristic of the Second Restatement is its ambiguity, a characteristic that has left a multitude of courts confused over how its provisions are to be interpreted. As a result, the decision to adopt the Second Restatement as a methodology for resolving choice of law issues is only the first step for Alaskan courts. The ambiguity of the Second Restatement itself, combined with erratic application of its methodology by both the Alaska Supreme Court and the United States District Court for the Ninth Circuit sitting in Alaska, has muddied already unclear waters for Alaska courts and practitioners. As a necessary second step, Alaska courts now must sift through the complex and ambiguous provisions of the Second Restatement in order to establish a more coherent and analytically consistent method of choice of law. The purpose of this Article, therefore, is to familiarize Alaska courts and practitioners with some of the controversies and pitfalls surrounding the application of Alaska’s

1. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 117 (1993).

2. See *M.O. Ehredt v. DeHavilland Aircraft Co. of Canada, Ltd.*, 705 P.2d 446, 453 (Alaska 1985).

3. See *Palmer G. Lewis Co., Inc. v. Arco Chem. Co.*, 904 P.2d 1221, 1227 & n.14 (Alaska 1995). Because Alaska’s espousal of the Second Restatement has been most evident in its courts’ contract and tort opinions, this Article is confined to a discussion of choice of law issues in contract and tort.

adopted choice of law methodology—the Second Restatement’s “most significant relationship” test.

II. CHOICE OF LAW DETERMINATIONS

Prior to the adoption of the Second Restatement, choice of law issues largely were governed by the territorial “rules”⁴ of the First Restatement.⁵ These rules, like the Second Restatement, taxonomized choice of law issues into rigid categories based upon the specific type of claim presented. For each “category” of issue, the American Law Institute (“ALI”), which authored the First Restatement, determined that there would be one specific contact that would be jurisdiction selecting, regardless of the number and nature of contacts that the issue or parties may have possessed with other jurisdictions.⁶

While the First Restatement’s rules offered ease of administration, their “plug-and-chug” method of application proved to be analytically constraining. According to some, it left courts with little ability to administer justice when the nature of the events overwhelmingly pointed to the application of the law of a jurisdiction different from where the First Restatement’s predetermined controlling event took place. For example, note 2 of Section 377 provided that when one person caused another to voluntarily take a deleterious substance, the place of the wrong was where the substance took effect.⁷ By way of illustration, the Restatement then provided the following hypothetical:

A, in state X, mails to B, in state Y, a package containing poisoned candy. B eats the candy in state Y and gets on a train to go to state W. After the train has passed into state Z, he becomes ill as a result of the poison and eventually dies from the poison in state W. The place of the wrong is state Z.⁸

In other words, the ALI arguably determined that although (1) neither party resided in state Z, (2) the poison was neither sent to

4. These rules are often referred to as “*lex loci*,” which is Latin for the “law of the place.” Examples include *lex loci delicti* (the law of the place of the wrong) or *lex loci contractus* (the law of the place of contracting).

5. RESTATEMENT OF CONFLICT OF LAWS (1934).

6. See, e.g., *id.* §§ 332 (contract), 378 (tort). Section 332 declared that the validity of a contract was to be determined by the law of the place where the contract was made. Section 378 directed courts to apply the law of the place of the wrong when faced with choice of law issues in tort, regardless of the number and nature of the contacts that the parties may have possessed with other jurisdictions. The place of the wrong usually is considered to be the place of injury. See *id.* § 377 nn.1-5 and illus. 1-7 (1934).

7. See *id.* § 377 n.2.

8. *Id.* § 377 illus. 2.

nor ingested in state Z, (3) neither A nor B ever intended on stopping in state Z, and (4) the fact that B became sick in state Z was completely fortuitous, the decision of the railroad to travel through state Z on the way to state W was the most important factor in the case. The route of the railway therefore trumped the law of the place where B presumably resided, where A knowingly and deliberately sent the poison (which presumably was also the place where A planned on the harm occurring), and where the poison was actually ingested. Equally as illogical is the fact that, under this rule, B's ability to collect from A could change each and every time B crossed a state line.⁹

Because of these types of intellectual constraints, and their potential to lead to unpredictable results, the First Restatement was criticized severely for its attempt to handle complex aspects of choice of law with a strict set of rules derived from over-simplified principles of territoriality.¹⁰ In response, courts revolted. Many courts either rejected the First Restatement outright as the jurisdiction's governing choice of law authority, or utilized "escape devices." "Escape devices" allowed courts to avoid the seemingly applicable rules of the First Restatement by characterizing the nature of a claim to avoid the undesirable sections, or by making certain procedural or policy determinations that allowed courts to dismiss a claim or apply the law of the forum of some other non-offending jurisdiction instead of applying the law of the jurisdiction called for by the First Restatement.¹¹

9. Of course, all of this disregards reality in that, since B is dead, it will be very difficult to pinpoint in which state he first grew ill before dying and, even had B lived, there would be no valid means of determining whether B was lying about in what state he grew ill in order to have the law of the most plaintiff-favorable state applied to his claim.

10. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

11. See, e.g., *Lilienthal v. Kaufman*, 395 P.2d 543, 547-49 (Or. 1964) (en banc) (applying Oregon law to protect an Oregon defendant by voiding a contract, to which California law otherwise was applicable as the place of contracting, performance, and plaintiff's residence, on the ground that California's law ran contra to Oregon's public policy of making spendthrifts' contracts voidable); *Haumschild v. Continental Cas. Co.*, 95 N.W.2d 814, 816-19 (Wis. 1959) (suggesting that the application of the law called for by "at least" six prior decisions and Sections 378 and 384(2) of the First Restatement was outdated and contrary to Wisconsin public policy, and characterizing interspousal immunity as an issue of "family law" rather than tort, in holding that the law governing interspousal immunity is not the law of the place of the alleged wrong but the law of the place where the parties are domiciled); *Grant v. McAuliffe*, 264 P.2d 944, 946-49 (Cal. 1953) (skirting

By 1952, the American legal profession had come to realize that the First Restatement was beyond salvage.¹² Recognizing that the theoretical basis underlying the First Restatement's territorial rules had become untenable, the ALI commenced work on a new and more flexible version of the Restatement that took into consideration the *quality* of the contacts that contending jurisdictions possessed with the parties and each disputed issue.¹³

III. ALASKA'S PATH TO THE SECOND RESTATEMENT

A. Tort

Prior to 1968, Alaska courts had suggested that tort liability would be governed by the laws of the place of the wrong in a manner consistent with the territorial rules approach of the First Restatement.¹⁴ However, in 1968, in *Armstrong v. Armstrong*,¹⁵ the Alaska Supreme Court was faced with a factual situation in which the strict application of the First Restatement's rules would have led to an unacceptable result. It was at this stage that the court took account of previous criticism directed at the First Restatement and redefined its approach towards making choice of law determinations.¹⁶

Section 390 of the First Restatement and case law that directed courts to apply the law of the place of the wrong in determining whether a cause of action survives the death of a negligent tortfeasor, and instead using two escape devices to apply the law of the forum: (1) characterizing the issue as "procedural" and (2) labeling the issue as one involving estate law rather than tort). It is worth noting that courts in different jurisdictions have disagreed on how properly to label an issue even when interpreting the same statute. Compare *Noe v. United States Fidelity & Guar. Co.*, 406 S.W.2d 666, 671 (Mo. 1966) (labeling a section of the Louisiana statute that allowed injured parties to bring a direct action against the insurer as procedural), with *Morton v. Maryland Cas. Co.*, 148 N.Y.S.2d 524, 527 (N.Y. App. Div. 1955) (labeling the identical section of the Louisiana statute as substantive). See also Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1043 n.12 (1987) (describing different types of "escape devices" used by the courts).

12. See generally, JUENGER, *supra* note 1, at 96 (noting that "most scholars considered [the] First Restatement obsolete").

13. See Smith, *supra* note 11, at 1045.

14. See *Marine Constr. v. Vessel TIM*, 434 P. 2d 683, 686 (Alaska 1967) (citing RESTATEMENT OF CONFLICT OF LAWS § 279 (1934) in declaring that "the creation of tort liability is governed by the law of the place of the injury"); *Lillegraven v. Tengs*, 375 P.2d 139, 140 (Alaska 1962) (same).

15. 441 P.2d 699 (Alaska 1968).

16. See *id.* at 701-04.

In *Armstrong*, the supreme court was called upon to resolve an interspousal dispute arising from an automobile accident that occurred while husband and wife, both long-time Alaska domiciliaries, were traveling from Washington through the Yukon Territory of Canada.¹⁷ Following the accident, the husband instituted a personal injury claim against the estate of his late wife, who was driving the car at the time of the fatal crash.¹⁸ While Alaskan law recognized interspousal actions based upon negligently inflicted harms, the law of the Yukon Territory provided defendant spouses with immunity.¹⁹

In *Armstrong*, the strict application of the First Restatement's *lex loci delicti* rule would have mandated that the laws of the Yukon Territory, as the place of the wrong, be applied to bar the husband's claim. Under this approach, rather than being governed by the laws of the more involved jurisdiction, the state in which the couple was domiciled, the liabilities of married persons towards one another could change every time the couple crossed a state or country line. Recognizing the variable results this approach would generate, the supreme court distinguished *Armstrong* from its prior cases with *lex loci delicti* and rejected the notion that earlier cases had established *lex loci delicti* as a controlling choice of law precedent.²⁰ Overturning the trial court's application of the *lex loci delicti* rule,²¹ the supreme court cited the "most significant relation" approach advocated by the Second Restatement (then existing as a tentative draft) in holding that the law of the place where married

17. *See id.* at 703.

18. *See id.* at 699. The family's insurance carrier was joined as a defendant.

19. *See id.* at 699-700.

20. *See id.* at 700-01 (asserting that "[*Marine Construction*] did not involve a tort action but rather raised questions concerning the applicable statute of limitations Although we did allude generally to the place-of-wrong conflicts rule in our decision in *Lillegraven*, the doctrine of *lex loci delicti* was not employed as a basis for the actual decision reached there").

21. In a battery of criticism, the supreme court declared:

That old rule [*lex loci delicti*] is today almost completely discredited as an unvarying guide to choice of law decision in all tort cases No conflict of laws authority in America today agrees that the old rule should be retained No American court which has felt free to re-examine the matter thoroughly in the last decade has chosen to retain the old rule It is true that some courts, even in recent decisions, have retained it . . . [b]ut their failure to reject it has resulted from an unwillingness to abandon established precedent before they were sure that a better rule was available, not to any belief that the old rule was a good one.

Id. at 702 n.17 (citations omitted).

parties are domiciled is the applicable law when adjudicating interspousal liabilities and immunities.²²

Although the court applied the law of the place where the married couple was domiciled and directed acerbic criticism at the *lex loci delicti* approach, it did not formally adopt the methodology of the Second Restatement for future choice of law determinations.²³ Instead, the court limited its holding by characterizing the application of *lex loci delicti* to interspousal immunity cases as a violation of Alaskan public policy under the specific circumstances of the case.²⁴ Seventeen years later the supreme court clarified its position.

In *Ehredt v. DeHavilland Aircraft Company of Canada, Ltd.*,²⁵ the court was asked to determine the appropriate measure of damages in a wrongful death case brought by a pilot's widow against the owner and manufacturer of an aircraft.²⁶ While the crash occurred in Alaska, the decedent pilot's personal representative and family resided in Florida.²⁷

Instead of applying the First Restatement's *lex loci delicti* approach, the supreme court formally adopted the cornerstone of the Second Restatement's tort analysis, the "most significant relationship" test. The court declared that according to Sections 175 and 178, "[t]he measure of damages used in an action for wrongful death should be the law of the state with the most significant relationship to the occurrence and the parties."²⁸ Applying the factors listed in Section 145 of the Second Restatement, the court held that Alaska had the most significant relationship with the issues raised in this wrongful death action since the crash occurred there on an intrastate flight, the pilot had lived in Alaska for the majority of three years preceding the crash, the owner of the plane was a

22. See *id.* at 702 (citing Section 390(g) of the Second Restatement as a tentative draft, since revised and redrafted as Second Restatement Section 169); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 and cmt. b (1971).

23. See *Armstrong*, 441 P.2d at 704.

24. See *id.* at 703. The court declared:

[W]e believe that adherence to the mechanical *lex loci delicti* choice-of-law rule would frustrate the policy of the State of Alaska in regard to interspousal causes of action and liabilities in tort, and would give unwarranted precedence to the laws of a jurisdiction with which the parties' contacts were merely fortuitous, transitory, and insubstantial.

Id.

25. 705 P.2d 446 (Alaska 1985).

26. See *id.* at 449.

27. See *id.* at 453.

28. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 175, 178 (1971)).

domiciliary of Alaska doing business there, and the pilot's employment relationship was centered in Alaska.²⁹ Thus, while the court ultimately reached the same conclusion that it would have under the *lex loci* methodology, it made a deliberate effort to reach this conclusion by distancing itself from the *lex loci delicti* approach and by formally adopting the "most significant relationship" approach of the Second Restatement.

B. Contract

While *DeHavilland* clearly marked Alaska's espousal of the Second Restatement's "most significant relationship" test for actions brought in tort,³⁰ it was not until 1995 that Alaska made a similar determination in contract.³¹ In *Palmer G. Lewis Co. v. Arco Chemical Co.*,³² the court was asked to determine the enforceability of an indemnity provision contained in a contract between a manufacturer and one of its raw material suppliers.³³ The manufacturer claimed that the law of Washington should be applied, as the site of the negotiating, contracting, and performance of the sales contract.³⁴ The supplier, however, argued that because the ultimate issue involved whether the manufacturer was entitled to implied indemnity under Alaska's common law, the law of

29. *See id.*

30. *See id.*; *see also* Smith, *supra* note 11, at 1051.

31. Although it would seem logically consistent to apply the same choice of law methodology in contract as in tort, Alaska's adoption of the Second Restatement in contract was not a foregone conclusion. Several states have used separate methodologies for choice of law determinations in contract and tort. *See, e.g.,* William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of its Successor: Contemporary Practice in the Traditional Courts*, 56 MD. L. REV. 1196, 1206-09 (1997) (noting that four states, Florida, Connecticut, Tennessee and Oklahoma, continue to apply the First Restatement in contract, but not in tort).

The Alaska Supreme Court provided early hints of how it might proceed in making choice of law determinations in contract prior to 1995. For example, in *Wear v. Farmers and Merchants Bank of Las Cruces*, 605 P.2d 27 (Alaska 1980), the court cited approvingly the Second Restatement's methodology for making choice of law determinations in contract, without going so far as to base its holding upon it. *See id.* at 31. The court cited the Second Restatement as one of many sources supporting the principle that "the law of the state which has the most significant relation with the contract, the assignment and the parties should govern," but ultimately based its holding upon what it referred to as "general law." *Id.*

32. 904 P.2d 1221 (Alaska 1995).

33. *See id.* at 1223.

34. *See id.* at 1227.

Alaska should be applied.³⁵ In the end, the court left no doubt about how it would proceed as to choice of law issues arising in contract: “When choice of law issues arise, we commonly refer to the *Restatement (Second) of Conflicts* for guidance.”³⁶ Applying the principles of the Second Restatement, the court then determined that the law of Washington was controlling.³⁷

IV. CHOICE OF LAW ANALYSIS UNDER THE SECOND RESTATEMENT

A. Background

Now that Alaska has adopted the Second Restatement’s “most significant relationship” test for resolving choice of law issues arising in tort and contract, Alaska courts must prepare themselves to navigate the provisions of this complex and ambiguous treatise. This undertaking is even more difficult than it sounds, because there is no generally accepted manner as to how the sections of the Second Restatement should be interpreted. As opposed to the nature of the field in 1934, when the territorial approach of the First Restatement enjoyed wide-ranging support, there was no single methodology that stood in line to succeed the territorial rules of the First Restatement. Instead, the collapse of the First Restatement had resulted in a balkanization of the choice of law field into half a dozen or so different methodologies, each claiming judicial support.³⁸ From the application of the laws of the jurisdiction with the “most significant relationship,” to the dispute surrounding the “governmental interest analysis” method,³⁹ courts across the

35. *See id.*

36. *Id.*

37. *See id.*

38. *See* JUENGER, *supra* note 1, at 96.

39. A significant debate in the choice of law field concerns whether the governmental interest analysis method is, in fact, adopted by Section 6 of the Second Restatement. Briefly stated, this method, credited to Professor Brainerd Currie of Duke University School of Law, is based on the theory that only states that have an “interest” in the issue should have their law applied. *See generally* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959). Apart from certain conduct-regulating state government concerns arising in tort, the governmental interest analysis approach treats a state as “interested” only if one of its domiciliaries will benefit by the application of its law, such that a state that is only territorially involved in a dispute is not deemed “interested” (an approach sometimes referred to as “lawmaker chauvinism”). *See* William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mish-mash*, 34 MERCER L. REV. 645, 659 (1983). In cases where more than one state

country selected, á la carte, from a menu of theories advocated by choice of law scholars in an attempt to develop a coherent and just choice of law methodology for their respective jurisdictions.⁴⁰ As a result, rather than “restating” what was occurring anywhere in the country (as its title would suggest), the drafters of the Second Restatement pieced the provisions of the treatise together through a series of compromises in an attempt to “restate” a beginning.⁴¹

Realizing that the Second Restatement failed to represent the “*communis opinio*”⁴² of either the courts or academia, many of the most distinguished choice of law scholars disagreed with the very thought of publishing a Second Restatement.⁴³ In fact, the cornerstone of the Second Restatement’s “most significant relationship” test, Section 6, passed by the slim margin of thirteen to twelve.⁴⁴ Nonetheless, members of the ALI pressed on and, despite a bar-

possesses an “interest,” the court will simply defer to the law of the forum. See Currie, *supra*, at 178.

Such an approach, however, seems inconsistent with the Second Restatement’s inclusion of territorial sections that create presumptions in favor of the law of a particular jurisdiction without regard for the parties’ domiciles. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-47, 148(1), 149, 151-52, 154-55, 189-91, 193-97 (1971). The difference between the two methodologies is highlighted in cases where no one state is clearly the most interested or has the most significant relationship. In such cases, Currie’s governmental interest analysis approach employs a forum-law break device, while the Second Restatement seems to default to the law as specified by the applicable presumptive section. See *id.*; Currie, *supra*, at 178.

As a result, this Article will follow the lead of *Bates v. Superior Court* and *Beals v. Scipa Securink Corp.*, and will assume that the governmental interest analysis method has not been adopted into the methodology of the Second Restatement. See *Bates v. Superior Court*, 749 P.2d 1367, 1370 (Ariz. 1988) (en banc) (determining California’s governmental interests analysis approach to be so materially different from the Second Restatement that Arizona courts should not rely on California cases for precedent even where California cases are the only precedent relating to the disputed issue); *Beals v. Scipa Securink Corp.*, No. CIV.A. 92-1512, 92-2588, and 93-0190, 1994 WL 236018 at *2 (D.D.C. May 17, 1994) (recognizing the governmental interest analysis and Second Restatement approaches as distinct, but nevertheless applying a constructive blending of the two approaches).

40. See JUENGER, *supra* note 1, at 106-07.

41. See Albert A. Ehrenzweig, *The Second Conflicts Restatement: Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230, 1244 (1965).

42. *Id.* at 1232.

43. See, e.g., *id.* at 1230 (advocating the Second Restatement’s withdrawal); Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963) (professing doubts and reservations in regard to the “threatened” adoption of the Second Restatement).

44. See Ehrenzweig, *supra* note 41, at 1237.

rage of criticism and a number of appeals for its withdrawal,⁴⁵ the Second Restatement officially was adopted in 1969.

B. The Three-Tier Structure

Divided into three separate “tiers,” the sections of the Second Restatement truly reflect the fact that their drafting was a product of compromise. In some cases, these sections appear to reincarnate the territorial approach of the First Restatement, while in others, rejection of the territorial approach is clear. Because the Second Restatement provides only minimal guidance as to how the three tiers are meant to interact with one another, the task of determining how best to integrate the separate tiers has been left to the courts. Instead of achieving integration, however, most judicial opinions (Alaska’s included) portray the analytical flailing of courts among all three of the Second Restatement’s tiers.

1. *The First Tier: The Territorial Presumption Sections.* In one respect, the tenor of the Second Restatement resembles the familiar territorial rules approach embodied in the First Restatement. This is because the first tier of the Second Restatement (Sections 146 through 149, 151, 152, 154, and 155 for tort,⁴⁶ and Sections 189 through 197 for contract) contains a series of presumptions directed toward certain specific factual situations, based largely on the territorial rules of the First Restatement.⁴⁷ For example, Section 146 declares that for personal injury issues, a presumption arises in favor of the law of the state where the injury occurred.⁴⁸ Similarly, when determining the validity of a life insurance contract, Section 192 establishes a presumption in favor of the law of the place where the insured party was domiciled at the time the policy was issued.⁴⁹

The most significant aspects of the Second Restatement are not its retention of territorial rules, but rather its movement away

45. See Currie, *supra* note 43, at 755; Reppy, *supra* note 39, at 655 n.43 (recounting further criticism directed at the Second Restatement).

46. Sections 150 and 153, containing more advisory language, are instead drafted in a similar manner as the “specific-issue sections.” However, instead of referring back to a general area of law section, Sections 150 and 153 refer directly to Section 6. See *infra* notes 124, 105-29 and accompanying text (discussing the difference between presumptive and specific issue sections and the appropriate treatment for Sections 150 and 153).

47. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-49, 151-52, 154-55, 189-97 (1971).

48. See *id.* § 146.

49. See *id.* § 192.

from the territorial rules toward a more policy-based alternative.⁵⁰ Shifting from the First Restatement's treatment of the territorial-based presumptive sections as conclusive, the Second Restatement applies territorial-based presumptions merely as rebuttable presumptions. This is evidenced by the overriding mandate of the Second Restatement that directs courts to apply the territorial presumption *unless, with respect to the particular issue, some other state possesses a more significant relationship to the parties and the tortious occurrence or contractual relationship involved in the dispute.*⁵¹ Courts are thus instructed to engage in their analysis, not with respect to the case as a whole, but instead, with respect to each disputed issue arising in the case.⁵² Consequently, for a given issue, the laws of a jurisdiction implicated by the applicable presumptive section may be trumped by the laws of a jurisdiction determined by the court as possessing a more significant relationship to the parties and the tortious occurrence or contractual relationship involved in the dispute.

However, the relevant question then becomes: How is a court to determine which state has the most significant relationship to the parties and the tortious occurrence or contractual relationship? This question is answered, albeit ambiguously, by the next two tiers of the Second Restatement. Each of the tiers provides courts with a list of factors to be taken into account when attempting to determine the jurisdiction possessing the most significant relationship with the parties and the tortious occurrence or contractual relationship involved in the dispute.

2. *The Second and Third Tiers: Finding the Jurisdiction with the Most Significant Relationship Via the Application of Section 6*

50. See generally Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, INTRODUCTION at VII-IX (1971).

51. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-49, 151-52, 154-55, 189-97 (1971).

52. This technique is endorsed by the presumptive sections as well as by the language of the general area of law sections, Sections 145 and 188, which call for the law to be applied to an "issue." *Id.* §§ 145(2), 146-49, 151-52, 154-55, 188(2), 189-97. In addition, the commentary to the Second Restatement states that [t]he courts have long recognized that they are not bound to decide all issues under the local law of a single state Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states.

Id. §§ 145 cmt. d, 188 cmt. d; see also *NL Indus. v. Commercial Union Ins. Co.*, 65 F.3d 314 (3d Cir. 1995) (emphasizing the need for separate choice of law analyses for each disputed issue).

and the General Area-of-Law Sections. In identifying the jurisdiction that possesses the most significant relationship to a legal issue, the parties and the disputed tortious occurrence or contractual relationship, courts are directed to base their analysis on the principles stated in Section 6 of the Second Restatement.⁵³ Section 6 functions as a second tier of analysis and states, in pertinent part:

When there is no [statutory] 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,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in determination and application of the law to be applied.⁵⁴

The precise weight placed on each of these factors will depend upon the particular type of issue involved, as well as the unique facts of the case. For example, comments to the Second Restatement suggest that, while the protection of justified expectations incorporated under factor (d) may be a major element to consider in contract cases, it often will play an unimportant role in tort cases.⁵⁵

Sections 145 and 188 together operate as a third tier to the Second Restatement. These two sections operate as the “general area-of-law” sections for tort and contract, respectively. Both, however, add a fair amount of confusion to the field, since they describe an additional set of factors that courts apparently must consider when applying the factors listed in Section 6. For example, when making a Section 6 analysis in tort, Section 145 directs courts to consider, according to their relative importance with respect to the particular issue:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,

53. The general area of law and presumptive sections of the Second Restatement, Sections 145-49, 151-52, 154-55 and 188-97, all refer courts back to the Section 6 factors in order to conduct a “most significant relationship” analysis. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-49, 151-52, 154-55, 188-97 (1971).

54. *Id.* § 6(2).

55. *See id.* §§ 145 cmt. b; 188 cmt. b.

- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.⁵⁶

The concept is similar for choice of law determinations in contract. Section 187 provides that in most cases, the law contractually selected by the parties will be upheld.⁵⁷ However, in cases where the parties fail to make such a determination, Section 188 directs courts to consider, as part of their Section 6 analyses, the following factors, listed in accordance with their relative importance with respect to the particular issue:

- (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.⁵⁸

In conducting their analyses, courts are directed to keep in mind that if the place of negotiating the contract and the place of performance are in the same state, the law of that state “will usually be applied” except as otherwise provided by the presumptive sections.⁵⁹

C. The Second Restatement as a Continued Source of Confusion

1. *Difficulty in Conducting a Valid Analysis.* In providing courts with three different levels of factors to consider when analyzing choice of law issues, the Second Restatement has freed courts from the analytical constraints of the First Restatement’s inflexible rules. At the same time, with three different sets of interrelated factors to consider and no meaningful way to balance these factors, it is easy to see how the Second Restatement has led to a substantial amount of confusion among courts and scholars. Take, for example, a simple personal injury claim resulting from an auto accident. Under the First Restatement, the choice of law issue was straightforward: choice of law issues concerning personal

56. *Id.* § 145(2).

57. *Id.* § 187.

58. *Id.* § 188(2)(a)-(e); see also *id.* § 186 (“Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188.”).

59. *Id.* § 188(3).

injury were governed by the law of the place where the wrong occurred.⁶⁰

Under the Second Restatement, however, the analysis becomes much more complex, as courts are forced to jump through several intellectual hoops. First, the court must begin its analysis with the applicable presumptive section, in this case Section 146, which establishes a presumption in favor of the law of the place of the injury.⁶¹ Second, to determine if the presumption established in Section 146 should be overturned, the court must carry forward this presumption to Section 6 where it must analyze the following:

- (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) the certainty, predictability and uniformity of result, and
- (g) the ease in the determination and application of the law to be applied.⁶²

Finally, the court must decide what to do with the general area of law section, in this case Section 145, and its additional list of factors to be taken into consideration when applying Section 6:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship between the parties is centered.⁶³

At this point, it is important to note that neither Section 146 nor Section 6 directly refers courts to Section 145. Instead, Section 146 guides the court directly to Section 6.⁶⁴ As a result, the court must render a decision as to how it wishes to treat those factors listed in Section 145.⁶⁵ There appear to be two possibilities as to how the court may proceed. First, the court may read into the presumptive section an implied directive to consider the factors listed

60. See RESTATEMENT OF CONFLICT OF LAWS §§ 377, 378 (1934); *supra* note 6.

61. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

62. *Id.* § 6(2)(a)-(g).

63. *Id.* § 145(2)(a)-(d).

64. See *id.* § 145.

65. This same issue arises in contract, where neither the presumptive sections nor Section 6 refer the court to the factors listed in Section 188.

in the general area-of-law sections en route to a Section 6 analysis. Under this approach, courts will often be required to balance the factors contained in all three tiers whenever it conducts a choice of law analysis. Alternatively, the court may choose to incorporate the general area-of-law factors into its analysis only in those instances where there are no applicable presumptive sections. In the end, regardless of its decision, the court will be faced with an overwhelming number of factors to consider with little guidance as to how to interpret their significance.⁶⁶

To provide a more concrete example, suppose a personal injury claim arose out of an auto accident occurring in state A, the forum, and is between plaintiff, who resides in state B, and defendant, who resides in state C. Assume that the laws of state A and B allow plaintiff to recover, while the law of state C allows no recovery. Under the Second Restatement, the court is asked to locate and apply the law of the jurisdiction that possesses the most significant relationship to the occurrence and the parties.⁶⁷ However, the court is faced with contacts that implicate the laws of three different jurisdictions. The application of the law of state A is supported by (i) the initial presumption established in Section 146,⁶⁸ (ii) any policies of the forum state A,⁶⁹ and (iii) the Section 145 factors implicating the law of state A as both the place of injury and the place where the conduct causing the injury occurred.⁷⁰

In favor of the law of state B, however, are (i) any policies of state B,⁷¹ and (ii) the Section 145 factor implicating the law of state B as the plaintiff's place of residence.⁷²

Finally, the application of the law of state C is supported by (i) any policies of state C,⁷³ and (ii) the Section 145 factor implicating the law of state C as defendant's place of residence.⁷⁴

In such cases, how is a court to proceed? The law of state A enjoys the most support in terms of having the greatest number of contacts with the dispute. However, such a "contact counting" approach is unsatisfactory and, in any event, appears to have been

66. See William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1388 (1997) (observing that "the Second Restatement provides judges with a starting point: a set of presumptions and a list of concerns worth addressing," and noting that "[i]t is then up to the judge to make it all work").

67. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

68. See *id.* § 146.

69. See *id.* § 6(2)(b), (c).

70. See *id.* § 145(a), (b).

71. See *id.* § 6(2)(b), (c).

72. See *id.* § 145(c).

73. See *id.* § 6(2)(b), (c).

74. See *id.* § 145(c).

rejected by the ALI's use of the most significant relationship test, a test that requires an analysis of both the quality and quantity of the contacts connecting the jurisdiction to the parties and the disputed issue. Sections 145 and 188 expressly state that their factors should be "evaluated according to their relative importance with respect to the particular issue."⁷⁵ This rejects a "contact counting" methodology that merely counts the number of contacts that each jurisdiction possesses with the parties and disputed issue without analyzing the quality of those contacts. In addition, the comments to the Second Restatement suggest that the contacts between a state and a disputed issue will possess differing weights depending upon the type of issue involved.⁷⁶

Beyond this shallow guidance rejecting one possible approach, the Second Restatement fails to provide courts with meaningful direction. Instead, as seen in the above example, the Second Restatement provides criteria under which reasonable arguments can be made for the application of the laws of *any* of the involved states, while leaving courts with little guidance as to the proper method of balancing among these criteria.⁷⁷

75. *Id.* §§ 145(2), 188(2).

76. *See id.* §§ 145 cmt. b, 188 cmt. b (declaring that the Section 6(2)(d) factor in favor of protecting the justified expectations of parties will carry more weight in contractual issues than in those involving tort). Accordingly, a number of cases expressly have denounced "contact counting" approaches. *See, e.g.,* *Bates v. Superior Court*, 749 P.2d 1367, 1372 (Ariz. 1988) (en banc) (determining that the appropriate analysis is "qualitative not quantitative"); *Mezroub v. Capella*, 702 So.2d 562, 565 (Fla. Dist. Ct. App. 1997) (stating that the most significant relationship test "is not a simple 'center of gravity' or 'contacts counting' test," and holding that "the court must determine which state or states have a true interest in the application of their law, by examining the various factual contacts in light of the rather malleable principles set forth in Section 6"); *Kammerer v. Western Gear Corp.*, 618 P.2d 1330, 1336 (Wash. Ct. App. 1980) (declaring that "[w]hile particular contacts, such as the place of injury, are to be considered . . . the court is not simply to count contacts, but must consider the competing policies and interests of the two states with respect to application of their laws").

77. As the distinguished Professor Currie expressed in quoting Justice Traynor's complaint about the weight properly accorded to a presumption, "Can you weigh a bushel of horsefeathers against next Thursday?" Currie, *supra* note 43, at 754 (quoting Justice Traynor). Many other commentators have expressed their frustration with the Second Restatement's theoretical inconsistencies. *See, e.g.,* David F. Cavers, *Re-restating the Conflict of Laws: The Chapter on Contracts*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 349 (Kurt H. Nadelmann et al., eds., 1961); Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1240 (1997) (noting the "schizophrenic" nature of the Second Restatement); Ehrenzweig, *supra* note 41, at 1231-36 ("[M]any new specific provisions [of the

One novel, but sensible, approach that Alaska courts may consider is to adopt a choice of law methodology that groups together states possessing similar laws when resolving disputes involving three or more jurisdictions. Using the above auto accident hypothetical, courts using this grouping method initially would note that the laws of states A and B are the same with respect to the disputed issue in that they both allow plaintiff to recover. In the choice of law analysis, the court would then group together the factors in favor of applying law A and B. The court's analysis would then pit all the factors in favor of applying the laws of either state A or B against all of the factors in favor of applying the law of state C.

This sort of analysis would have a definite impact in three-way cases where the law of the jurisdiction with the unique law has the most significant relation to the occurrence and the parties when considered against the two other states *individually*, but not when considered against the two states *collectively*. For example, in the hypothetical above, if state C is forty percent related to the occurrence and the parties, while states A and B are each only thirty percent related to the occurrence and the parties, then the law of state C could be applied as it is the *jurisdiction* possessing the most significant relationship to the occurrence and the parties. Looking past the political boundaries, however, and instead to the conflicting *laws* at issue, it becomes clear that the laws of state A or B should be applied as their pro-plaintiff law is sixty percent related to the occurrence and the parties compared to state C's pro-defendant law that is only forty percent related.

Although the Second Restatement is phrased in terms calling for the law of the state having the most significant relation,⁷⁸ courts at least should question the intelligence of strictly basing their decisions on this language, as the field is known as choice of law, not choice of states. In the end, courts that approach choice of law issues as a winner-take-all battle among sovereign *states* attempting to have their individual law applied to disputes in which they have

Second Restatement] will inevitably add to the confusion created by the original version.”); Smith, *supra* note 11, at 1170 (“The Restatement is a curious montage of virtually every choice of law theory imaginable, all brought together in one, almost undecipherable text.”).

The court's dilemma is made only worse when the law of all three involved states differ – take, for example, a tort case in which plaintiff's home state allows plaintiff an unlimited recovery, defendant's home state precludes plaintiff's recovery, and the law of the state where the tort is committed allows plaintiff a limited recovery (*e.g.*, no punitive damages).

78. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 145(1), 188(1) (1971).

an interest may well reject this grouping method. However, courts that view choice of law disputes as calling for the application of the *law* most connected to the parties and the occurrence or transaction should be more eager to adopt such a grouping method.

2. *Risk of Circumscribing Meaningful Judicial Review.* Because conflict of law cases applying the Second Restatement contain so many factors and minimal direction on how to weigh these factors, courts are able to “work backwards” in their decisions without being detected. That is, courts may take advantage of the Second Restatement’s ambiguity by first selecting the outcome of the case that “feels” correct to the court (without engaging in any genuine choice-of-law analysis), and then attempting to justify its selected result by pointing to a set of contacts connected to the desired jurisdiction and labeling them as “the most significant.”⁷⁹ In this manner, the ambiguity of the Second Restatement’s provisions provides courts with an ability to circumscribe meaningful judicial review without facing repercussions. As a result, the ambiguity of the Second Restatement not only prevents courts from making a good faith effort to apply its provisions, but also tosses a shroud over the judicial decision-making process in a manner that makes it difficult both to hold courts accountable for their decisions and to rely on their decisions as meaningful precedent.

D. Alaska’s Special Concerns

Given the vast ambiguity and uncertainty of the Second Restatement, Alaska courts must develop their own methods of interpreting and weighing the various factors of the Second Restatement. This effort has been hampered by state and federal

79. See Borchers, *supra* note 77, at 1233 (suggesting that “citation to the Second Restatement is often little more than a veil hiding judicial intuition”); Fisher v. Huck, 624 P.2d 177, 178 (Or. Ct. App. 1981) (admitting that since the adoption of the Second Restatement, “the choice of law has been based upon somewhat amorphous considerations, the evaluation of which depends in large measure on the semantics used by the court making the particular decision”); Willis L.M. Reese, *Conflict of Laws*, 33 AM. J. COMP. L. 332, 334-37 (1985) (book review) (observing that the judicial practice of working backwards in choice of law decisions is considered a “common phenomenon”); Reppy, *supra* note 39, at 652 (criticizing the “better law method” in which the judge decides the result in advance and then simply instructs a law clerk to “[w]rite an opinion under which plaintiff prevails, and employ all methods that support the result”); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 974 (1994) (declaring that “a court can reach virtually any result in any choice of law case and find some support for the result in the Second Restatement”).

courts applying Alaska law and interpreting the Second Restatement in an inconsistent and illogical manner. Part of this dilemma stems from decisions of the Alaska Supreme Court itself. Although the court has issued only a few opinions directly interpreting the Second Restatement, these opinions have misapplied the treatise's complex three-tiered system.⁸⁰ Adding to the confusion are two federal district court cases that have misinterpreted and misapplied Alaska's choice of law methodology.⁸¹ Thus, before Alaska courts can hope to tackle the complex balancing called for by the three-tiered structure of the Second Restatement, they must first unravel these decisions to begin to understand how each of the three separate tiers of the Second Restatement were meant to be applied.

1. *Alaska Supreme Court Cases.* One of the major determinations to be decided by the Alaska Supreme Court involves how it will incorporate the general area of law sections for tort and contract, Sections 145 and 188 respectively, into its choice of law analysis. Thus far, the Alaska Supreme Court has allowed these general area of law sections to disrupt its application of the Second Restatement. In *Ehredt v. DeHavilland Aircraft Company of Canada*,⁸² the Alaska Supreme Court was asked to determine the appropriate measure of damages to be applied in a wrongful death case brought by a pilot's widow against the owner and manufacturer of an aircraft.⁸³ Under the law of Alaska – where the crash occurred, the owner of the aircraft was domiciled and conducting business, and the decedent pilot lived for the majority of three years prior to his death⁸⁴ – pre-judgment interest is awarded as part of a compensatory damages award. Neither income taxes nor inflation are considered in awarding future lost wages, awards for future lost wages are not reduced to present value, and widows and children are not allowed to recover for their own mental anguish resulting from the decedent's death.⁸⁵ Under the law of Florida, however – where the decedent pilot's personal representative and family resided⁸⁶ – successful plaintiffs are not entitled to recover pre-judgment interest, income tax is deducted

80. See *Palmer G. Lewis Co. v. Arco Chem. Co.*, 904 P.2d 1221 (Alaska 1995); *Ehredt v. De Havilland Aircraft Co.*, 705 P.2d 446 (Alaska 1985).

81. See *Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680 (D. Alaska 1993); *Robinson v. U-Haul Co.*, 785 F. Supp. 1378 (D. Alaska 1992).

82. 705 P.2d 446 (Alaska 1985).

83. See *id.* at 449.

84. See *id.* at 453.

85. See *id.* at 452-53.

86. See *id.* at 453.

from future wage awards, awards for future wages are reduced to present value, the jury is allowed to consider the effect of inflation in determining the amount of lost wages, and surviving spouses and children may recover for their own mental pain and suffering resulting from the decedent's death.⁸⁷

The Second Restatement suggests that the court should have begun its analysis with Section 178, the presumptive section that specifically applies to the amount of damages to be awarded in a wrongful death claim.⁸⁸ This section refers the court directly to Section 175,⁸⁹ where a presumption is established in favor of applying the law of the place of injury.⁹⁰ The court should have then carried this presumption forward to Section 6 to determine if its factors displaced the Section 175 presumption.⁹¹ Finally, the court then should have made a precedent-setting determination as to how best to incorporate the set of factors listed in the general area of law section, Section 145, into its choice of law methodology, either incorporating them into the Section 6 analysis or deeming them inapplicable in cases where an applicable presumptive section exists.⁹²

Instead of following this approach, the court began by citing Sections 178 and 175 without ever referring to the entire point of these sections – their presumption in favor of the law of Alaska as the place of the injury.⁹³ Then, instead of carrying this presumption to Section 6, the court got lost in a Section 145 detour, where it carefully matched the facts of the case to the four considerations

87. *See id.* at 452.

88. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 (1971). Sections 175-80 apply as the presumptive sections for “wrongful death actions” (in the same manner that Sections 146-49, 151-52 and 154-55 apply as the presumptive sections for “torts”). *See id.* §§ 146-49, 151-52, 154-55, 175-180.

89. *See id.* § 178 (“The law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death.”).

90. *See id.* § 175. Section 175 states:

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

Id.

91. *See id.*

92. *See id.* at §§ 6, 145.

93. *See Ehredt*, 705 P.2d at 453 (citing Sections 175 and 178 for the proposition that “[t]he measure of damages used in an action for wrongful death should be the law of the state with the most significant relationship to the occurrence and the parties”).

listed in Section 145.⁹⁴ Based upon its Section 145 analysis, the court held the law of Alaska applicable to the dispute,⁹⁵ giving the heart of the Second Restatement, Section 6, nothing more than a token footnote reference.⁹⁶ As a result, rather than basing its analysis on the undeniably relevant sections of the Second Restatement, Sections 178, 175 and 6, the court instead sidestepped these sections and based its holding upon Section 145.⁹⁷

Ten years later, in *Palmer G. Lewis Co. v. Arco Chemical Co.*,⁹⁸ the Alaska Supreme Court again rested its analysis upon the factors of a general area of law section, this time in contract and in reliance upon the factors listed in Section 188.⁹⁹ The court was asked to rule on the enforceability of an indemnity provision contained in a sales contract between a manufacturer and one of its raw material suppliers.¹⁰⁰ The manufacturer claimed that the law of Washington should be applied because Washington was the site of the negotiating, contracting and performance of the sales contract.¹⁰¹ The supplier argued that because the ultimate issue concerned whether the manufacturer was entitled to implied indemnity under Alaska's common law, the law of Alaska should be applied.¹⁰² While there is no doubt that the court's Section 188 analysis was well-founded, as there was neither a choice of law clause in the contract nor an applicable presumptive section,¹⁰³ the court rested its holding in favor of the law of Washington prematurely on the Section 188 factors without even referencing Section 6.¹⁰⁴

At this point it must be emphasized that, regardless of whether the Alaska Supreme Court reached the same results that would have been achieved through proper applications of the Second Restatement, the court's misinterpretations and misapplications in the two above cases establish questionable precedent for future decisions and generate confusion among lower courts and practitioners about how the sections of the Second Restatement are meant to be applied. To avoid such confusion and to develop a more coherent and analytically consistent method of applying the

94. *See id.*

95. *See id.*

96. *See id.* at 453 n.9.

97. *See id.*

98. 904 P.2d 1221 (Alaska 1995).

99. *See id.* at 1227.

100. *See id.* at 1223.

101. *See id.* at 1227.

102. *See id.*

103. *See id.*

104. *See id.*

Second Restatement in the future, Alaska courts must understand how to administer properly the three-tiered structure of the Second Restatement.

a. *Mistake 1: The Failure To Use the Presumptive Sections and Section 6.* One of the few things that is made clear by the Second Restatement is that the presumptive sections and Section 6 are both vital aspects of a choice of law analysis. However, as a result of the two aforementioned Alaska Supreme Court cases, Alaska practitioners and lower courts may be left confused as to the role of these important sections. In order to interpret the Second Restatement more accurately, courts should consider two important points. First, there can be no doubt that the Second Restatement contains presumptive sections for a reason. If the presumptions contained in them are displaced by later analyses under Section 6, courts should not omit this important information from its opinions, but instead should go through the analytical motions so as to make the omission clear.¹⁰⁵ Second, courts must realize that the general factors listed in Sections 145 and 188 are directed to be used “in applying the principles of § 6.”¹⁰⁶ That is, courts must conduct a Section 6 analysis regardless of whether they begin with a presumptive section or a general area of law section. It is simply improper for courts to engage solely in a Section 145 or Section 188 analysis, as the factors listed in these sections are interdependent with those listed in Section 6.

b. *Mistake 2: The Proper Role of The General Area of Law Sections: Sections 145 and 188.* Given the focus that the *DeHaviland* court placed on Section 145, it appears that the Alaska Supreme Court will incorrectly use the factors listed in general area of law Sections 145 and 188 even when one of the presumptive sections applies. While the Second Restatement does not give any explicit guidance concerning the propriety of utilizing the general area-of-law sections when one of the presumptive sections also applies, such a practice seems inconsistent with the language em-

105. Other courts similarly have failed to apply an applicable presumptive section. See, e.g., *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1000-02 (Wash. 1976) (overlooking Section 175 in a wrongful death case and instead applying Sections 145 and 6); *Mitchell v. United Asbestos Corp.*, 426 N.E.2d 350, 355 (Ill. App. Ct. 1981) (ignoring Section 175 in wrongful death case and relying on Sections 145 and 6).

106. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(2), 188(2) (1971) (emphasis added).

bodied in the Second Restatement's provisions and comments for three reasons.¹⁰⁷

First, the commentaries to Sections 145 and 188 strongly suggest that the presumptive sections were intended to replace rather than complement an analysis of the factors listed in Sections 145 and 188.¹⁰⁸ For example, the commentary to Section 145 states that "[t]he rule of this Section states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality [The following presumptive sections deal] with particular torts as to which it is possible to state rules of greater precision."¹⁰⁹ The commentary to Section 186 similarly provides that "Sections 187-188 set forth general rules for determining the state of the applicable law. The following presumptive sections describe various types of contracts for which it is possible, on the basis of existing knowledge, to lay down more precise rules for determining the state of the applicable law."¹¹⁰ The language of these comments suggests that the presumptive sections were promulgated for specific types of torts and contracts for which more pre-

107. Courts across the country have struggled with this concept. Unsure about how to proceed, most courts have preferred to err on the side of being over- rather than under-inclusive, and accordingly have analyzed all three of the Second Restatement's tiers. *See, e.g., Collins v. Trius, Inc.*, 663 A.2d 570, 572-73 (Me. 1995) (citing Sections 6, 145, and 146 before holding the Canadian law of damages to apply to claims arising from an auto accident occurring in Maine in which all parties were Canadian domiciliaries); *Cosme v. Whittin Mach. Works, Inc.*, 632 N.E.2d 832, 834-836 (Mass. 1994) (citing Sections 146, 145 and 6 before determining that Massachusetts law applies); *Gilbert Spruance Co. v. Pennsylvania Mfrs. Assoc. Ins. Co.*, 629 A.2d 885, 888-89 (N.J. 1993) (describing Section 193 as providing guidance on how to apply the Section 188 factors); *Bates v. Superior Court*, 749 P.2d 1367, 1369-72 (Ariz. 1988) (en banc) (utilizing Sections 146, 145 and 6 before determining that the Section 146 presumption applied).

However, a few recent courts have obtained a better understanding of the Second Restatement's three tiered system and have realized that the presumptive sections replace, rather than complement, the general area of law sections. *See, e.g., General Ceramics Inc. v. Fireman's Fund Ins. Cos.*, 66 F.3d 647, 655-59 (3d Cir. 1995) (applying New Jersey's choice of law principles as "embraced by . . . *Gilbert Spruance*," but differing its approach by proceeding directly from Section 193 to a Section 6 analysis without stopping en route to cite the Section 188 factors); *Value House, Inc. v. MCI Telecomms. Corp.*, 917 F. Supp. 5, 6-7 (D.D.C. 1996) (holding that Section 148, the presumptive section for fraud and tortious misrepresentation, applies to a claim of negligent misrepresentation "*rather than* Section 145" (emphasis added)).

108. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 cmt. a, 188 cmt. a (1971).

109. *Id.* § 145 cmt. a.

110. *Id.* § 186 cmt. a.

cise applications of the Section 145 or 188 factors could be made. Consequently, it would be erroneous for courts to reinvent the wheel and potentially disrupt the “precise” determinations already made by the ALI.

Second, the plain language of the presumptive sections directly refers the reader to the factors of Section 6 without providing any reference to the factors considered in Sections 145 or 188.¹¹¹ In this respect, it is important for courts to understand the subtle distinction between the true “presumptive” sections contained in Title B of the chapters on tort¹¹² and contract,¹¹³ and the “specific issue” sections contained in Title C.¹¹⁴

The true presumptive sections operate as particular applications of the Section 145 or 188 factors for specific categories of torts and contracts.¹¹⁵ Because these presumptive sections have already taken the factors listed in Sections 145 or 188 into account in creating their presumptions, the Second Restatement directs courts to advance directly to Section 6.¹¹⁶

In contrast to the true presumptive sections are the specific-issue sections. These sections are contained in a separate title of the Second Restatement and apply to *certain issues* that arise in tort or contract.¹¹⁷ For example, they apply to the standard of care in torts,¹¹⁸ or the capacity to enter into a contract,¹¹⁹ rather than to *specific types* of torts or contracts. Instead of directing courts to Section 6, these sections expressly refer the courts back to the factors listed in Sections 145 and 188.¹²⁰ Confusion arises because many of the specific-issue sections advise courts about how the consideration of Section 145 or 188 factors often will affect the

111. *Id.* § 175.

112. *See id.* §§ 146-49, 151-52, 154-55 (labeled “Particular Torts”).

113. *See id.* §§ 189-97 (labeled “Particular Contracts”).

114. *See id.* §§ 156-74 (labeled “Important Issues”), 198-207 (labeled “Particular Issues”).

115. *See, e.g., id.*

116. *See, e.g., id.* §§ 146 (applying to personal injury cases), 196 (applying to contracts for the rendition of services). Both sections refer to Section 6 and omit any reference to the general area of law sections.

117. *See id.* tit. C, Introductory Note at 477.

118. *See id.* § 157.

119. *See id.* § 198.

120. *See id.* §§ 156-74, 198-205, 207. The one exception is Section 206, which definitively states that details of performance are determined by the law of the place of performance. *See id.* § 206.

court's ultimate determination.¹²¹ The suggestive language contained in these specific issue sections, however, stops well short of constituting a true presumption of the types contained in the presumptive sections. Compare the direct operative language of Section 146, the presumptive section for personal injury issues stating that "the local law of the state where the injury occurred *determines the rights and liabilities of the parties*,"¹²² with the more precatory language of Section 164, a specific issue section stating that, when dealing with contributory fault issues, "*the applicable law will usually be the local law of the state where the injury occurred*."¹²³ As a result of this difference in language, courts should view the guidance of the specific issue sections as providing nothing more than added information as to how Section 145 and 188 factors "usually" affect the analysis.¹²⁴ In the end, the important distinction is that the presumptive sections, having already taken the factors listed in the general area of law sections into account, direct the courts to advance to Section 6 without stopping en route to reconsider the Section 145 or 188 factors. In contrast, the specific-issue sections have not pre-balanced the factors listed in Sections 145 or 188, and as a result, direct courts to consider the Section 145 or 188 factors before conducting a Section 6 analysis.

Third, the specific presumptive section pertaining to fraud and tortious misrepresentation, Section 148, suggests that courts are expected to move directly from a presumptive section to a Section 6 analysis, rather than stopping en route for an analysis of the factors listed in Sections 145 or 188.¹²⁵ Specifically, Section 148(2) provides its own lengthy list of contacts to consider, many of which relate to or are even repetitive of the general factors listed in Section 145:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,

121. See *id.* § 156(2) ("The applicable law will usually be the local law of the state where the injury occurred."); see also *id.* §§ 157(2), 158(2), 159(2), 160(2), 162(2), 164(2), 165(2), 166(2), 169(2), 172(2), 198(2), 199(2), 202(2).

122. See *id.* § 146 (emphasis added).

123. See *id.* § 164(2) (emphasis added).

124. The same "advisory" interpretation should be given to Sections 150, 153 and 188(3), as they comment on the "usual" results of a Section 6 analysis. See *id.* §§ 150(2) and (3), 153, 188(3).

125. See *id.* § 148.

- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.¹²⁶

Close analysis shows that this list largely is based upon the factors listed in Section 145; indeed, one factor is an exact replica of a Section 145 factor. Specifically, Section 148 factors (a) through (c) are clearly related to Section 145's focus on the location where the injury occurred,¹²⁷ and where the conduct causing the injury occurred,¹²⁸ while Section 148 factor (d) is a verbatim replica of the factor listed in Section 145(2)(c).¹²⁹ The only reasonable explanation for such replication is that the drafters intended for courts to advance directly from the presumptive section to a Section 6 analysis without detouring to the general area of law sections for a repetitive review.

c. *A New Strategy for Alaska Courts.* Because the most sensible reading of the Second Restatement utilizes the factors listed in the presumptive sections and Section 6, and treats the presumptive sections as particularized applications of the general factors listed in Sections 145 and 188, Alaska courts should establish a new overall strategy for analyzing choice of law issues. Under its new strategy, Alaska's choice of law approach under the Second Restatement should be broken down into two distinct analyses. The determining factor as to which analysis to apply would depend on whether or not a presumptive section is triggered by the specific facts set forth before the court. If one of the presumptive sections applies, the court should begin with the applicable presumptive section and then move to a Section 6 analysis to determine whether that presumption is displaced, without stopping en route to re-analyze the factors listed in Sections 145 and 188. However, if the particular set of facts before the court does not trigger the application of any presumptive section, the court should consider the factors listed in the applicable general area of law section (Section 145 if in tort, or Section 188 if in contract) in conducting its Section 6 analysis.

2. *Confused Federal District Court Opinions.* The above decisions of the Alaska Supreme Court are not the only cases clouding the choice of law field for Alaska practitioners and lower

126. *Id.* § 148(2).

127. *See id.* § 145(2)(a).

128. *See id.* § 145(2)(b).

129. *See id.* § 145(2)(c).

courts. Adding to the confusion have been district court opinions from within the Ninth Circuit attempting to apply Alaskan choice of law methodologies. In these opinions, the federal court makes its own determinations as to how Alaska courts would decide certain issues. Many of these determinations, however, are contrary to the spirit, if not the letter, of the Second Restatement. As a result, Alaska courts should consider these federal decisions carefully before deferring to their statements as to what they have deemed to be the status of Alaskan choice of law.

a. *Robinson v. U-Haul Company*. In *Robinson v. U-Haul Co.*,¹³⁰ the district court was faced with a choice of law issue involving contacts with four different states.¹³¹ The court characterized the plaintiffs as former Florida domiciliaries on their way to their future domicile in Alaska.¹³² The defendant, a Florida company, had rented plaintiffs a tow dolly for their journey.¹³³ During their trip, plaintiffs were involved in an accident in the Yukon Territory of Canada.¹³⁴ Plaintiffs alleged that the accident, and the personal injuries for which they sought damages, directly resulted from the failure of their tow dolly, which was manufactured in Iowa.¹³⁵ Defendant requested that the court apply Alaska law, which had abolished joint and several liability, while plaintiffs filed an opposition requesting the court to apply Florida law, which continued to recognize joint and several liability.¹³⁶

130. 785 F. Supp. 1378 (D. Alaska 1992).

131. *Id.*

132. *See id.* at 1379. This legal conclusion is questionable given the guidance of the Second Restatement, which declares that “a domicile once established continues until it is superseded by a new domicile.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971). Furthermore, in the illustrations to Section 19, the specific example is given in which: “A, having a domicile in state X, decides to make his home in state Y. He leaves X and is on his way to Y but has not yet reached Y. His domicile is X.” *Id.* § 19 illus. 4. As a result, even though the plaintiffs in *Robinson* were in transit, they clearly would have been considered domiciliaries of Florida under the Second Restatement at the time the *cause of action* arose. Plaintiffs, however, may have been considered Alaska domiciliaries at the time the *issue was adjudicated*. Whether the court should look to the facts at the time the cause of action arose, or instead, at the time the issue is adjudicated, is discussed in the section of this Article on “freezing.” *See infra*, notes 159-64 and accompanying text.

133. *See Robinson*, 785 F. Supp. at 1378-79.

134. *See id.* at 1378.

135. *See id.* at 1378-79.

136. *See id.* at 1378.

Purporting to apply Alaska's choice of law methodology,¹³⁷ the district court determined that the laws of Alaska were applicable to the joint and several liability issue.¹³⁸ Of importance to Alaskan courts and practitioners, however, is not the outcome, but rather the fact that the district court committed a number of errors in reaching its conclusion.

i. Erroneous Interpretation of a Forum-Law Bias. The *Robinson* court's first error was its creation of a forum-law bias in Alaska's choice of law methodology that, until this point, had never been associated with Alaska law.¹³⁹ Specifically, the court stated that "[w]hile it is true that the Alaska Supreme Court cites the [Restatement Second] favorably, it seems clear that the Alaska courts will apply the law of Alaska unless there is a substantial reason to apply the law of another state."¹⁴⁰ What is clear, however, is that Alaska opinions never have suggested such a forum-law bias. In support of its interpretation of Alaska law, the district court cited footnote nine of *Ehredt v. DeHavilland Aircraft Co. of Canada*,¹⁴¹ a footnote that does nothing more than provide an exact quotation of Section 6 of the Second Restatement, which notably contains no such forum-law bias.¹⁴²

One possible explanation for the *Robinson* court's misinterpretation of Alaska law is that the court mistakenly believed that a forum-law bias was called for by Section 6. This explanation is evidenced by the court's statement during its Section 6 analysis that "applying the law of the forum in all but the rare case will serve the interest of certainty, predictability, and uniformity of result and will always provide ease in the determination and application of the law to be applied."¹⁴³ This quotation is a clear reference to Section 6(2) factors (f) and (g), which direct the court to factor such considerations into its analysis.¹⁴⁴ However, if the court relied on this language of Section 6 to interpret a forum-law bias into the Second Restatement, it clearly placed undue emphasis on subsections (f) and (g), as they are but two of seven different factors listed in Section 6 that are meant to be balanced against the pre-

137. Federal district courts exercising jurisdiction based on diversity of citizenship apply the choice of law rules of the state in which they sit. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

138. See *Robinson*, 785 F. Supp. at 1379.

139. See *id.*

140. *Id.*

141. 705 P.2d 446 (Alaska 1985), cited in *Robinson*, 785 F. Supp. at 1379.

142. See *DeHavilland*, 705 P.2d at 453 n.9 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971)).

143. See *Robinson*, 785 F. Supp. at 1379.

144. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f)-(g) (1971).

sumptions and factors listed in other sections of the Second Restatement.¹⁴⁵ For example, as discussed above, Section 146 establishes a presumption in favor of applying the law of the place where the injury occurred, regardless of whether that jurisdiction happens to be the forum.¹⁴⁶ Section 6(2)(c) expressly requires courts to consider the relevant policies of involved *non-forum* states and the relative interests of those states in the determination of the particular issue.¹⁴⁷ Reading a forum-law bias into the Second Restatement that is rebutted only in the “rare case in which the connection between Alaska and the parties is so remote that the law of some other place must be applied in order to conform to the reasonable expectations of the parties, or to avoid injustice,”¹⁴⁸ as the *Robinson* court has done, places undue emphasis on subsections (f) and (g) and effectively reads the Second Restatement’s presumptions and other factors out of the treatise.

A second possible explanation for the district court’s erroneous interpretation is that it was based on a prior Ninth Circuit case, *Jenkins v. Whittaker Corporation*.¹⁴⁹ In that case, the court of appeals interpreted a similar forum-law bias into the law of Hawaii.¹⁵⁰ In *Jenkins*, however, the court of appeals took notice of a Hawaii Supreme Court decision that was particularly conspicuous in the sense that it went to extreme lengths to reject the guidance of the Second Restatement and other modern choice of law theories in order to apply Hawaiian law, rather than the law of the parties’ domicile, to an interspousal immunity issue.¹⁵¹ While the court of appeals had adequate grounds for reading a forum-law bias into

145. See *id.* § 6(2)(a)-(g). As the Supreme Court of California noted, “[e]ase of determining applicable law and uniformity of rules of decision . . . must be subordinated to the objective of proper choice of law in conflict cases, *i.e.*, to determine the law that most appropriately applies to the issue involved” *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) (en banc) (citation omitted).

146. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971) (“In 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 under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.”).

147. See *id.* § 6(2)(c).

148. *Robinson*, 785 F. Supp. at 1379.

149. 785 F.2d 720 (9th Cir. 1986).

150. See *id.* at 724-25.

151. See *id.*; see also *Peters v. Peters*, 634 P.2d 586, 591-95 (Hawaii 1981); Smith, *supra* note 11, at 1067 (noting that *Peters* specifically rejected the Second Restatement, as well as several other modern approaches, in reaching its conclusion).

this astonishing Hawaiian decision, no such justification is evidenced in Alaska case law. Quite the opposite, Alaska's commitment to the Second Restatement, which contains no such forum law favoritism, shows that it clearly is improper to transpose such a reading into Alaska's choice of law methodology.

ii. Failure to Apply Section 171 or Section 145. A second mistake committed by *Robinson* involved failure on two fronts. First, it failed to apply specific issue Section 171,¹⁵² which directs courts to Section 145 to determine the controlling law when faced with joint and several liability issues in tort.¹⁵³ Second, it failed to proceed with a Section 145 analysis before applying the factors listed in Section 6.¹⁵⁴ However, rather than taking the Section 145 factors "into account in applying the principles of § 6,"¹⁵⁵ as directed by the Second Restatement, the court merely proffered the conclusory statement: "Evaluating this case in light of the Restatement (Second) of Conflicts of Laws § 145 and § 6 (1971), I conclude that Alaska law rather than Florida law should govern."¹⁵⁶ Nowhere did the court elaborate on its supposed "evaluation" of Section 145 or even refer to any of the factors listed in Section 145, many, if not all, of which implicated jurisdictions *other than* Alaska.¹⁵⁷ However, instead of acknowledging these factors and

152. See *supra* notes 107-129 and accompanying text for a discussion of the specific issue sections. It should be noted that, although Section 171 is a specific issue section, it is not one of the many specific issue sections that remark on how an analysis of the general area of law section will "usually" end up. Instead, it refers the court directly to a Section 145 analysis without first attempting to predict the end result of that analysis.

153. Section 171 states that "the law selected by application of the rule of § 145 determines the measure of damages." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971). Furthermore, comment e and illustration 1 to Section 171 both specifically state that choice of law issues concerning joint and several liability are to be determined by the law of Section 145. *Id.* § 171, cmt. e and illus. 1.

154. Although the plaintiffs' ultimate claim was for personal injury (a Section 146 issue), the particular issue before the court involved joint and several liability. Because courts are directed to analyze each choice of law issue individually, a proper choice of law analysis in this case would have been conducted under Section 171 rather than Section 146. See *supra* note 47 and accompanying text

155. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

156. *Robinson*, 785 F. Supp. at 1379.

157. For example, Section 145(2)(a) directs courts to the place where the injury occurred (the Yukon Territory); Section 145(2)(b) implicates the place where the conduct causing the injury occurred (probably Iowa, where the tow dolly was manufactured, or Florida, where it was supposed to be kept in proper operating condition, but, in any event, not Alaska since the accident occurred prior to plaintiff's arrival in Alaska). Section 145(2)(c) refers to the domicile, residence and place of business of the parties (in defendant's case, Florida and in plaintiffs' case,

taking them into account during its Section 6 analysis, the court neglected any meaningful discussion regarding the relevance of the Section 145 factors, and proceeded to base its entire analysis on its fabricated forum-law bias and its erroneous attempt to coordinate the specific facts of the case with several of the factors listed in Section 6.¹⁵⁸

iii. The “Freezing” Issue: A Call for Guidance from Alaska Courts. A third point to emphasize is that the *Robinson* court did not “freeze” the factual situation at the time the cause of action arose. In other words, the district court did not appear to analyze the choice of law issue according to the facts that existed at the time of the alleged commission of the tort, but instead seemed to take into consideration facts that occurred after the alleged commission of the tort. This is evidenced by the court’s characterization of the plaintiffs as former Florida domiciliaries¹⁵⁹ and its emphasis on the plaintiffs’ post-accident contacts with Alaska.¹⁶⁰ While this approach was not necessarily erroneous, because the district court was forced to make this decision without the benefit of Alaskan precedent, Alaska courts should re-examine the issue.

The importance of “freezing” should not be underestimated. For example, if the district court had frozen the parties in place at the time of the alleged tort, the plaintiffs would have been treated as Florida domiciliaries.¹⁶¹ In addition, the plaintiffs may not have been considered Alaska *residents* for Section 145(2)(c) purposes, since they had not yet reached their destination. If this were the case, other than being the forum state, Alaska would not have pos-

arguably Florida as well – at least in terms of domicile). Section 145(2)(d) refers courts to the place where the relationship, if any, between the parties is centered (presumably Florida, as the place where the tow dolly was rented by defendant to plaintiffs).

158. *See Robinson*, 785 F. Supp. at 1379 (concocting a phantom forum-law bias and generally referring to the language contained in Section 6(2) factors (b) through (g)).

159. *See Robinson*, 785 F. Supp. at 1379. Under the Second Restatement, plaintiffs were clearly Florida domiciliaries at the time the cause of action arose. *See supra* note 132. Plaintiffs could properly be considered former Florida domiciliaries only when they had arrived, and acquired a new domicile, in Alaska. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 & illus. 4 (1971). This did not occur until after the cause of action arose.

160. *See Robinson*, 785 F. Supp. at 1379 (noting that plaintiffs had, since the accident, become domiciled in Alaska and emphasizing, as part of the court’s Section 6 analysis, plaintiffs’ post-accident connections with Alaska and the fact that they had abandoned their Florida residence).

161. *See supra* note 132.

sessed any contacts with the parties or disputed issue and its law would likely not have been applied.¹⁶²

While the Second Restatement fails to provide any guidance on the “freezing” issue because of a lack of authority, Alaska may wish to join the majority approach, which freezes the parties in their respective positions at the time the cause of action arises so that facts transpiring after the cause of action arises are not considered by the court in its choice of law analysis.¹⁶³ The purpose behind such a rule is, first, to prevent parties from taking deliberate actions after a cause of action arises for the purposes of bettering their chances in litigation, and, second, to allow parties to take actions in good faith after the cause of action arises without diminishing their chances of success in litigation that is based entirely on past occurrences.¹⁶⁴ Finally, because the *Robinson* court acted without relevant Alaska precedent, Alaska courts should re-evaluate the freezing issue and make their own determination as to its role in Alaska’s choice of law methodology.

b. *Carriere v. Cominco Alaska, Inc.* Approximately one year after *Robinson*, a district court sitting in Alaska was asked to apply Alaska law to a choice of law issue involving the proper apportionment of damages. In *Carriere v. Cominco Alaska, Inc.*,¹⁶⁵ the plaintiff, a Louisiana domiciliary, was injured while working in Alaska when he was struck by a beam dropped from an overhead crane.¹⁶⁶ Plaintiff alleged that the accident was a result of the supply of faulty gas to the crane and brought negligence and strict liability claims against the Alaska corporation that had supplied the fuel.¹⁶⁷ Defendant alleged that other parties (such as the original supplier of the fuel, the fuel distributor, the quality control monitor, the owner of the construction project and plaintiff’s own em-

162. In such a case, not only is it unlikely that Alaska law would possess the “most significant relation” to the parties and to the disputed issue under the Second Restatement, but in addition, the application of Alaska law would face serious constitutional impediments. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-13 (1981) (declaring that, if the forum state possesses only insignificant contacts to the parties and the occurrence or transaction, application of its law is unconstitutional on either or both Due Process and Full Faith and Credit grounds).

163. See *Gore v. Northeast Airlines*, 373 F.2d 717 (2d Cir. 1967); *Rice v. Dow Chem. Co.*, 875 P.2d 1213 (Wash. 1994) (en banc); *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967).

164. See Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 143-144 (1994) (describing the holding in *Robinson* as a “punishment for not forum shopping”).

165. 823 F. Supp. 680 (D. Alaska 1993).

166. See *id.* at 681.

167. See *id.*

ployer) potentially were concurrent tortfeasors. Defendant moved for a ruling from the court that would allow the jury to allocate fault among the concurrent tortfeasors or, in the alternative, for leave to file a third-party complaint naming all the potentially concurrent tortfeasors as defendants.¹⁶⁸ The court then engaged in a choice of law analysis to determine whether it should apply the law of Alaska or Louisiana, without ever discussing the content of those laws or whether the laws even differed on the issue of liability.¹⁶⁹

As was the case in *Robinson*, the *Carriere* court failed to begin with specific-issue Section 171, which directs courts to Section 145 to determine the controlling law when faced with issues involving the apportionment of damages in tort.¹⁷⁰ This time, however, the court also erred by beginning with a Section 146 analysis,¹⁷¹ forgetting the important directive of the Second Restatement to conduct a choice of law analysis for each individual disputed issue, not to the case as a whole.¹⁷² Although the plaintiffs' ultimate claim was for personal injury (to which Section 146 is applicable), the particular claim before the court involved the apportionment of damages (which is a Section 171 issue).¹⁷³ Because courts are directed to analyze each choice of law issue *individually*, a proper choice of law analysis in this case would not have involved Section 146, but rather would have taken the following approach: First, begun with Section 171; second, followed the directive of Section 171 to analyze the factors listed in Section 145; and, finally, considered the factors of Section 145 as part of a Section 6 analysis. Instead, the court moved from its Section 146 analysis to an analysis of the Section 145 factors in reaching its conclusion that Alaskan law would apply to the issue¹⁷⁴ (a movement that *would* have been correct had the court begun with Section 171, but, as this Article has argued, probably was incorrect under its own analysis that began with the application of Section 146).¹⁷⁵ However, it should be noted that, although the district court ignored Section 171, erroneously began with Section 146 and, for all intents and purposes, ignored those

168. *See id.* at 681-82.

169. *See id.* at 682-92.

170. *See supra* note 153.

171. *See Carriere*, 823 F. Supp. at 682.

172. *See supra* note 52 and accompanying text.

173. *See Carriere*, 823 F. Supp. at 681.

174. *See id.* at 682.

175. *See supra* notes 106-29 and accompanying text Section IV(D)(1)(b), (c).

factors listed in Section 6,¹⁷⁶ *Carriere* was an improvement over *Robinson* in the sense that the court seemed to abandon its earlier interpretation of Alaska law that called for a phantom forum-law bias.

In the end, *Robinson* and *Carriere* raise two major points. First, Alaska courts should not allow a federal court's erroneous analyses and mistaken interpretations of Alaska law to dictate Alaska's approach toward choice of law issues. Instead, Alaska courts should scrutinize the federal court's decisions and learn from the errors made in their analyses in an attempt to develop their own coherent body of law to govern the choice of law field. Second, these federal cases highlight the fact that, until Alaska courts better define their own choice of law approach, federal courts are likely to continue to misinterpret Alaska law in future adjudication.

V. CONCLUSION

Although Alaska unquestionably has adopted the Second Restatement's "most significant relationship" test for making choice of law determinations, this adoption has not provided Alaska with either a complete or coherent choice of law methodology. Not only is there a lack of an accepted norm for interpreting the complex and ambiguous provisions of the Second Restatement, but, both the Alaska Supreme Court and the United States District Court for the district of Alaska have generated additional confusion by handing down decisions that misinterpret the provisions of the Second Restatement as well as misapply Alaska case law. This state of uncertainty in the field is misleading to courts and practitioners who will need to understand in the future how the Second Restatement is to be applied in Alaska.

To avoid further ambiguity and confusion, Alaska courts should regroup and announce a new, more analytically sound methodology for interpreting the Second Restatement. While this is easier said than done, Alaska courts should abandon their current approach, in which the courts inconsistently apply the various tiers of the Second Restatement, and adopt a new method that employs one of two distinct analyses. The particular type of analysis used by the court in a given instance should depend on whether one of the Second Restatement's presumptive sections applies to the specific set of facts before the court. If a presumptive section is triggered, the court should advance directly from the presumptive

176. The court cited Section 6 only in a footnote, in which it merely quoted the factors listed in Section 6 without engaging in any discernable analysis. See *Carriere*, 823 F. Supp. at 682 n.1.

section to a Section 6 analysis. If a presumptive section is not triggered, the court should interpret the Section 6 factors in light of the considerations listed in the applicable general area of law section. Not only does such an approach provide Alaska courts with a choice of law methodology that is analytically consistent with the provisions and spirit of the Second Restatement, but it also provides future courts (state, as well as federal) and practitioners with some sense of structural guidance as to how the complex provisions of the Second Restatement are meant to be applied under Alaska law.

Only after this fundamental revision can Alaska courts begin to flesh out the best way to balance the various factors of the Second Restatement, and move on to grapple with the more subtle issues presented in this Article, such as the grouping approach and the freezing concept, to determine their respective places in Alaska's overall choice of law methodology.