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Choice of Law in Kentucky

John R. Leathers

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## Choice of Law in Kentucky

**By John R. Leathers***

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INTRODUCTION

It has been just over thirty years since Kentucky became one of the first American jurisdictions to formally reject vested rights¹ as its methodology for making choices of law, moving forward from that point into a new era of conflicts jurisprudence, free from the rigid strictures of the past. In that period, Kentucky state court appellate decisions have attempted to flesh out the methodology to be applied in the commonwealth. Federal trial courts and appellate courts, primarily in Kentucky or the Sixth Circuit but occasionally in other federal jurisdictions, have added their own interpretations of the Kentucky conflicts rules. What has emerged is far from a clear picture of the status of Kentucky choice of law, and that unclear picture is well exemplified by federal attempts to apply Kentucky law. The purpose of this Article is primarily descriptive: to compile the existing state and federal case law, organized into categories; to assist the Kentucky bench and bar in understanding the current state of affairs; and to make future choices. Before beginning the journey forward, it seems in order to take a brief look at Kentucky’s status prior to this modern era.

¹ For a detailed discussion of “vested rights” jurisprudence, see infra notes 2-16 and accompanying text.
I. CHOICE OF LAW PRIOR TO 1967

Prior to 1967, Kentucky (like virtually every other American jurisdiction) used vested rights as its conflicts or choice of law methodology.² Vested rights was the system embodied in the First Restatement of Conflicts,³ the brainchild of Joseph Beale. As a body of jurisprudence, it was typical of the rigid, territorialist thinking prevalent prior to the turn of this century. In addressing the issue of legislative jurisdiction,⁴ the system was the counterpart of the rigid control of judicial jurisdiction⁵ embodied in Pennoyer v. Neff.⁶

The First Restatement functioned simplistically. Legal issues were identified, typically by characterization. Thus, one species of tort case was wrongful death, one species of contract case was excuses for nonperformance, etc. Once an issue had been characterized, specific sections of the First Restatement identified which jurisdiction’s law controlled. Thus, a wrongful death claim was governed by the law of the jurisdiction in which the injury causing the death occurred.⁷ Contract issues were a bit more complex, with the law of the place of the making of the contract controlling “validity” issues⁸ and the law of the place of performance controlling “performance” issues.⁹

The central focus of vested rights was on territorial and temporal vesting. Thus, the rights and liabilities of parties involved in an automobile accident vested territorially in the jurisdiction where the accident occurred and vested temporally as well. It was thereafter the duty of any forum with judicial jurisdiction to enforce those previously vested rights, hence the name of the system. Vested rights was also conceptually rigid in that it was

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² "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).
³ See generally RESTATEMENT OF CONFLICT OF LAWS (1934).
⁴ As used in this Article, "legislative jurisdiction" is the ability of a state or country to control the outcome of a controversy on the merits.
⁵ As used in this Article, "judicial jurisdiction" is the ability of a state or country to serve as a forum for the litigation of a controversy.
⁷ See RESTATEMENT OF CONFLICT OF LAWS §§ 377-383. It was this application of the law of the place of the injury which gave rise to the system being frequently referred to as adopting the "lex loci" rule for torts.
⁸ See id. § 332.
⁹ See id. § 358.
a "jurisdiction selecting" approach. That is, all the substantive rights and liabilities of the parties were governed by the state identified by reference to the appropriate choice of law rule.\textsuperscript{10} The methodology was obviously more suited to the simplistic pleading and joinder provisions of common law or code systems, with their restrictions resulting in more narrow litigation than modern procedural systems.

By the 1960s, the vested rights doctrine was under severe academic criticism. The Second Restatement\textsuperscript{11} had been in draft stages since prior to 1950 and scholars such as Robert Leflar\textsuperscript{12} and Brainerd Currie\textsuperscript{13} had proposed alternative systems for making choices of law. Quite apart from its academic criticism, vested rights was also crumbling under the tendency of courts to avoid the choices which at first blush appeared dictated by the First Restatement. Thus, seemingly clear results were avoided by such devices as characterization\textsuperscript{14} or public policy veto.\textsuperscript{15} Unable to resist what

\textsuperscript{10} The procedural issues involved in litigation were governed by the law of the forum. See id. § 585. To the extent that obvious difficulties exist in differentiating "substantive" from "procedural" issues, the system was doomed to struggle with issues falling into the "twilight zone," wherein rules of law are somewhat substantive and somewhat procedural.

\textsuperscript{11} Professor Willis L.M. Reese was the Reporter and primary architect of this monumental work.

\textsuperscript{12} See ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 4 (4th ed. 1986) ("Ultimately, the basic choice-influencing considerations have to be identified and some system worked out for deliberately basing choice of law decisions upon intelligent analysis of those considerations.").

\textsuperscript{13} See BRAINERD CURRIE, ON THE DISPLACEMENT OF THE LAW OF THE FORUM, IN SELECTED ESSAYS ON THE CONFLICT OF LAWS 3, 75 (1964) (stating that "the normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course" and that "[t]he court should ordinarily depart from this procedure only at the instance of a party wishing to obtain the advantage of a foreign law").

\textsuperscript{14} See, e.g., Alabama Great S. R.R. Co. v. Carroll, 11 So. 803, 804 (Ala. 1892) (manipulating a seemingly obvious tort action by determining that the tort occurred in some state other than where the accident physically occurred); Grant v. McAuliffe, 264 P.2d 944, 946 (Cal. 1953) (holding that a seeming tort issue was really a procedural matter requiring application of the law of the forum); Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163, 164 (Conn. 1928) (holding that a seeming tort issue was really a contract issue).

\textsuperscript{15} This was a device which allowed a forum to refuse to apply the law which was dictated by its conflicts rules upon the grounds that application of that sister state's law was contrary to the public policy of the forum. See, e.g., Kilberg v. Northeast Airlines, 172 N.E.2d 526, 527-28 (N.Y. 1961).
had become the overwhelming weight of both scholarly and judicial opinion, vested rights began to crumble in the mid-1960s as courts chose to abandon the pretensions and sophistry of prior manipulations in favor of the various choice of law systems academically proposed.

Prior to 1967, Kentucky was firmly committed to vested rights as its choice of law methodology. At that point, Kentucky, faced with a classic fact pattern which revealed the shortcomings of vested rights as a conflicts system, chose to begin its departure from that prior choice of law system.

II. KENTUCKY DEPARTS FROM VESTED RIGHTS

In the 1967 decision *Wessling v. Paris*, the Kentucky Court of Appeals was confronted with what would have been a very clear choice of law question for vested rights courts. A Kentucky resident, while a passenger in an automobile driven by a Kentucky resident, was injured in an accident in Indiana during a trip which began and was to have ended in Kentucky. The passenger brought suit in Kentucky, personal jurisdiction over the driver being clearly available since she was a Kentucky resident.

Historically, the substantive rights and liabilities of the parties would have been governed by Indiana law since that was the place of the accident. Noting, however, that "no conflict of laws authority today agrees that the old rule shall be retained," the court of appeals applied Kentucky law to avoid the impact the Indiana guest statute would have had upon the passenger's ability to recover. Fearing the uncertainty that abandonment of vested rights might pose, the court chose to "limit the application of the rule to a very clear case, such as we have here. All of the interests involved (other than the fortuitous place of the accident) were Kentucky

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16 See, e.g., *Ansback v. Greensberg*, 256 S.W.2d 1, 2 (Ky. 1952) (applying the lex loci rule to an automobile accident case). All Kentucky conflicts decisional law prior to 1967 is consistent with application of the *First Restatement*.


18 Choice of law cases have long used the state of a party's domicile as an important connecting factor in making choice of law decisions. For purposes of this consideration, "resident" may be considered synonymous with "domiciliary."

19 *See Wessling*, 417 S.W.2d at 259.

20 A guest statute is a limitation upon the liability that the driver of a vehicle owes to passengers in that vehicle. Typically, a guest statute provides that the host/driver is not liable to the guest/passenger unless a heightened showing of negligence (i.e., "gross" or "willful and wanton") can be made.

21 *Wessling*, 417 S.W.2d at 260.
interests." Amazingly, an identical "clear case" was before the court of appeals within six months and the matter was held, as in Wessling, to be governed by Kentucky law rather than the Indiana guest statute.

The decision in Wessling was correct under any of the successor choice of law systems because, in the analysis of Professor Currie, the facts were easily identifiable as a false conflict. Kentucky had an obvious interest in seeing the Kentucky-domiciled passenger compensated, regardless of the location of the injury, and Indiana's guest statute had no sensible application to protect a non-Indiana driver operating a motor vehicle which was registered and insured in Kentucky. Indeed, the facts were so easy that the decision reached (in and of itself) gave no insight as to what would be Kentucky's successor to vested rights as a choice of law methodology.

The opinion contained, at various points, references to virtually every scholarly camp of the critics of vested rights. In what was the beginning of a pattern for torts cases, the court paid more than passing deference to the role of forum law, noting that "there is no other requirement that the law of a foreign state be applied in the local forum except the adopted policy of such forum." With such conflicting references to possible theoretical justifications, the outcome was a result which could have been justified under any of the suggested successors to vested rights, providing no insight into more difficult issues and even suggesting that vested rights might remain the methodology except for "very clear cases." Such an illusion of limitation was soon shattered, but the mystery of the methodology was not.

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22 Id. at 261.
23 See Story v. Burgess, 420 S.W.2d 548, 548 (Ky. 1967).
24 See generally CURRIE, supra note 13.
25 The court noted that "[w]hile it might be said that Indiana has a policy of protecting drivers on their highways from claims by passengers, surely this must extend no further than an interest in protecting Indiana residents or those who sue in Indiana courts." Wessling, 417 S.W.2d at 260.
26 The Second Restatement was specifically referenced. See id. (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379(a) (Tentative Draft No. 9, 1964)). A footnote to the opinion also contained references to the works of Dicey, Leflar, Stumberg, Morris, and Ehrenzweig. See id. at 260 n.1. Perhaps Professor Cavers should feel slighted at having been omitted, but the most significant omission is of Brainerd Currie since his seminal work is the source of the false conflicts analysis.
27 Id. at 260. This echoes the "local law theory" philosophy behind the works of Judge Learned Hand and Professor Walter Wheeler Cook. See David F. Cavers, The Two "Local Law" Theories, 63 HARV. L. REV. 822 (1950).
Within a year of Wessling, the court was confronted in Arnett v. Thompson with the mirror image of the Wessling facts. In Arnett, the Ohio husband-driver of an automobile was sued in Kentucky by his Ohio wife-passenger, who had been injured in an automobile accident in Kentucky. Had the litigation occurred in Ohio, the wife would have faced barriers to recovery both from the Ohio guest statute and from that state’s common law rule of interspousal immunity. Kentucky had no guest statute and had overruled the common law rule of immunity, so that it was possible for the wife to recover. The result in a Kentucky forum would have been easily discernible prior to Wessling; Kentucky was the situs of the accident and so its law would govern to allow the wife to recover. The departure from vested rights in Wessling, however, led the husband (or, more likely, his insurer) to argue that Ohio law should govern.

The appeal of such an argument is obvious. The result in Wessling was that the law of the domicile of the parties controlled, so that application of a similar principle in Arnett would result in application of Ohio law. Such an argument overlooks one crucial fact: while the fact patterns are the mirror image of each other, the law patterns are not, and Kentucky remains the forum in both. In the parlance of interest analysis, it has long been assumed that Arnett presented a true conflict. Surely the policies of Ohio to protect its drivers from ungrateful guests and to protect spouses from the domestic intranquility of litigation applied to the parties who were domiciled in Ohio. More difficult to identify is the Kentucky interest in these facts. One may at least argue that Kentucky’s liability-oriented policy was directed toward compensation of tort victims and, perhaps, deterrence of tortfeasors. Both such policies would be furthered by applying Kentucky law to an accident occurring in Kentucky, regardless of the domicile of the tort victim or the tortfeasor. Kentucky, as the place of the accident, was the key to activation of such a policy.

After reviewing various conflicts authorities, virtually all of which would have applied Ohio law, the court concluded that it would apply

28 Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968).
29 See id. at 112.
30 See id.
31 See id. at 113.
32 See id. at 112.
33 See id.
34 Professor Reese, Reporter for the Second Restatement, later confirmed that Ohio law was the correct result for Arnett. See Willis L.M. Reese, The Kentucky Approach to Choice of Law: A Critique, 61 KY. L.J. 368, 373 (1973).
Kentucky law.\textsuperscript{35} Seeming to expressly reject any aspect of “weighing” of contacts which might be implicit in the \textit{Second Restatement}, the court stated that “the conflicts question should not be determined on the basis of a weighing of interests, but \textit{simply on the basis of whether Kentucky has enough contacts to justify applying Kentucky law}.”\textsuperscript{36} Almost simultaneously, the court of appeals directed application of Kentucky law to a virtually identical Kentucky accident case where the litigants (husband-driver and wife-passenger) were from Indiana.\textsuperscript{37}

As had been the case in \textit{Wessling}, the \textit{Arnett} decision mentioned in passing a number of conflict of laws authorities.\textsuperscript{38} It must be taken that, as possible successors to vested rights in Kentucky, most of those were implicitly rejected by the result in \textit{Arnett}. Realistically, the holding in a decision is the result on the material facts, and one must pay at least equal attention to what a decision does as to what it says. Looking at the result in \textit{Arnett}, one can easily see that a choice of forum law has occurred in what is at best a true conflict fact pattern in which most of the prominent academic rivals would have chosen Ohio law. Indeed, the only major body of jurisprudence which would support the choice of Kentucky law is that of Brainerd Currie, who theorized that in a true conflict situation the duty of the forum was to apply its own law.\textsuperscript{39} Surely the language in \textit{Arnett} about applying Kentucky law if there are “sufficient” contacts echoes the Currie analysis that a forum should apply its own law when it has due process sufficient connections, although the due process sufficiency of Kentucky’s contacts may be more problematical than one might think at first glance.

The pattern of application of Kentucky law whenever possible continued in the final installment of the modern Kentucky state court tort choice of law cases, \textit{Foster v. Leggett}.\textsuperscript{40} There, a Kentucky resident was a passenger in an Ohio-registered and -insured vehicle driven by an Ohio

\textsuperscript{35} See \textit{Arnett}, 433 S.W.2d at 114.
\textsuperscript{36} Id. at 113 (emphasis added).
\textsuperscript{37} See \textit{Layne v. Layne}, 433 S.W.2d 116 (Ky. 1968).
\textsuperscript{38} See \textit{Arnett}, 433 S.W.2d at 113 (noting that many authorities were mentioned in a \textit{Wessling} footnote and also discussing the ideas of Judge Charles and Professor Sedler).
\textsuperscript{39} See \textit{CURRIE}, supra note 13, at 75. But cf. \textit{BRAINERD CURRIE, Justice Traynor and the Conflict of Laws, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, supra note 13, at 629, 688-89 n.236 (noting that at times it is preferable to define domestic interests with “restraints and moderation”).
\textsuperscript{40} \textit{Foster v. Leggett}, 484 S.W.2d 827 (Ky. 1972).
domiciliary who was employed in Kentucky and kept a room rented full-time in Kentucky, staying there on average two nights per week. The passenger was killed in an accident in Ohio and suit was brought in Kentucky, being met with a defense based upon the Ohio guest statute. The difficulty of Kentucky applying its law to the merits of the litigation can easily be seen just by considering the personal jurisdiction problem which leaps from the facts. No stretch of the Kentucky long arm statute would have allowed personal jurisdiction over the Ohio resident for a claim arising from an accident in Ohio. But for the fortunate circumstance of personal service upon the defendant while physically present in Kentucky, there would have been no personal jurisdiction. Once one perceives the virtual unavailability of judicial jurisdiction, it can clearly be seen that an exercise of legislative jurisdiction (i.e., application of Kentucky law to the merits) was a difficult proposition.

Revisiting Wessling and Arnett, the court noted that some might read those decisions to indicate that Kentucky utilized the “most significant contacts” analysis to apply Kentucky law to accidents in other states (Wessling) and the “sufficient contacts” analysis to apply Kentucky law to accidents in Kentucky (Arnett). The court expressly disclaimed any intention to do so. Noting again its desire to apply Kentucky law whenever Kentucky had “significant contacts—not necessarily the most significant contacts,” the court proceeded to apply Kentucky law. Again without citing any scholarly authority, the court stated that “[w]hen the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons.”

The decision may not contain scholarly citations, but surely that view of the role of the court in choosing forum law whenever possible is pure Brainerd Currie. Indeed, the pattern of Wessling, Arnett, and Foster is classic Currie: one false conflict with only forum policies implicated and two true conflicts all lead to the same result, which is application of

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41 See id. at 827-28.
43 See Foster, 484 S.W.2d at 829.
44 Id.
45 Id.
46 See CURRIE, supra note 13, at 75.
47 Foster is a true conflict because Kentucky has an interest in seeing the survivors of its domiciliary compensated for her death, wherever it occurred. Ohio law has an interest because its guest statute would serve to protect both its
forum law. Indeed, the criticism of the *Foster* result in the dissent of Justice Reed echoes the classic criticism of Currie's choice of law system: that it encourages forum shopping, an easily indulged pastime in the era of modern long arm jurisdiction.\(^4\) In a very real sense, Currie's pro-forum system (brilliant as it may be in its theoretical analysis) actually balkanizes choice of law and is the antithesis of a true choice of law system because its result is automatic and mindless in the only fact pattern worth deciding—the true conflict.

Whatever one may think of the intellectual soundness of the group, this trilogy of Kentucky Court of Appeals tort conflicts decisions sets the stage for the modern choice of law era in Kentucky. Their language and results cast shadows throughout both Kentucky's non-tort conflicts cases and the federal cases which have attempted to apply Kentucky's choice of law rules.

### A. The Contracts Experience of Kentucky

After all the major Kentucky tort choice of law cases in the modern era had been decided, the Kentucky Supreme Court was confronted with fact patterns requiring a choice of law on contract issues. Surprisingly, the treatment of those cases was (on the surface at least) far different from that afforded the tort cases.

In 1977, the Kentucky Supreme Court addressed issues relating to uninsured motorist coverage under an automobile insurance policy in *Lewis v. American Family Insurance Group*.\(^4\) The Indiana-domiciled driver and passenger of a vehicle which was registered and insured in Indiana were involved in an accident in Kentucky with a vehicle driven by a Kentucky-domiciled uninsured driver. They filed suit in Kentucky against the uninsured driver and American Family Insurance Group, which allegedly had uninsured motorist liability on two separate policies applicable to the vehicle in which they were riding. The decision lacks discussion as to whether there was in fact any difference between the law of Indiana and Kentucky regarding liability under the two policies but proceeds to apply Indiana law.\(^5\)

Prior to *Lewis*, there was Kentucky authority for the proposition that Indiana law should have governed, with that authority coming from the domiciliary driver and his insurer.

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\(^4\) See *Foster*, 484 S.W.2d at 830-31 (Reed, J., dissenting).

\(^4\) Lewis v. American Family Ins. Group, 555 S.W.2d 579 (Ky. 1977).

\(^5\) See *id.* at 581.
vested rights result in cases like *Fry Bros. v. Theobold*. That would have been a standard result in the vested rights era since such disputes were governed under the *First Restatement* by the law of the place of the making of the contract. In *Lewis*, the court stated that "[s]uch a mechanical approach is no longer favored." The court cited with favor the "most significant relationship test" of the *Second Restatement* and, in particular, that section of the *Second Restatement* applicable to insurance contracts. Based upon the conclusion that Indiana had the most significant relationship, its law was applied.

In fact, there were some modern era cases supporting the result in *Lewis*, one of which was cited by the court and one of which was not. Although decided in the modern era of conflicts in Kentucky, neither of those cases had cited even the slightest authority for their conclusion that the law of states other than Kentucky applied to the fact patterns. Given the propensity for Kentucky law evident from the tort cases, the failure to apply Kentucky law is surprising. Indeed, most surprising about those two cases and *Lewis* is that all three reach a result quite unlike the tort predecessors—they apply the law of another state to the merits even though Kentucky had judicial jurisdiction.

That result is less surprising, however, when one considers that what is conspicuously absent from *Lewis* is even a hint that the policy of any state other than Indiana was implicated in the dispute. With no identification of Kentucky law having been different from Indiana's, one cannot even conclude for certain that there was a conflict in the two states' laws. Thus, it is difficult to verify that Indiana had the most significant relationship when no one else's relationship appears to have had any bearing on the case. In reviewing the result, one must recall that the dispute was not between the uninsured Kentucky driver and the Indiana residents but was merely between those Indiana residents and their own insurer. It is difficult to see how Kentucky could have had any interest in those facts.

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51 Fry Bros. v. Theobold, 265 S.W. 498 (Ky. 1924).
52 *See* RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).
53 *Lewis*, 555 S.W.2d at 581.
54 *See id.* at 582 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971)).
55 *See id.*
56 *See* Allstate Ins. Co. v. Napier, 505 S.W.2d 169 (Ky. 1974).
58 *See Lewis*, 555 S.W.2d at 581.
The lack of a Kentucky interest is so dramatic, indeed, that any attempt to apply Kentucky law to affect the outcome of the litigation on the merits almost certainly would have violated due process. Viewed thusly, the case talks approvingly of the Second Restatement but may actually present a false conflict in which Indiana is the only interested jurisdiction. Application of Indiana law under those circumstances is almost certainly the correct result. The language in Lewis being so different from that in the tort cases, however, presents some difficulties for analyzing Kentucky law. The case does stand for the clear proposition (as to contract cases, at least) that Kentucky will not invariably apply its own law simply because it has judicial jurisdiction.

The issue of the absence of a Kentucky interest was not posed in Breeding v. Massachusetts Indemnity and Life Insurance Co., in which Kentucky law was applied to a dispute arising from the death of a Kentucky domiciliary in Kentucky. In Breeding, the decedent had rented a vehicle from a Budget auto rental franchisee in Louisville. Along with the auto rental, the decedent purchased a policy for accidental death which provided coverage for an accidental death during the term of the rental whether or not related to the auto rental. The decedent then drowned in Kentucky, his death having been at least partially related to intoxication. The master policy, which had been issued to Budget’s franchiser in Delaware, contained both a choice of law clause in favor of Delaware law and an exclusion of coverage for any death “caused directly or indirectly by ... intoxicants.” Without addressing the problem posed by the choice of law clause, the Kentucky Supreme Court held that Kentucky law applied to override the exclusion because the decedent had not, as required

59 There is authority in the form of a plurality opinion of the United States Supreme Court that a state may constitutionally apply its own rule in such a circumstance. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981). Even that tenuous position, however, was founded upon two factual connections not present in Lewis: the forum as the place of employment of the injured party and a post-accident move to the forum by the claiming party. See id. at 304. Given the narrowness of the opinion when those grounds were present, I conclude that an attempt to apply forum law in the absence of such connections would be violative of due process.

60 Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982).

61 See id. at 718.

62 Id. (quoting policy language).

63 As will be seen infra, that sub silentio invalidation of the choice of law clause has not gone unnoticed in other Kentucky cases.
by Kentucky statute,64 been supplied with a copy of the policy which notified him of the exclusion.65

In reaching its decision, the supreme court (as it had in the prior tort cases and Lewis) recognized that mechanical deference to the law of the place of the delivery of the policy (which would have been the vested rights position) was no longer desirable. Rather, the court found that the choice of law should be based upon the “grouping of contacts doctrine,” with reference specifically to the Second Restatement.66 That methodology identified, the court then observed that Delaware did not have a significant relationship to the parties or the transaction but had “one that [was] tenuous at best.”67 Kentucky had the most significant relationship to insurance “purchased in Kentucky by a Kentucky resident from a Kentucky corporation” giving rise to a claim generated by that resident’s death in Kentucky.68

As with Lewis, the result is unquestionable. Again, however, it is far from clear that there was even a conflict. While Delaware law did not require that a copy of the policy be delivered to the insured to effectuate an exclusion,69 it appears that the master policy itself provided that such notification of coverage “shall be delivered to each insured.”70 Surely the duties of the insurer independently assumed by its own contract would prevail over the minimum requirements of Delaware statutes. Thus, the case could be characterized as a false conflict in which Kentucky was the only interested state or in which there was no different result posed by the law of the two states.

The modern era contract cases pose an interesting counterpoint to the modern era tort cases. The multiple references to the Second Restatement in Breeding appear to differ dramatically from the apparently straightforward rejection of the Second Restatement in Arnett and Foster. Furthermore, the application of non-Kentucky law in Lewis stands out dramatically. Nowhere do the contract cases echo the forum-oriented language seen in the tort cases or proclaim a desire to apply Kentucky law based on “sufficient” rather than “significant” contacts.

64 See K.R.S. § 304.18-080(2) (Michie 1970).
65 See Breeding, 633 S.W.2d at 720.
66 See id.
67 Id.
68 Id.
69 See DEL. CODE ANN. tit. 18, § 3542 (1953).
70 Breeding, 633 S.W.2d at 718 (quoting policy language).
While the language may differ, the contracts cases are similar to the tort cases in one highly important respect: Kentucky law was not applied in the face of what was clearly a false conflict (Lewis) and it is possible to view even Breeding as a false conflict with only Kentucky interested. Thus, the pattern may be the same: application of Kentucky law in every case in which there were sufficient contacts to do so. If one cares to make the issue more complicated and state that Breeding was a true conflict, still the pattern was not broken because the choice was to apply Kentucky law. Thus, one may look at what the cases (tort and contract) do, rather than what they say, to observe that Kentucky is choosing to apply its own law in every case in which it has an interest, even if it is not necessarily the most significant interest. Surely that is a result more theoretically attributable to Brainerd Currie than to the Second Restatement.\footnote{See CURRIE, supra note 13, at 75.} Despite that clear pattern, however, the Second Restatement language in the contract cases has served as a departure point for Kentucky choice of law decisions over the years.

The major modern era conflicts cases from the Kentucky Supreme Court thus appear themselves to display a "conflict" in language if not in result: the tort cases on their surface reject Second Restatement terminology in favor of what appears to be a Currie, due process-based approach; the contract cases cite approvingly to Second Restatement language but reach results which could be justified under the "sufficient contacts" analysis of the tort cases. Perhaps a better clue to what is going on in the choice of law methodology can be found in the other decisions by Kentucky's supreme court and court of appeals on other conflicts issues.

B. Decisional Developments After the First Wave of Modern Cases

Before attempting to discern a pattern from the modern Kentucky choice of law cases, it is to be hoped that the system shares a common trait of modern systems: that it is an "issue selecting" approach rather than a "jurisdiction selecting" approach as was vested rights. The simple difference between the two is that a modern choice may result in the law of one state controlling one issue in a case and the law of another state controlling some other, but still "substantive," issue. This "issue selecting" phenomenon is known by conflicts scholars as "depecage,"\footnote{See BLACK'S LAW DICTIONARY 436 (6th ed. 1990).} but there is no evidence in the Kentucky state court experience to demonstrate that Kentucky's system encompasses it. There is an instance in the federal

\footnote{See CURRIE, supra note 13, at 75.}
\footnote{See BLACK'S LAW DICTIONARY 436 (6th ed. 1990).}
system of such a duality of controls,\textsuperscript{73} and one must assume that such an approach will prevail in the state courts as well.

1. \textit{Choice of Forum Clauses}

Any conflicts case has, by definition, elements which cut across state or national boundaries. Thus, it is not unusual to see conflicts cases involve personal jurisdiction disputes as a threshold matter. In an attempt to solve that uncertainty, parties to written contracts will often insert "choice of forum clauses" by which a particular state is chosen as an appropriate forum for litigation of any disputes which may arise. The language of such clauses may vary, occasionally being couched in terms of an agreement that a particular state is the appropriate "venue" for litigation or that the parties submit themselves to the personal jurisdiction of a particular state. Occasionally, a particularly well drafted clause may use the artful terminology that the parties designate a particular state as the exclusive forum for any such disputes. In whatever format, such clauses cause the forum (whether the designated one or a nondesignated one to which a reluctant party has taken the litigation) to initially determine the clauses' validity.

Kentucky's court of appeals faced such a clause in \textit{Prudential Resources Corp. v. Plunkett}.\textsuperscript{74} In \textit{Prudential Resources}, a contracting party had ignored a forum selection clause in favor of Texas and had brought suit in Kentucky. The dispute involved the validity of an option to purchase a mineral lease to real property located in Kentucky.\textsuperscript{75} Kentucky (as the situs of the property) was an available forum, but the issue was whether it should so serve in view of a forum selection designating Texas as the proper forum. The court of appeals began by resolving any doubts as to whether a forum selection clause ousted Kentucky of jurisdiction to even address any dispute between the parties. Citing the \textit{Second Restatement}, the court held that such clauses did not oust other, nondesignated forums of jurisdiction.\textsuperscript{76} The court further noted, however, that the \textit{Second Restatement} mandated enforcement of such a clause unless "it is unfair or


\textsuperscript{74} Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97 (Ky. Ct. App. 1979).

\textsuperscript{75} See \textit{id.} at 98.

\textsuperscript{76} See \textit{id.} at 99 (citing \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 80 (1971)).
unreasonable." Since it appeared that none of the facts relating to negotiation and execution of the contract occurred in Kentucky, that one of the parties to the contract was a Texas resident, that the other party maintained offices in Texas, that there was no "overreaching" by either party, but that the agreement was the result of "arms length" bargaining, the court concluded that it was neither unfair nor unreasonable to enforce the clause as written. The action was thus dismissed to be refiled in Texas. While upholding the clause based on Second Restatement analysis, it is worthwhile to note that the court found that "Kentucky [had] a minimal interest in this lawsuit." 

A similar situation confronted the Kentucky Supreme Court almost twenty years later in Prezocki v. Bullock Garages, Inc. The Prezockis, who were residents of Kentucky, contracted with Bullock Garages (presumably a nonresident corporation) for construction, apparently in Kentucky, of a garage. Their form contract contained a choice of forum clause in favor of Illinois. The Prezockis filed suit in district court in Kentucky, but the action was dismissed pursuant to Bullock's motion based on the forum selection clause. Reiterating the prior reliance of Kentucky's court of appeals on section 80 of the Second Restatement, the supreme court noted that the record was insufficiently developed for a court to have decided whether enforcement of the clause would be unfair or unreasonable. The case was remanded to develop a factual record on which to judge whether the clause was unfair or unreasonable.

Given the consumer-driven nature of the facts and the inclusion of the clause in what was apparently a form contract, it is certainly possible that an ultimate determination of unfairness to the Kentucky residents could have been made. Harking back to language in Prudential, one may also speculate that Kentucky's interest in applying its own law to allow recovery for its damaged residents arising from Kentucky conduct was likely to play a role in the ultimate outcome as well. For purposes of analysis of Kentucky's choice of law system, Prezocki (like Prudential) indicates a reliance upon the Second Restatement and serves notice that forum selection clauses do not invariably result in enforcement of the selection.

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77 Id.
78 See id. at 100.
79 Id.
81 See id. at 889.
82 See id. at 888-89.
2. Choice of Law Clauses

Similar in effect to (and often confused with) choice of forum clauses are choice of law clauses, which provide that in whatever forum, disputes between the parties will be governed by the law of a chosen jurisdiction. Indeed, it is not unusual to see contractual documents which contain both a choice of forum clause and a choice of law clause, occasionally combined into a single clause. A carefully drafted clause will normally state that disputes are governed by the internal, municipal, or local law of the chosen jurisdiction in order to avoid a reference to the “whole” law of the chosen state, with its inherent renvoi possibilities, although the Second Restatement indicates that such a clause which lacks definition of the extent of law chosen will normally be limited to the chosen forum’s local law. The effect of a choice of law clause is to avoid the necessity of making a choice, deferring to the parties’ contractually chosen law.

Typical of such clauses was the provision enforced by the Kentucky Supreme Court in Fite & Warmath Construction Co. v. MYS Corp. There, a Tennessee contractor entered into a contract in New York with a Kentucky corporation, the principal place of business for which was New York, for construction of a shopping mall in Kentucky. The contract contained a choice of law clause in favor of Kentucky law. After a dispute over issues arising during construction, the owner sought arbitration pursuant to an arbitration clause contained in the contract. Without discussion, the supreme court proceeded to apply Kentucky (and federal) law to the request notwithstanding that the traditional choice of law would most likely have been New York law (place of making of the contract) but

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83 “Renvoi,” or reference back, occurs when a forum chooses to determine a case exactly as would a court in the state whose law is chosen. That will mean that the reference to the other state includes its conflicts rules (the only distinction between its whole law and its local law). See BLACK’S LAW DICTIONARY 1298 (6th ed. 1990). It is not impossible, given disparity of choice of law methodologies, to find that the referred-to state would not choose to apply its own law but would choose to apply the law of the forum. This is typically avoided by having a reference to sister state law be only to its local law, thus avoiding the reference back possibility.

84 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1971).
85 Fite & Warmath Constr. Co. v. MYS Corp., 559 S.W.2d 729 (Ky. 1977).
86 See id. at 731.
87 See id.
88 See id.
for the clause. Ultimately, the court concluded that the arbitration clause was required to be honored pursuant to the Federal Arbitration Act, which governed contracts involving interstate commerce. Noting that Kentucky had its own statutory arbitration provisions, the court specifically noted that it was not "displacing a viable public policy of" Kentucky.

Before turning to other choice of law clause cases, it is worthwhile to note that Kentucky in *Fite & Warmath* upheld a clause which chose Kentucky law. A clause choosing the law of another state poses quite a different view of the forum-oriented pattern previously observed in the modern Kentucky conflicts cases. In such a case, however, the result should not vary because the control as to contracts involving interstate commerce would be federal law rather than state conflicts law.

In *General Electric Co. v. Martin*, the court of appeals was faced with a fact pattern involving whether a Kentucky resident who had been employed by General Electric in Kentucky was entitled to disability benefits denied by that company's pension plan administrator. The resident, who had a third grade education and worked for the company for twenty-two years, had (early in her employment) applied to participate in the General Electric pension plan. The plan contained a choice of law clause in favor of New York law. Although the parties attempted to demonstrate a difference between the law of New York and that of Kentucky as it related to the case at hand, the court of appeals found "no significant difference between the law of the two states." Thus, the case appears to have presented a false conflict, with no real reason to determine whether the choice of law clause was valid. Despite that fact, the court

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89 See id.
91 See *Fite & Warmath*, 559 S.W.2d at 734.
92 See id. (citing K.R.S. § 417.010-.018 (1953) (repealed 1984)).
93 Id.
94 This should not be taken to mean that all contract cases involving interstate commerce are governed by federal law. Rather, those containing arbitration clauses are required by the Federal Arbitration Act to be arbitrated absent an effective waiver by the parties.
96 It should be noted that such a piece of litigation today would be governed by federal law because it was a dispute involving a benefit plan provided to the employee by her employer. Such claims are governed now by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1974).
97 *General Elec. Co.*, 574 S.W.2d at 316 n.1.
observed that the provision was valid, citing to a 1948 Kentucky case and the Second Restatement.\textsuperscript{9} Again, however, it is worth noting that Kentucky was not asked to defer to another state's law in a situation where Kentucky law would have reached a different substantive result. Had there been the probability of a different result, the obvious disparity of bargaining position would have provided a serious test for the fairness analysis inherent in the Second Restatement.

One must sharply contrast the results in Fite & Warmath and General Electric with the result in Breeding.\textsuperscript{9} That is one of the core methodology contract cases in which the supreme court (without discussion of its reason for ignoring the choice of law clause) applied Kentucky law despite the presence of a choice of law clause which seemed to indicate that Delaware law would govern. Perhaps implicit in the reason for the different results is that the Second Restatement position on choice of law clauses, somewhat like that on choice of forum clauses, is that they need not be enforced if the law chosen would be "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state."\textsuperscript{10} Thus, one might reason that an analysis similar to that mandated in Prezocki\textsuperscript{10} for choice of forum clauses would have concluded that enforcement of a boilerplate clause in a master insurance policy activated by issuance in Kentucky to a Kentucky resident was contrary to fundamental Kentucky policy. While that has a superficial appeal, it seems inconsistent with the elderly, third-grade educated worker in General Electric being bound by what was surely a boilerplate clause. Perhaps the absence of a discernible difference in the law of the two states may explain the General Electric result. The presumably sophisticated parties to a major construction contract in Fite & Warmath pose no such dilemma, the supreme court having specifically noted that the contract was not an adhesion contract or the result of unequal bargaining power.\textsuperscript{12} Without any discussion of the issue, one simply cannot tell why (in the analysis of the Second Restatement) the supreme court in Breeding felt application of Delaware law so against the policy of Kentucky that it could not even be chosen by the parties. It is quite

\textsuperscript{9} See id. (citing Big Four Mills v. Commercial Credit Co., 211 S.W.2d 831 (Ky. 1948) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971)).

\textsuperscript{9} Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982).

\textsuperscript{10} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a).

\textsuperscript{10} Prezocki v. Bullock Garages, Inc., 938 S.W.2d 888 (Ky. 1997).

\textsuperscript{12} See Fite & Warmath Constr. Co. v. MYS Corp., 559 S.W.2d 729, 735 (Ky. 1977).
possible that what is seen in *Breeding* is the result of more substantial Kentucky connections in a situation where the contractual clause indicated a choice of non-Kentucky law. Alternatively, it is possible that there was really no conflict between the law of the two states because of the contractual requirement that a copy of the exclusions be provided to the insured.\(^\text{103}\)

In sharp contrast to the *sub silentio* rejection of the choice of law clause in *Breeding* is the emphatic rejection of a choice of law clause in *Paine v. La Quinta Motor Inns, Inc.*,\(^\text{104}\) which involved a dispute between the Kentucky sellers and nonresident buyers of land located in Kentucky. The contract was partially executed in Kentucky and contained a choice of law clause in favor of Texas law. A dispute arose as to whether the sellers were bound by a particular clause in the contract. Superficially, the action would have been time-barred under Texas law but timely under Kentucky law.\(^\text{105}\) The court of appeals held that the choice of law clause was of no effect because of the interest which Kentucky had in a claim involving Kentucky land and a contract at least partially entered into in Kentucky. The court also noted the result in *Breeding*, in which the choice of law clause was ignored. In reaching this conclusion, the court of appeals characterized Kentucky as "egocentric or protective concerning choice of law questions."\(^\text{106}\) The court of appeals neither cited the Second Restatement's "contrary to a fundamental policy" analysis nor explored what interests of Kentucky might have been offended by the parties having chosen Texas law.

These four cases thus present at least a facial inconsistency. While there is one case (*Fite & Warmath*) upholding a clause in a major commercial contract involving sophisticated parties and one case (*General Electric*) upholding such a clause based on the Second Restatement, two later cases clearly ignore such a clause, with one case (*Paine*) not citing the Second Restatement at all and sounding a great deal more like the "sufficient contact" analysis which is typical of the Kentucky tort cases. Undoubtedly significant in looking at the pattern is that *Fite & Warmath*

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\(^{103}\) *See supra* notes 60-65 and accompanying text.


\(^{105}\) I describe that possibility as "superficial" because the court ultimately concluded that the action was not time-barred by either Kentucky law or Texas law. Thus, the case is in reality a false conflict, with no choice necessary as to which law applied.

\(^{106}\) *Paine*, 736 S.W.2d at 357.
was a case in which the chosen law was Kentucky. It would be nonsensical for a forum to ever find that the choice of its own law by the parties is contrary to its own public policy. Thus, *Fite & Warmath* provides no real clue as to the solution for the true problem: when the parties have chosen the law of a state other than Kentucky.

However confusing, the pattern establishes a clear signal that such clauses are not to be blindly enforced or taken for granted in Kentucky. Indeed, the results in the later cases cast grave doubts on enforcement of such clauses, indicating at a minimum that they require factual exploration. If one takes it that there was no difference between the law of the two states in *General Electric*, then the remaining cases all point to application of Kentucky law where there is a difference and where such choice is made possible by sufficient factual connections with the forum.

3. Nonresident Insurance Carriers

In what might be viewed either as a contractual dispute somewhat similar to *Lewis* or as a recognition of lack of legislative jurisdiction, the Kentucky Court of Appeals refused to apply Kentucky law to a Tennessee insurance contract in *State Farm Mutual Automobile Insurance Co. v. Tennessee Farmers Mutual Insurance Co.* The case arose from an automobile accident in Kentucky between a Kentucky driver and a Tennessee driver. The Tennessee driver's carrier ultimately paid $15,000 to the Kentucky driver and the Kentucky driver's own carrier paid an additional $10,000 as underinsured motorist benefits. The Kentucky driver's insurer then sought to recoup its $10,000 from the Tennessee carrier, which had not registered to do business in Kentucky, upon the theory that its minimum coverage should have been the $25,000 required by Kentucky law. Citing both to the result in *Lewis* (which is consistent in that it applied the law of the place of contracting rather than Kentucky law) and the *Second Restatement*, the court of appeals held that Tennessee law applied, so that the Tennessee insurer was not liable for the higher amount.

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109 See id. at 521.
110 See id. at 522-23 (citing *Lewis*, 555 S.W.2d at 579; *Breeding v. Massachusetts Indem. & Life Ins. Co.*., 633 S.W.2d 717 (Ky. 1982); *Restatement (Second) of Conflict of Laws § 188 (1971)*).
The result, like Lewis, is correct because no other conclusion was possible. The court of appeals was quite close to recognizing that essential truth when it noted that "the General Assembly has no power to dictate to a nonresident driver and his nonresident nonregistered insurance carrier what must be in their contract."111 Indeed, any attempt to apply Kentucky law to the facts would undoubtedly have been violative of due process under the classic holding in Home Insurance Co. v. Dick.112 In simple terms, Kentucky lacked sufficient contacts to satisfy due process had it attempted to apply its own law to control the contract terms between a Tennessee insured and her Tennessee insurer, which had not registered to do business in Kentucky and which had issued the policy in Tennessee. Thus, the case cited the Second Restatement as authority for its position but also reached a result which was no different than would be reached under a "sufficient contacts," or Currie, analysis.

4. Workers' Compensation

The problem of a worker who enters an employment relationship in one state and is physically injured in the course of that employment in another is common, and there are United States Supreme Court cases stretching back over half of a century dealing with the problems posed.113 It is now quite clear that a worker who is employed in one state and injured in another may recover under the workers' compensation law of either state,114 even if the worker has had a prior award in the less generous state.115 That issue may be complicated, however, if the employer has no workers' compensation insurance coverage. In such cases arising entirely domestically, most states provide some sort of state-sponsored fund to protect the worker. In Kentucky, that is accomplished through the Uninsured Employers' Fund.116

111 Id. at 522.
112 Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (holding that a state may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them).
In *Bryant v. Jericol Mining, Inc.*, the court of appeals addressed the claim of a Virginia resident hired in Virginia by a Virginian who had no workers' compensation insurance. The worker was injured while working in Kentucky and sought to recover benefits from the Kentucky Uninsured Employers’ Fund. Such cases in Kentucky proceed first through an administrative proceeding in the Department of Workers’ Claims and then on appeal into the judicial system. Prior to being in the court of appeals, the claim of the injured worker in *Bryant* had been dismissed, apparently upon the theory that Kentucky’s uninsured employer provisions did not apply because Virginia had the greater contacts with the parties and the events. The court of appeals reversed, noting that it was “not concerned whether Virginia [had] more contacts in the case than Kentucky.” That lack of concern was because, as the court of appeals saw the issue, the question was whether Kentucky had sufficient contacts to trigger application of its law. The court concluded that the physical injury in Kentucky was sufficient.

This usage of the “sufficient contacts” analysis was more reminiscent of the methodology used in the Kentucky tort cases than the language typically encountered in the contracts cases. That should not be surprising because the fact pattern is much closer to a classic tort case than a contract case. There was in fact no workers’ compensation insurance in effect, so there was no contractual dispute to resolve. The injury was much more like the triggering event for a tort case than a dispute over coverage. Thus, the workers’ compensation system (designed to supplant tort and contract liability between workers and employers for job-related injuries) reverted to the closest analogy—a physical injury tort—and the court of appeals concluded that Kentucky law applied because it had sufficient contacts to do so. The result is consistent with the *Second Restatement* (which was not cited in the decision) and with a “sufficient contacts” analysis.

5. *Succession to Property*

The advent of modern choice of law systems made little change in the area of succession to property. This consistency is not surprising since this is an area which demands certainty and predictability long before actual

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118 *See id.* at 47.
119 *Id.*
120 *See id.*
121 *See id.*
fact patterns arise at death. Thus, the Second Restatement retained the First Restatement’s positions that succession to realty (testate and intestate) remained governed by the law of the situs of the realty, while succession to personalty (testate and intestate) was governed by the law of the decedent’s domicile. This pattern has proved as true in Kentucky as in other states.

In Cox v. Harrison, the court faced a situation where it appeared that a nonresident executed a will which was valid in the state of his residence and in which he disposed of both personalty (some physically located in Kentucky) and realty (some physically located in Kentucky). Following the execution of that will, the nonresident was divorced from the woman to whom he was married at the time of the execution of the will. At the time of that divorce, a Kentucky statute provided that a divorce had the effect of revoking a will as it related to realty. Citing to the Second Restatement, the court of appeals held that the validity of the will as it related to Kentucky realty was governed by Kentucky law. Since the will had, under Kentucky law, been revoked by the divorce, it could not have been admitted to probate in Kentucky in an original proceeding and was similarly barred from admission in an ancillary proceeding involving the nonresident. This result simply applied the law of the situs of the realty to determine the status of testate succession to that realty, the position which the Second Restatement had adopted from the First Restatement.

Upon reflection, the result seems nonsensical. Kentucky law was applied to affect the will of a nonresident based upon a divorce decree apparently granted in another state. The home state of that individual attached no such consequence to the divorce, as is evident from the fact that Kentucky’s position was not applied to the personalty located in Kentucky. The personalty’s passage was governed by the law of the decedent nonresident’s domicile at the time of his death. It is difficult to

122 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 (1971).
123 See id. § 236.
124 See id. § 263.
125 See id. § 260.
126 Cox v. Harrison, 535 S.W.2d 78 (Ky. 1975).
127 See id. at 79.
128 See id.
130 See Cox, 535 S.W.2d at 78 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 (1971)).
131 See id. at 79.
conceive any Kentucky interest furthered by application of its law to these facts.

Nevertheless, it should be noted that the net effect of the result, like so many other cases, is that Kentucky law was applied to the facts before the court. Although the source of that decision was said to be the Second Restatement, the result would have been the same under a "sufficient contacts" analysis, the situs of the property in Kentucky being sufficient contact to allow application of Kentucky law. One could also note that the problem might better have been solved not by approaching it as a choice of law problem, but as a res judicata issue: the former wife's rights under the prior will were not extinguished by the divorce decree under the law of the rendering state. That approach would have had the salutary result of having her rights be the same in all states since the impact of that divorce decree would have been required to be honored by all states pursuant to full faith and credit. Viewed thusly, it may be seen that Kentucky actually lacked an interest and should not have applied its own law.

The continuation of the prior conflicts treatment for succession to property has been applied during the modern era to trust matters as well. In Santoli v. Louisville Trust Co., a Kentucky trustee was charged with administration of a trust created many years before under the wills of persons who were Michigan domiciliaries when they died. At a later time, there was a dispute as to whether the adopted children of one of the trust beneficiaries were entitled to succeed to an interest in the trust. The difference between how the issue would be handled under Kentucky law and under Michigan law is not described in the reported decision. Indeed, the factual connection of Kentucky, other than being the place of business of the corporate trustee, is unclear. With the only identifiable Kentucky connection being the place of business of the trustee, there surely was no Kentucky interest to be furthered in determining who among competing claimants might be entitled to a share in the trust. In any event, the court decided in a very abstract fashion that questions as to the law to be applied to issues of succession to a trust created under the law of Michigan were to be governed by the law of the testators' domicile at the time of their death. In support of that position, the court of appeals relied upon a prior decision, Martin v. Harris, a case long before the modern conflicts era in

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133 See id. at 182.
134 See id. at 183.
135 See id. at 183-84.
The court could certainly have cited as modern authority the Second Restatement, which confirms application of the law of the decedent's domicile in such cases. The case illustrates the more rigid rules which survive, which are in sharp contrast to the analysis of interests typical of modern choice of law systems outside succession to property.

6. Statute of Frauds

It is quite familiar to lawyers that attempts to contract occasionally run afoul of the statute of frauds. Although every American state has some variant of that inheritance from the English, most lawyers are probably unaware that the statutes are not uniform but vary slightly from state to state. Among the most important variations is the fact that some versions characterize any attempt to bind in the absence of a writing as "void" and others say that absent a writing, "no action may be brought" to enforce any alleged agreement. The first type is typically thought of as a "substantive" statute of frauds and the latter as a "procedural" statute of frauds. The Kentucky version is of the latter type. That fact alone should alert one to the probability that Kentucky's statute will likely be applied to all litigation brought in Kentucky, upon the theory (challenged perhaps in terminology but not practically in result) that the forum will typically apply its "procedural" law to disputes in its courts.

In Audiovox Corp. v. Moody, a Kentucky employee of Audiovox Kentucky filed an action for breach of contract and other claims arising from her discharge from employment. Part of the employee's claims involved breach of an alleged oral contract which was said to have been made during a meeting in New York. Audiovox contended that the breach of contract claim was barred by the statute of frauds because the contract was not capable of performance within one year. The court of appeals ultimately concluded that the contract in question was in fact capable of performance within one year and thus not within the control of the statute of frauds.

136 See id. at 183 (citing Martin v. Harris, 203 S.W.2d 78 (Ky. 1947)).
137 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 268 (1971).
139 The Second Restatement, for example, does not rely upon the characterization of an issue as "procedural" but provides that a forum will normally apply its "own local law rules prescribing how litigation shall be consulted." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122.
140 Audiovox Corp. v. Moody, 737 S.W.2d 468 (Ky. Ct. App. 1987).
141 See id. at 470.
In reaching that conclusion, the court certainly implied (by citation to the Kentucky statute and Kentucky case law) that it was deciding the issue under the Kentucky statute of frauds. The court noted, however, that New York had "adopted an identical statute of frauds to that in effect in Kentucky."\(^1\)

The *Second Restatement* position on statutes of fraud is that the law chosen to govern the disputes otherwise arising from the contract should similarly govern disputes as to the need for a writing.\(^1\) We will not know how Kentucky will deal with such a situation until facts arise in which the requirement of a writing would be satisfied under the law of another state but not under Kentucky's interpretation of its own statute of frauds. The true question can only arise in a case wherein Kentucky would conclude that the other state's law would apply to other disputes arising under the contract. In such a situation, Kentucky would arguably be protecting its own interest as a forum in refusing to enforce an agreement which lacked a sufficient writing. Should the pattern of applying Kentucky law when there are "sufficient contacts" continue, that would surely be a fact pattern in which Kentucky law could be chosen and would demonstrate conclusively that it is governed not by the *Second Restatement* but by some sort of forum-oriented choice of law system, most likely that of Brainerd Currie. Alternatively, a choice of that other state's law would confirm usage of the *Second Restatement* for areas other than torts.

7. *Statute of Limitations*

Statutes of limitations historically present difficulties for choice of law analysis. In the vested rights era, courts struggled to determine whether such statutes were substantive or procedural, when in reality they had aspects of both. The *Second Restatement* mirrors some of those struggles, with one of its sections holding that an action is time-barred in a forum if, under the law of the otherwise applicable state, such an action is barred by a "statute of limitations which bars the right and not merely the remedy."\(^1\)\(^4\) The concept of "barring the right" basically tracks the prior case law about "substantive" statutes without adhering to the baggage which goes with the label. More generally, however, the *Second Restatement* provides that the forum will not entertain an action barred by forum law, including any

\(^{142}\) Id. at 470 n.1 (citing N.Y. GEN. OBLIG. LAW § 5.701 (McKinney 1998)).

\(^{143}\) See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 141.

\(^{144}\) Id. § 143.
borrowing statute. This latter provision will typically control Kentucky's results because Kentucky has a borrowing statute.

The impact of the borrowing statute is demonstrated by Ellis v. Anderson. That case involved litigation in Kentucky between two drivers who had been involved in an accident in Ohio. The injured driver brought suit in Kentucky, relying upon the Kentucky two-year statute of limitations applicable to personal injuries. The statute allowed two years to sue after the final payment of basic reparation benefits. Ohio law provided a two-year period for suit, but such time ran from the day of the accident rather than being tied to termination of no-fault benefits. The court of appeals held that the action was time-barred because the Ohio limitation (being shorter) was required by the borrowing statute to be applied to the facts. If we assume that the merits of the dispute between the parties would, consistent with Wessling, have been governed by Kentucky law, this result must mean that Kentucky's borrowing statute is driven by the place where the claim physically arises rather than by the law which will be applied to the merits of the litigation.

Both this case and the prior decision in Seat v. Eastern Greyhound Lines, Inc. interpret the borrowing statute to mean that Kentucky will always apply the shorter of such limitations. Had the Ohio statute been longer and the action time barred under Kentucky law but not Ohio law, the Kentucky borrowing statute as interpreted in Seat would have applied Kentucky law. Thus, the net effect, in cases litigated in Kentucky but arising under another state's law, is that Kentucky will always apply the shorter of the two limitations. The presence of the Kentucky borrowing statute thus makes this traditionally difficult choice of law quite easy in Kentucky, requiring no reference to a choice of law methodology. Although this was a fact pattern in which Kentucky law constitutionally could have applied (even though the impact would have been to lengthen the time for the action), deferring that Kentucky interest was not done

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145 See id. § 142.
146 See K.R.S. § 413.320 (Michie 1992).
149 See OHIO REV. CODE ANN. § 2305.10 (Banks-Baldwin 1998).
150 See Ellis, 901 S.W.2d at 47.
152 As noted above, the “where it arose” or “arising under” dimension of the statute requires some explication as to whether that refers to the place of the physical occurrence or the jurisdiction whose law is chosen to govern the merits.
pursuant to Kentucky's choice of law rules. The choice has been made legislatively, and deference to the legislative directive is correct according to the Second Restatement and Currie (who always maintained that deference to foreign law was legislatively controlled) and as a matter of basic jurisprudence.

8. Uninsured or Underinsured Motorists

The issue of uninsured or underinsured motorists was first confronted by the Kentucky state courts in Lewis,\(^{153}\) where it was held that Kentucky law did not apply to a dispute between nonresidents and their insurance carrier as to uninsured motorist coverage allegedly applicable to an injury arising from an accident occurring in Kentucky.\(^{154}\) Although discussed more in the context of legislative jurisdiction to control policy terms, a similar problem existed in State Farm Mutual Automobile Insurance Co. v. Tennessee Farmers Mutual Insurance Co.\(^{155}\) Still later, a factual situation arose in Bonnlander v. Leader National Insurance Company,\(^{156}\) which bore an amazingly close resemblance to that in Lewis. At issue was the stacking of coverage of uninsured motorist policies which had been written in Ohio to cover Indiana insureds who had been injured in an accident in Kentucky.\(^{157}\) The argument of the insureds was that Kentucky law should apply to stack the coverages rather than Indiana law, which would not allow stacking. Citing the preference of the Kentucky tort cases (Wessling, Arnett, Foster) for Kentucky law, the insureds contended that Kentucky law rather than Indiana law applied.\(^{158}\) Rejecting that conclusion and relying explicitly upon Lewis and the Second Restatement, the court of appeals found that the matter should be governed by "the law of the state with the greatest interest in the outcome of the litigation."\(^{159}\) The result in Bonnlander was application of Indiana law.\(^{160}\)

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\(^{153}\) Lewis v. American Family Ins. Group, 555 S.W.2d 579 (Ky. 1977).
\(^{154}\) See id. at 581-82.
\(^{157}\) See id. at 619.
\(^{158}\) See id. at 620.
\(^{159}\) Id.
\(^{160}\) See id. at 621.
A similar conclusion in a case with very similar facts was reached in *Snodgrass v. State Farm Mutual Automobile Insurance Co.* \(^{161}\) There, a Virginia resident was injured in Kentucky as a result of an accident in which the other vehicle was operated by a Kentuckian. \(^{162}\) The policy limits of the Kentuckian’s liability policy proved inadequate and the Virginian sought recovery under his own underinsured motorist coverage, which had been issued in Virginia. \(^{163}\) Under the law of Kentucky, he could have stacked his coverages and thus recovered substantially more than was available under Virginia law. As had been the case with *Lewis* and *Bonnlander*, the court chose to apply the law of the state in which the nonresident plaintiff’s insurance policy was issued rather than Kentucky and, as a result, denied the stacking of the policies. \(^{164}\)

*Lewis, Bonnlander,* and *Snodgrass* all choose not to apply Kentucky law and do so in situations where such a result was required by the limits of due process, i.e., in fact patterns where a different result would be violative of due process. Those results are consistent both with Currie’s choice of law system and the *Second Restatement*. Yet, this surely is a close area. The United States Supreme Court plurality decision in *Allstate Insurance Co. v. Hague* \(^{165}\) indicated that a state which was not the situs of the accident did not violate due process by applying its own stacking rules to an insurance policy issued elsewhere because of three connecting factors: (1) the accident victim was employed in the forum and commuted to work there each day; \(^{166}\) (2) the insurer was licensed to do business in the forum; and (3) the plaintiff (the administratrix of the deceased insured) had moved to the forum at the time that the litigation occurred. \(^{167}\) Apparently, even the dissent in *Allstate* assumed that forum law could have been applied had it been the place of the accident, as was Kentucky in all three of the cases under consideration. \(^{168}\) Given that the nature of the dispute was

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\(^{162}\) See id. at *1.

\(^{163}\) See id.

\(^{164}\) See id. at *3.


\(^{166}\) Despite, apparently, the fact that the claim did not arise from the employment or during the course of a commute. See id. at 314.

\(^{167}\) See id.

\(^{168}\) See id. at 337 (Powell, J., dissenting).
contractual, between an insured and his or her insurer, it is difficult to see why the situs of the accident would have an interest to satisfy due process, other than rote reliance upon the long-discredited deference to the lex loci. Thus, I conclude not only that the results in the cases are correct but that they are the only results consistent with due process. It is interesting to note that the Kentucky Court of Appeals in Snodgrass, faced with a very strong argument based upon Allstate, expressly rejected the contention that Kentucky law should be applied to the claims of the Virginia resident arising under the policy issued in Virginia, even in view of the fact that his insurer was also licensed to do business in Kentucky. That rejection was entirely correct as a policy choice, a conflicts choice, and (inferentially) as a matter of sound, modern constitutional law.

9. Domestic Relations

The area of domestic relations has historically received extensive treatment in law school courses in conflicts but actually presents few problems for choice of law. Cases in the area tend to revolve more around jurisdictional disputes, judgment enforcement, and judgment modification issues. Kentucky's experience in the modern era has tended in those same directions even after adoption of a new choice of law methodology.

Typical of the sort of multistate jurisdictional disputes for domestic relations conflicts is Gaines v. Gaines.169 There, a couple who had lived primarily outside Kentucky came to Kentucky to live. The marriage broke apart and the wife moved to Georgia with the minor children, leaving the husband in Kentucky. The husband then commenced a dissolution action in Kentucky, which (at that time) lacked personal jurisdiction over the wife.170 The court of appeals ultimately concluded that with no personal jurisdiction over the wife and with the children being physically absent from Kentucky, Kentucky only had jurisdiction to dissolve the marriage171 and order the husband to pay child support for the absent children. Those aspects of a trial court decision which had determined the custody and

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169 Gaines v. Gaines, 566 S.W.2d 814 (Ky. 1978).

170 This matter arose before passage of the Kentucky Domestic Relations Long Arm Statute, K.R.S. § 454.220 (Michie 1996), which would now confer personal jurisdiction over the departing wife for a period of one year after her departure from Kentucky.

171 It has long been clear that a state which is the domicile of one party to the marriage has judicial jurisdiction to dissolve the relationship. See Williams v. North Carolina, 317 U.S. 287 (1942).
visitation of the children, the maintenance obligations of the husband, and the rights of the parties to personalty not located in Kentucky were reversed for lack of jurisdiction. Interestingly, the court of appeals did uphold the ability of the trial court to make disposition of personalty located in Kentucky, citing the authority of the Second Restatement. That latter conclusion, founded on traditional notions of quasi in rem jurisdiction, seems a dubious conclusion in view of the fact that personal jurisdiction over the wife was expressly found to be absent and the United States Supreme Court has directed that quasi in rem jurisdiction is constitutionally unavailable in cases lacking personal jurisdiction. The decision eliminating that historical use of quasi in rem jurisdiction was extremely new at the time of Gaines and likely overlooked by the parties and the courts. Alternatively, it is possible that what was missing from the law and fact pattern of Gaines was a domestic relations long arm statute. Constitutional availability of such personal jurisdiction is clear from the current Domestic Relations Long Arm Statute in Kentucky. In such situations, Shaeffer would not bar the use of quasi in rem jurisdiction.

Viewing a custody issue from the "other side" of Gaines (i.e., a state faced with a custody decree from a sister state rendered in a proceeding which lacked personal jurisdiction over one of the parents), the court of appeals in Batchelor v. Fulcher held that an Indiana custody decree in favor of a father was not binding on the mother (a Kentucky resident) who was seeking custody of children physically present with her in Kentucky. The court found that a prior Indiana decree did not preclude the mother's custodial rights because of a lack of personal jurisdiction over her in that state. The court then found that Kentucky properly exercised jurisdiction to award custody to the mother because Kentucky was the domicile of the children at the time of the custody proceeding and the father had been personally served with process in Kentucky. Citing the proposed official

172 Gaines, 566 S.W.2d at 819.
173 See id. (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60 (1971)).
175 See K.R.S. § 454.220.
176 Batchelor v. Fulcher, 415 S.W.2d 828 (Ky. 1967).
177 See id. at 830. It is familiar constitutional law that a parent's custodial right may not be cut off without personal jurisdiction. See May v. Anderson, 345 U.S. 528 (1953). Any purportedly personal judgment rendered without personal jurisdiction is not entitled to full faith and credit, a proposition which predates even Pennoyer v. Neff, 95 U.S. 714 (1878).
draft of the *Second Restatement*, the court found personal jurisdiction to thus be present and remanded the issue of custody to the lower court.\footnote{178}{See Batchelor, 415 S.W.2d at 830-31 (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 79 (Proposed Official Draft 1967)).}

Historically, one of the more difficult interstate problems for domestic relations cases has been how to deal with support awards, both child support and maintenance. The difficulty is caused by the fact that typically such awards are (as to prospective payments) modifiable in their rendering state and hence not encompassed within the requirement of full faith.\footnote{179}{See Sistare v. Sistare, 218 U.S. 1, 17 (1910).} Kentucky’s difficulty is resolved by the presence, at the current time, of the Kentucky version of the Uniform Reciprocal Enforcement of Support Act (“URES A”).\footnote{180}{See K.R.S. § 407.010-480 (Michie 1996).} Prior to adoption of that act, however, Kentucky took the position in *White v. Bennett*\footnote{181}{White v. Bennett, 553 S.W.2d 845 (Ky. Ct. App. 1977).} that it should act to enforce such awards and that it could also increase such an award because of the modifiable status in the rendering state.

In *White*, a couple was divorced in Maryland and the husband was ordered to pay monthly child support.\footnote{182}{See id. at 846.} Sometime later, at which point the now-divorced couple lived in Kentucky, the wife sought to do three things: secure payment of unpaid sums under the Maryland order, secure future payments at an increased rate, and have the husband ordered to place the children on his employer-provided health coverage.\footnote{183}{See id. at 847.} The past due amount was of course recoverable pursuant to full faith and credit because it was vested and thus like any other money judgment for a sum certain.\footnote{184}{See *Sistare*, 218 U.S. at 1.} As to the future amounts, those were not entitled to full faith because they remained modifiable under Maryland law.\footnote{185}{See *White*, 553 S.W.2d at 846-47 (citing *Sistare*, 218 U.S. at 17; *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 109 (1971)).} The Kentucky court nonetheless undertook to enforce those future payments and acted to both increase the support amount and to add a requirement of health insurance provision for the children.\footnote{186}{See id. at 847.} In taking that action, the court of appeals cited the *Second Restatement* as authority and reviewed what it felt was the significant interest of Kentucky in taking such actions.\footnote{187}{See id. (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 60). All interested parties (both divorced parents and the children) were Kentucky
significance for our purposes is that Kentucky undertook (independent of the statutory duties of URESA) to take such an action and, as in so many other instances, cited the Second Restatement as its authority for doing so. In so doing, however, we should note that it favored the significant Kentucky interests of providing support for persons then living within its borders.

Finally, Kentucky has shown itself exceptionally progressive in dealing with an unanswered question which has plagued domestic relations conflicts law (although the issue is much broader than just the domestic relations area) since the turn of this century: whether an equity decree of a sister state will be honored by an enforcing state—the issue left unanswered by the United States Supreme Court in Fall v. Eastin. In Arthur v. Arthur, the court of appeals addressed a fact pattern incredibly similar to Fall. The Arthurs were divorced in Indiana in an action in which the husband (who was subject to the personal jurisdiction of the Indiana court) was ordered to convey to the wife real property located in Kentucky. The husband did not comply and the wife was given a deed by a commissioner of the Indiana court. The husband then conveyed the property to his brother, who apparently took possession with notice of the commissioner’s deed to the wife. The wife then brought an action in Kentucky to clear her title to the land. The court of appeals held that the deed between the husband and his brother was in fact void (presumably because of notice of the ex-wife’s interest) but found that the trial court’s recognition of the ex-wife’s title under the Indiana commissioner’s deed had been an error. It was concluded, citing Fall, that a deed of a judicial official in Indiana could not convey title to Kentucky real estate. On that point, the case is indeed like Fall, but the result was very unlike Fall because the court of appeals found (as did the concurring opinion of Justice Holmes in Fall) that the domiciliaries at the time of the action to enforce prior support and to enforce and increase future support.

188 Fall v. Eastin, 215 U.S. 1 (1909) (establishing the long standing rule that a court cannot effectively pass by judicial conveyance good title to real property outside its jurisdiction and thereby bind its sister jurisdiction where the property is located).


190 See id. at 593.

191 See id. at 594.

192 See id.

193 See id.

proper remedy was for the ex-wife to seek to have the Kentucky courts direct the same conveyance as had the Indiana court. Should the ex-husband disobey the Kentucky order, a master commissioner's deed would obviously be available and fully valid as to Kentucky real estate. The court of appeals thus held that Kentucky courts should enforce the equities arising from a sister state decree, regardless of whether required by full faith and credit. Beyond that interesting conclusion, moreover, the court of appeals cited as its authority the Second Restatement.

These cases in the area of domestic relations all carry a common thread of citation to the Second Restatement of Conflicts, although typically in regard to such issues as judgments and jurisdiction, not the classic choice of law disputes encountered elsewhere. In all instances where a choice was necessary (i.e., some difference existed between Kentucky law and the law of another state), there is not a single instance of choosing the law of another state. Thus, one could again conclude that whatever the cases say, what they in fact do is choose Kentucky law whenever it is possible to do so and whenever it makes a difference.

C. A Pattern for Choice of Law in Kentucky

Looking then to the state cases in the modern era, what seems to emerge is a pattern—and one which has unfortunate timing dimensions because of the order in which the cases emerged. The torts cases (Wessling, Arnett, Foster) all choose Kentucky law as controlling, citing as their authority that Kentucky has sufficient contacts to do so. It is worthwhile noting that those three seminal cases originate (with Wessling) in 1967 and conclude (with Foster) in 1972. In sharp contrast, the non-tort conflict cases primarily begin (with Lewis) in 1977 and continue to virtually the present time. What is conspicuous is that the tort cases predate the other conflicts cases and, viewed in a historical perspective, stand aside from all the other cases in language, if not in result. The consistent theme in the non-tort conflict cases is a citation to the Second Restatement, in quite sharp contrast to the apparent rejection of that methodology in Arnett and Foster where it is generally thought that application of “significant

195 See Arthur, 625 S.W.2d at 595.
196 See id. (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971)).
197 See supra notes 17-48 and accompanying text.
198 See supra notes 49-196 and accompanying text.
contacts" rather than "sufficient contacts" would have altered the result. We will revisit that general perception once the additional body of data contained in federal case law is examined.

That contrast between tort cases and non-tort cases was recognized by the court of appeals in Bonlander v. Leader National Insurance Co.\(^{199}\) There, facts amazingly close to those in Lewis were found. At issue was the stacking of coverage of uninsured motorist policies which had been written in Ohio to cover Indiana insureds who had been injured in an accident in Kentucky. The argument of the insureds was that Kentucky law should apply to stack the coverages rather than Indiana law, which would not allow stacking.\(^{200}\) Citing the preference of the Kentucky tort cases (Wessling, Arnett, Foster) for Kentucky law, the insureds contended that Kentucky law rather than Indiana law applied.\(^{201}\) Rejecting that conclusion and relying explicitly upon Lewis, the court of appeals stated that the insureds were "confusing choice of law as it applies to torts and choice of law as it applies to contract actions."\(^{202}\) As to the difference between tort and contract actions, the court of appeals found that tort actions chose Kentucky law if there was "any significant contact with Kentucky," while contract actions chose "the law of the state with the greatest interest in the outcome of the litigation."\(^{203}\) The result in Bonlander was application of Indiana law.\(^{204}\) Although the facts in Bonlander only justified the court of appeals making an observation as to a dichotomy between tort and contract cases, the discussion herein clearly indicates that the dichotomy is between tort cases and all other conflicts cases by the Kentucky courts in the modern era.

Thus, Kentucky may be governed by what is essentially a choice of law system with a split personality. It can clearly be seen that the classic, forum-oriented, "sufficient contacts" analysis of Brainerd Currie is followed for tort cases. It can at least be argued that the "significant contacts" analysis of the Second Restatement is the preferred methodology for all other cases. What is missing, however, is a recognition that cases hold what they do, not what they say. One can closely analyze the results and wonder whether even the contract cases are not in actuality showing a preference for Kentucky law in all instances where it is possible to be chosen,

\(^{200}\) See id. at 619.
\(^{201}\) See id. at 620.
\(^{202}\) Id.
\(^{203}\) Id.
\(^{204}\) See id. at 621.
but the clear language in favor of the Second Restatement in those cases is always going to pose difficulties, unless there is some alternative explanation available here.

D. Synthesizing the Lines of State Cases

If one attempts to synthesize the Kentucky state court decisions, a very clear pattern emerges in terms of results if not of methodology. As described previously, there are twenty-four modern era Kentucky state court conflicts cases. Only nine\textsuperscript{205} of those apply the law of a state other than Kentucky. Those are:

\textit{Lewis v. American Family Insurance Group.}\textsuperscript{206} The case is actually a false conflict in which Kentucky lacked sufficient contact to satisfy due process had it attempted to apply its own law.\textsuperscript{207} Put differently, there was no Kentucky interest to be furthered by applying its law to alter the outcome of the litigation on the merits.

\textit{Santoli v. Louisville Trust Co.}\textsuperscript{208} The case involved no Kentucky interest in the dispute as to whether a particular individual was entitled to share in an interest in a trust created under the will of a nonresident decedent. Any attempt to apply Kentucky law to that particular issue would likely have violated due process.

\textit{General Electric Co. v. Martin.}\textsuperscript{209} Kentucky law was not applied because a choice of law clause indicated that another state's law was applicable.\textsuperscript{210} The opinion indicated that there was no difference (on the applicable issue) between Kentucky law and the law of the state chosen by the clause.\textsuperscript{211} Thus, the case presented a false conflict in which the outcome on the merits would not have been altered by application of Kentucky law. The "choice" had in any event been contractually made.

\textit{Prudential Resources Corp. v. Plunkett.}\textsuperscript{212} There is actually no decision as to which law to apply to the merits but simply deference to a choice of forum clause.\textsuperscript{213}

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\textsuperscript{205} In \textit{Arthur v. Arthur}, 625 S.W.2d 592 (Ky. Ct. App. 1981), the issue was really whether to defer to a sister state equity decree rather than making a pure (i.e., not previously judicially determined) choice of law. \textit{See id.} at 595. Thus, it is not counted as an eighth deviation from the general pattern.

\textsuperscript{206} \textit{Lewis v. American Family Ins. Group}, 555 S.W.2d 579 (Ky. 1977).

\textsuperscript{207} \textit{See id.} at 581-82.

\textsuperscript{208} \textit{Santoli v. Louisville Trust Co.}, 550 S.W.2d 182 (Ky. Ct. App. 1977).


\textsuperscript{210} \textit{See id.} at 316 n.1.

\textsuperscript{211} \textit{See id.}

\textsuperscript{212} \textit{Prudential Resources Corp. v. Plunkett}, 583 S.W.2d 97 (Ky. Ct. App. 1979).

\textsuperscript{213} \textit{See id.} at 100.
\end{flushright}
Arthur v. Arthur. The "application" of other state law was really just a willingness to enforce a sister state equity decree and hence not a choice deferring Kentucky law in any respect.

State Farm Mutual Automobile Insurance Co. v. Tennessee Farmers Mutual Insurance Co. Although slightly different as to the substantive issue involved, the case was substantially like Lewis, being a false conflict in which there was no Kentucky interest to be furthered by applying its own law to the merits and any attempt to do so would have violated due process.

Ellis v. Anderson. The decision to apply the law of a state other than Kentucky when Kentucky's law could constitutionally have been chosen was mandated by the Kentucky borrowing statute. Thus, the decision to defer to another state's law was made legislatively rather than under Kentucky's choice of law rules.

Prezocki v. Bullock Garages, Inc. That Kentucky law was not ultimately applied is really just an unlikely possibility. The case was remanded to develop a record on application of the choice of law clause in favor of Illinois. Given the consumer-driven facts, Kentucky law most likely should have been applied.

Bonlander v. Leader National Insurance Co. and Snodgrass v. State Farm Mutual Automobile Insurance Co. As was the case with Lewis and State Farm, these cases were false conflicts in which there was no Kentucky interest to be furthered by applying its law to the merits of the litigation and any attempt to apply Kentucky law would have violated due process.

What the cases thus indicate, in result if not in language, is that Kentucky is choosing to apply its own law to the merits whenever it has the constitutional ability to do so and that this pattern carries over to all types of cases rather than being limited to tort cases as might be implied from the extensive citation to the Second Restatement in the non-tort cases. The

216 See id. at 522.
218 See id. at 48.
exceptions to that pattern thus are Ellis, wherein the deviation from Kentucky law was legislatively directed, and Prudential Resources and General Electric, where choices were contractually made.

Perhaps what this bespeaks, with the benefit of thirty years of hindsight, is that the Second Restatement’s results (as a practical matter) are not as different from those of Currie as might have been thought when the two competing choice of law philosophies were being viewed prospectively. Indeed, I can observe from the Kentucky cases only Arnett and (arguably) Foster as cases in which the Kentucky result differed from that which the Second Restatement would have approved. Even that may be overstating the case since Professor Reese (Reporter for the Second Restatement) himself stated that Foster was “a close case” and only opined in favor of Ohio law “if [he were] forced to decide.” If a reasonable analysis under the Second Restatement could support the decision in Foster, then only Arnett would stand out in the Kentucky state court experience as inconsistent with the Second Restatement.

There is a tremendous amount of citation in the Kentucky case law to the Second Restatement. If one may conclude that the Kentucky experience is consistent with both the Second Restatement and Professor Currie’s proposed methodology, then a very valuable insight is gained and a useful source of information (the Second Restatement) is made available and applicable to all Kentucky choice of law issues, not just those relating to issues other than torts. Thus, the “most significant relationship” aspect of section 6 of the Second Restatement appears, after thirty years in Kentucky at least, to have proved compatible with the interest analysis.

This pattern will obviously pose difficulties for the future in Kentucky until it is addressed and dealt with, either by synthesis or by recognition, that two different systems are being used. The pattern appears to be uniformly forum-oriented and quite consistent with where it began—the modern era tort cases with their results in favor of application of forum law whenever possible. In the non-tort cases, there is not a single modern era case to “voluntarily” choose the law of another jurisdiction when Kentucky had an ability to choose its own law and a forum interest was violated by the choice of non-Kentucky law. The difficulty of the dichotomous language in this pattern is manifesting itself in the experience of

\[\text{222} \text{ Reese, supra note 34, at 374.}\]
\[\text{223} \text{ Id. at 373.}\]
\[\text{224} \text{ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).}\]
\[\text{225} \text{ By this it is meant that there was no legislative directive (borrowing statute, etc.) or contractual choice (choice of law clause, etc.).}\]
federal courts, which are in most instances required to apply Kentucky's choice of law rules. A review of the federal experience demonstrates how unclear the Kentucky choice of law rules really are.

III. FEDERAL EXPERIENCE WITH KENTUCKY'S CHOICE OF LAW METHODOLOGY

The courts of the United States for the most part have no independent choice of law methodology.\textsuperscript{226} Despite having obvious frequent exposure to conflicts issues because of the existence of diversity jurisdiction,\textsuperscript{227} federal courts are obliged by \textit{Klaxon v. Stentor Electric Manufacturing Co.},\textsuperscript{228} a policy outgrowth of \textit{Erie Railroad Co. v. Tompkins},\textsuperscript{229} to apply the choice of law rules of the state in which they are sitting. The only exception to that requirement is that in cases which are transferred to a federal court pursuant to the forum non conveniens standards of 28 U.S.C. § 1404(a), the court is required to apply the choice of law rules of the transferor court.\textsuperscript{230} Thus, federal courts are peculiarly attuned to (and at the mercy of) state choice of law rules, particularly those of the state in which they sit. Those facts have caused Kentucky's federal courts and (occasionally) federal courts in sister states to struggle with the content of Kentucky's choice of law rules. Given the confused picture set forth above, it is not surprising that the federal courts have had considerable difficulties.

\textsuperscript{226} In matters governed by federal law (whether the Constitution, federal statutes, federal regulations, or federal common law), state conflicts rules are, of course, irrelevant. Thus, state choice of law rules have no application in admiralty cases. \textit{See}, \textit{e.g.}, \textit{Lauritzen v. Larsen}, 345 U.S. 571 (1953). Even when it is necessary to decide between United States law and the law of a foreign country in cases involving foreign governments, state law is inapplicable. \textit{See}, \textit{e.g.}, \textit{United States v. Pink}, 315 U.S. 203 (1942). In such cases, there actually is a limited body of federal conflicts law. The methodology applied therein is currently the Second Restatement. \textit{See} \textit{Aqua-Marine Constructors, Inc. v. Banks}, 110 F.3d 663 (9th Cir.), \textit{cert. denied sub nom. Polaris Ins. Co. v. Aqua-Marine Constructors, Inc.}, 118 S. Ct. 339 (1997).


\textsuperscript{228} \textit{Klaxon v. Stentor Elec. Mfg. Co.}, 313 U.S. 487 (1941) (holding that in diversity jurisdiction cases, a federal court must use the choice of law of the state where it sits).

\textsuperscript{229} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64 (1938) (holding that in diversity jurisdiction cases, a federal court must generally use the law of the state in which it sits).

A. Jurisdiction Selecting Mechanisms

1. Choice of Forum Clauses

The Kentucky state courts' position on such clauses appears clear. In the modern era, Kentucky's courts are committed to the Second Restatement's notion that such clauses do not oust the nonchosen forum of jurisdiction and that analysis of such clauses in the factual context of a particular dispute is necessary to determine if application would be "unfair or unreasonable."231

In Horning v. Sycom,232 a Kentucky dentist purchased a computer billing system from a Wisconsin limited partnership which had created the software for the system and a Texas corporation which manufactured the hardware.233 The sale occurred as a result of a sales call upon the Kentucky dentist by representatives of the Wisconsin software seller. The system did not work and the dentist brought suit in Kentucky asserting various claims, including tort and contract theories.234 The sellers sought to have the case transferred to Wisconsin based upon a Wisconsin choice of law and choice of forum clause contained in the form contract signed by the dentist.235 The district court denied the transfer motion, finding the issue directly controlled by the Kentucky Court of Appeals decision in Prudential Resources Corp. v. Plunkett.236 Looking to the Second Restatement as it did in Plunkett, the court found that such a clause did not oust Kentucky of jurisdiction and that Kentucky was preferred as a forum because the dentist would be seriously inconvenienced by litigation in Wisconsin, coupled with the fact that there had been a severe disparity in bargaining position between the parties.237

A similar fact pattern, but where the chosen forum was Kentucky, arose in KFC Corp. v. Lilleoren238 where KFC (a Delaware corporation with its principal place of business in Kentucky) filed suit in Kentucky against the Oregon holders of two franchises. The franchisees sought a transfer to

231 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).
233 See id. at 820.
234 See id.
235 See id.
236 See id. at 821 (citing Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97 (Ky. Ct. App. 1979)).
237 See id. (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971)).
federal court in Oregon since the claims arose from the operations of franchises in three cities in that state, but KFC resisted upon the grounds of a Kentucky choice of forum clause contained in the franchise agreements. In upholding the forum selection clause (and refusing the transfer), the court did not make any reference at all to Kentucky state law on the subject but relied solely on two United States Supreme Court decisions, one of which upheld such a clause and another of which affirmed a transfer despite the existence of such a clause. The court concluded that the message of the United States Supreme Court had been that substantial deference was to be given to such clauses and that absent evidence of substantial unfairness, they should be upheld. The court then noted that the record before it was devoid of any such evidence. While the failure to make a reference to Kentucky law is troubling, the result is consistent with Plunkett and the Second Restatement, which in the absence of affirmatory evidence against application would uphold the clause.

It is difficult to form much of a conclusion about the federal court's actions in Creditors Collection Bureau, Inc. v. Access Data, Inc. because neither the normal factual information about the parties (state of incorporation, principal place of business, etc.) nor the underlying facts can be determined from the reported opinion. All that is known is that the parties were signatories to a contract which contained a Tennessee choice of forum clause. One party brought suit in Kentucky and the defendant sought, similar to KFC, to have the case transferred to Tennessee under the provisions of 28 U.S.C. § 1404(a). In making the decision to uphold the clause and order the transfer, the court, as in KFC, made no reference at all to Kentucky state law but rather relied upon United States Supreme Court case law, pointing as well to Sixth Circuit

239 See id. at 1023-24.
240 See id. at 1024 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590 (1991)).
241 See id. at 1024-25 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988)).
242 See id. at 1025.
243 See id.
245 See id. at 312.
246 See id.
247 See id. at 313 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), for the proposition that such clauses were not automatically valid but that they were
precedent to the effect that such clauses should be upheld unless unreasonable under the circumstances. Finding nothing in the facts to suggest that it would be unreasonable to the plaintiff to enforce the clause, the court ordered the transfer. Again, the result appears quite compatible with that observed in Kentucky state cases on the issue although they are not referred to in the decision.

The results in the cases surely appear consistent with the Kentucky choice of law position on choice of forum cases. The emphasis on upholding, except for cases of "substantial unfairness," is certainly consistent with the Kentucky (and Second Restatement) position on the issue. The federal cases are disturbing, however, in that only Horning uses the Kentucky analysis. KFC and Creditors Collection appear more interested in federal law on the issue, possibly upon the theory that what is being determined is a transfer under the appropriate federal statute and that a federal court may ignore state conflicts decisions in deciding such an issue. It would seem, however, that since the transfer decision is being determined by the validity of a clause which is itself a creature of state law (i.e., contained in a contract which is clearly governed by state law), it would be anomalous to ignore that state law.

2. Door Closing Provisions

In quite sharp contrast to the choice of forum clause, one may occasionally encounter (most typically through a statute) a "door closing" provision which purports to close the doors of a state's courts to particular persons or to particular types of actions. Such cases may have a superficial appearance as conflicts cases, but at the threshold issue of whether to serve as a forum, they are not. They are, most simply, cases in which the state courts would not entertain an action, and the issue posed in the federal system is whether a federal court in that particular state is similarly disqualified. The cases are thus more in line with the Erie factors to be considered in making a transfer decision).

See id. (citing Moses v. Business Card Express, 929 F.2d 1131 (6th Cir. 1991)).


See, for example, the Mississippi statute in Woods v. Interstate Realty Co., 337 U.S. 535 (1949), and the North Carolina statute in Angel v. Bullington, 330 U.S. 183 (1947).
controls of federalism than with the Klaxon mandate to apply state choice of law rules.252

In the Sixth Circuit, an encounter with such a Kentucky provision occurred in Miller v. Davis,253 an action brought in Kentucky seeking pension benefits on behalf of Kentucky beneficiaries of a trust administered in the District of Columbia by a labor union. The actual issue in the case was whether a federal court in Kentucky could adjudicate the dispute at all since the district court had concluded that a Kentucky state court (faced with the same situation) would have had no jurisdiction over a trust which had its situs outside Kentucky.254 That aspect of the decision was reversed, the Sixth Circuit holding that under its interpretation of the line of cases beginning with Erie Railroad Co. v. Tompkins,255 such a course of action by the Kentucky state courts would not be binding on the federal court.256 The Sixth Circuit further noted that the source of the alleged “door closing” dimension of Kentucky law was a relatively old Kentucky case,257 the results of which were very much in doubt due to later developments in Kentucky’s law of long arm jurisdiction and choice of law.258 Thus, the Sixth Circuit was uncertain whether a Kentucky state court would in fact have concluded that it lacked jurisdiction or that the law of the District of Columbia should be applied to claims made by Kentucky beneficiaries.259 As to the possibility that Kentucky law might actually be applied in the modern era to the merits of such a claim, the Sixth Circuit relied upon a Second Restatement shift of position which favored application of Kentucky law over the law of the District of Columbia.260 Not needing to decide what was Kentucky’s choice of law rule in the context of the appeal before it, the Sixth Circuit remanded for subsequent proceedings.261

252 See supra notes 228-29 and accompanying text.
253 Miller v. Davis, 507 F.2d 308 (6th Cir. 1974).
254 See id. at 311.
255 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
256 See Miller, 507 F.2d at 314. This “door closing” aspect of the case under the analysis of Erie is discussed at length in John R. Leathers, Miller v. Davis: The Sixth Circuit Applies an Interest Analysis to an Erie Problem, 63 KY. L.J. 923 (1975).
257 See Miller, 507 F.2d at 315 (citing Wilder v. United Mine Workers Welfare & Retirement Fund, 346 S.W.2d 27 (Ky. 1961)).
258 See id. (citing K.R.S. § 454.210 (Michie 1968); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 299 (1971)).
259 See id. at 316.
260 See id. at 315-16 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 267).
261 See id. at 318.
In retrospect, the Sixth Circuit reached a correct result, quite apart from
the issue of whether the alleged Kentucky door closing position was
binding on a federal court. With the benefit of more than twenty years of
subsequent Kentucky conflicts law, we now know the court was correct
that Kentucky would want to apply its own law to duties of a trustee
occurring outside Kentucky where the impact upon Kentucky beneficiaries
was clear. Any notion that Kentucky lacked personal jurisdiction over such
a trustee could not sustain modern long arm analysis. In addition to the fact
that the Second Restatement appeared to favor application of Kentucky law,
Kentucky’s forum-oriented system would dictate choice of Kentucky law
concerning the trustee’s duties to Kentuckians.

3. Choice of Law Clauses

Upon five occasions in the modern era of Kentucky conflicts jurispru-
dence, federal courts have faced issues raised by choice of law clauses. In
none do they appear to have noted the very clear signals of Kentucky law
that such clauses are not to be blindly enforced but must be subjected to
factual scrutiny.

In In re Velasco, a doctor who was apparently domiciled in Kentucky
contracted with a California corporation to engage in a sale and leaseback
for medical and office equipment to be used in the doctor’s practice. The
lease contained a California choice of law clause. When the doctor
became bankrupt, it was necessary to determine the status of the arrange-
ment to rule upon whether the lease constituted an executory contract. The
court determined that the lease was, under California law, not an executory
contract and thus to be treated as a loan with a security arrangement. In
choosing to apply California law pursuant to the choice of law clause, the
court referred to both state and federal case law, as well as to the
Uniform Commercial Code. Although fifteen years after Kentucky’s
emergence into the modern conflicts era, the court chose not to rely upon

263 See id. at 873.
264 See id. at 874.
265 See id. (citing Big Four Mills Ltd. v. Community Credit Co., 211 S.W.2d
831 (Ky. 1948), as predating the modern era of conflicts jurisprudence in
Kentucky).
266 See id. (citing Consolidated Jewelers Inc. v. Standard Fin. Corp., 325 F.2d
31 (6th Cir. 1963), as predating the modern era of Kentucky conflicts
jurisprudence).
267 See id. (quoting U.C.C. § 1-105(1) (1989)).
modern case law but to apply older law, which may or may not have been applicable after modern developments in Kentucky. Indeed, we know from Kentucky's decisions in *Fite & Warmath*\(^{268}\) and *General Electric*\(^{269}\) that such clauses were upheld prior to the consideration by the bankruptcy court in *Velasco*. We also know, however, from the later decisions in *Breeding*\(^{270}\) and *Paine*\(^{271}\) that such clauses have been subjected to scrutiny (and occasionally disregarded) under the *Second Restatement* analysis when they did not choose Kentucky law. Thus, the decision to enforce the California choice of law clause without careful examination of the underlying circumstances in *Velasco* appears to be an error, at least with the benefit of knowing the cases which postdate it.

Similarly, in *In re Glover Construction Co.*\(^{272}\) a Kentucky buyer of equipment contracted with a seller (apparently a nonresident of Kentucky) for installation in Kentucky. In the midst of a dispute over the duties of the buyer and seller under the contract (which contained a Kentucky choice of law clause), the buyer filed for bankruptcy protection. The bankruptcy court was then called upon to determine whether there did in fact exist a binding contract. The court chose to apply Kentucky law.\(^{273}\) The court seemed to assume that such would have been the case because Kentucky was the place of performance of the contract. That seems an ill-founded conclusion since the dispute between the parties went to the validity of the contract (it was missing certain material elements) and that would historically have been an issue governed by the law of the place of the making of the contract. There are not sufficient facts given in the reported decision to determine where that may have been. In any event, the court applied Kentucky law because of the choice of law clause.\(^{274}\) That is a sensible solution, since the result was to choose to apply the law of the forum. One must wonder, however, about the wisdom of basing the result on the choice of law clause since the ultimate conclusion was that no binding contract existed; it is difficult to conceive how a "non-contract" can nevertheless result in a binding contract as to the choice of law issue.

\(^{268}\) *Fite & Warmath Constr. Co. v. MYS Corp.*, 559 S.W.2d 729 (Ky. 1977).
\(^{270}\) *Breeding v. Massachusetts Indem. & Life Ins. Co.*, 633 S.W.2d 717 (Ky. 1982).
\(^{273}\) *See id.* at 583-84.
\(^{274}\) *See id.* at 583 n.4.
Nevertheless, in result, the case fits the pattern of *Fite & Warmath*, but it is disturbing that the opinion of the bankruptcy court cites no Kentucky case authority whatsoever pertaining to choice of law clauses.

In *Gateway Press, Inc. v. Leejay, Inc.*, the case presented an argument between a resident seller of services and a nonresident buyer of the result of those services. The seller, a Kentucky corporation with its principal place of business in Kentucky, contracted with the buyer, a Massachusetts corporation with its principal place of business in Massachusetts, to present certain pages portraying the buyer's merchandise for inclusion in a catalog to be printed by a third party outside Kentucky. When the buyer failed to pay, the seller filed suit in Kentucky. The nonresident buyer unsuccessfully contested personal jurisdiction. What is interesting for our purpose, however, is that the contract between the parties contained a choice of law clause in favor of Kentucky law, and the court cited it with approval as part of its conclusion that Kentucky did in fact have personal jurisdiction. It is clear that the court assumed the choice of law clause to have been valid under the facts at hand. Given what we know from other sources of Kentucky choice of law on the topic (i.e., *Fite & Warmath*, *General Electric*, *Breeding*, and *Paine*), the issue is not as clear as

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275 *Fite & Warmath Constr. Co. v. MYS Corp.*, 559 S.W.2d 729 (Ky. 1977).


277 It should hardly be surprising that jurisdiction was found under the "doing business" portion of the Kentucky Long Arm Statute, K.R.S. § 454.210(2)(a) (Michie 1985 & Supp. 1996). *See Gateway Press*, 993 F. Supp. at 580. While the case law historically draws a distinction between nonresident buyers and nonresident sellers, even a nonresident buyer may be subjected to personal jurisdiction upon sufficient facts. The factual contacts of the nonresident in *Gateway Press* seem to exceed those in *Tube Turns Division of Chemetron Corp. v. Patterson Co.*, 562 S.W.2d 99 (Ky. Ct. App. 1978), and more closely resemble the facts in *Info-Med, Inc. v. National Healthcare, Inc.*, 669 F. Supp. 793 (W.D. Ky. 1987).

278 *See Gateway Press*, 993 F. Supp. at 581. Such a clause is not conclusive as to personal jurisdiction but is evidence of an intent by a nonresident to avail himself or herself of the benefits and protections of the law of the chosen state. *See Burger King v. Rudzewicz*, 471 U.S. 462, 469-72 (1985).

279 *Fite & Warmath*, 559 S.W.2d at 729.


281 *Breeding v. Massachusetts Indem. & Life Ins. Co.*, 633 S.W.2d 717 (Ky. 1982).

most might suppose. While the facts in *Gateway Press* most likely would lend themselves to validating the clause, it is unfortunate that the court did not at least undertake the analysis which appears mandated from the later Kentucky state court cases. It is extremely likely, however, that any analysis would have resulted in applying Kentucky law because it is virtually unthinkable that Kentucky would conclude that a clause calling for application of Kentucky law is violative of Kentucky’s policy.

The first Sixth Circuit consideration of such clauses came in *WorldSource Coil Coating, Inc. v. McGraw Construction Co.* McGraw agreed to construct a plant in Kentucky for WorldSource; the facility was to be financed by General Electric Capital. Construction was taking place pursuant to a written contract which contained both an arbitration clause and an Illinois choice of law clause. A dispute arose when the contractor contended work was complete but that it should be paid for certain additions. Although the contractor originally stated that it would seek arbitration, it instead filed suit in a Kentucky state court, seeking both injunctive relief and damages. The action was removed to federal court, where the contractor sought to compel arbitration. The district court refused to order arbitration, finding that under Illinois law the filing of the action by the contractor had constituted a waiver of its right to compel arbitration. It appears that none of the parties questioned that the issue of whether such conduct amounted to waiver was to be governed by Illinois law, presumably because of the choice of law clause. There is no discussion in the case of whether either the district court or the Sixth Circuit believed that Kentucky’s choice of law rules would have required an upholding of the Illinois choice of law clause. The facts are so scant that one cannot even begin the “fundamental fairness” analysis which the Second Restatement and the Kentucky cases contemplate. Perhaps the solution is that the result is correct by the “agreement” (i.e., failure to raise the issue, rather than the choice of law clause encountered in other cases) of the parties to utilize Illinois law, but the possibility also exists that counsel for the contractor simply never realized that one might, under the Kentucky analysis, escape such clauses. One may also wonder why no one

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284 See id. at 475.
285 See id. at 476 n.1.
286 See id. at 475.
287 See id. at 476-77.
288 See id. at 476 n.3.
thought to argue that the contract was encompassed within the Federal Arbitration Act\textsuperscript{289} and to contend that under case law pursuant to that statute, such an action was not a waiver. There is in fact a dissenting opinion which argued in favor of federal law controlling, and the reference for authority therein is to federal case law in favor of arbitration without mentioning the federal statute.\textsuperscript{290}

Similar Sixth Circuit enforcement of such a clause occurred in \textit{Tractor \\& Farm Supply, Inc. v. Ford New Holland, Inc.}\textsuperscript{291} Tractor, a Kentucky corporation with its principal place of business in Kentucky, was a dealer for Ford New Holland, a Delaware corporation with its principal place of business in Michigan, at a Kentucky location pursuant to a franchise agreement which contained a Michigan choice of law clause.\textsuperscript{292} Ford canceled the agreement, placed the franchise with a new dealer, and several Tractor employees left to work for the new dealership.\textsuperscript{293} Tractor filed suit against Ford for breach of contract and fraud. In a strange shift of position, Ford argued that Kentucky law should apply to the contract dispute rather than Michigan law as was called for under the contract which Ford drafted.\textsuperscript{294} Although the court acknowledged that Kentucky had ignored a choice of law clause in \textit{Breeding},\textsuperscript{295} the court noted the favorable disposition of Kentucky courts toward such clauses in \textit{Paine},\textsuperscript{296} particularly where the party arguing to ignore the clause was its drafter. Thus, the court upheld the choice of law clause and applied Michigan law to the contract claims.\textsuperscript{297}

As a group, \textit{Glover Construction} and \textit{Gateway Press} surely reach correct results in that they apply Kentucky law, in both instances as a result of enforcing choice of law clauses in favor of Kentucky law. In \textit{Velasco}, however, the upholding of a clause in favor of California law may well be at odds with the Kentucky state court decisions which, apparently based on

\textsuperscript{290} See WorldSource, 946 F.2d at 481 (Gadala, D.J., dissenting) (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)).
\textsuperscript{292} See id. at 1201.
\textsuperscript{293} See id.
\textsuperscript{294} See id. at 1201-02.
\textsuperscript{295} See id. at 1202 (citing Breeding v. Massachusetts Indem. \\& Life Ins. Co., 633 S.W.2d 717 (Ky. 1982)).
\textsuperscript{296} See id. at 1202-03 (citing Paine v. La Quinta Motor Inns, Inc., 736 S.W.2d 355 (Ky. Ct. App. 1987), overruled on other grounds by Oliver v. Schultz, 885 S.W.2d 699 (Ky. 1994)).
\textsuperscript{297} See id. at 1203.
the Second Restatement, appear more oriented toward choosing Kentucky law where there is an element of unfairness to a Kentucky domiciled consumer-party. In WorldSource, there is no apparent explanation for using Illinois law pursuant to a choice of law clause without at least undertaking the analysis called for in the Second Restatement, although there may be no harm since the issue should most likely have been governed by the Federal Arbitration Act in any event. Nevertheless, it is clear that there is not a single federal case which, when confronted with a choice of law clause, has undertaken the skeptical inquiry required by the later Kentucky cases.

4. Kentucky’s Borrowing Statute and Statutes of Limitations

As noted previously from the Kentucky state court cases, the Kentucky conflicts position on statutes of limitations can be easily summarized. Because of the interaction between the borrowing statute\(^2\) and Seat,\(^2\) actions will normally be governed by the shorter statute of limitations—Kentucky’s or that of the state where the claim arose. In the federal setting, there may be a difference caused by the fact that upon the occasion of a transfer from another state pursuant to 28 U.S.C. \$ 1404(a), a federal court in Kentucky will actually apply the other state’s choice of law rules.\(^3\) This may have the effect of reaching a different result than if the action were being tried in a Kentucky state court. In none of the reported federal decisions has that occurred, but it is a pattern which may occur and of which note should be taken.

Typical of the reported cases is T-Birds, Inc. v. Thoroughbred Helicopter Service, Inc.,\(^3\) in which an Ohio resident was injured in a helicopter crash in Ohio. An action was brought in Ohio against the owner of the helicopter service and a company which had overhauled the helicopter in Kentucky. The action was originally brought in Ohio but was transferred to Kentucky under of 28 U.S.C. \$ 1406 because some of the defendants were not subject to personal jurisdiction in Ohio.\(^4\) A dispute then arose as to whether the action was governed by the applicable Ohio statute of limitations (by which measure it was timely) or the Kentucky

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\(^2\) K.R.S. \$ 413.320 (Michie 1992).
\(^3\) See Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (construing 28 U.S.C. \$ 1404(a) (1994)).
\(^3\) See id. at 549; 28 U.S.C. \$ 1406 (1994).
statute of limitations (by which it was time-barred). With a transfer based upon the fact that Ohio could not have served as a forum, it was clear that Kentucky's conflicts laws applied to the action. While the court concluded that Kentucky law applied so that the action was time-barred, there was no reasoning given as to why that was concluded. The result is correct and the reason which should have been stated is the Kentucky borrowing statute. Under that statute, it has clearly been held that Kentucky's shorter statute of limitations will bar actions which are otherwise timely in the place where they arose.

Similarly, in Martin v. Stokes, a Virginia resident was injured in Kentucky in an automobile accident when her vehicle was struck by a vehicle owned by a Kentucky resident and driven by a California resident. Suit was commenced in federal court in Virginia and transferred to federal court in Kentucky, but the basis for that transfer was not stated by the transferor court. Under Virginia choice of law rules, the action would have been timely under a two-year statute of limitations; under Kentucky choice of law rules, the action would have been time-barred under a one-year statute of limitations. Thus, the question of which state's choice of law rules were to be applied was determinative of the proper resolution of the case. In an action transferred pursuant to 28 U.S.C. § 1404(a), the choice of law rules of the transferor court are to be applied. Although not as clear, the difference between such transfers and those pursuant to 28 U.S.C. § 1406 made it likely that in such a situation the choice of law rules of the transferee state would be applied. Thus, it was necessary for the Sixth Circuit to remand this action to the district court to determine the basis for the transfer from Virginia. Given that one of the defendants in the action was a Kentucky resident and that the accident occurred in Kentucky, it seems far-fetched to think that Virginia actually had personal jurisdiction. Thus, one may speculate that this was a § 1406 transfer, in which case

See supra notes 144-52 and accompanying text.
See id. at 470.
See id. at 471 (citing Van Dusen v. Barrack, 376 U.S. 612, 639 (1964)).
It would be nonsensical to apply the transferor's choice of law rules in a § 1406 transfer since the transferor, by definition, was not able to serve as the forum. See Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3846, at 364-66 nn.25-26 (1986); see also Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984 (5th Cir. 1989).
See Martin, 623 F.2d at 473.
Kentucky's choice of law rules would apply and the action would be time-barred.

In a similar case, *Carson v. U-Haul Co.*, Georgia residents were injured in an accident in Kentucky. Also involved in the accident were a Kentucky driver, a Kentucky corporation with its principal place of business in Tennessee, and an Oregon corporation with its principal place of business in Oregon. The injured parties filed suit in federal court in Georgia, but the matter was transferred to Kentucky following development of a personal jurisdiction argument by the corporations and before process could be served on the Kentucky driver. The transfer was made at the insistence of the plaintiff Georgia residents. The action was brought within a two-year time period set by Georgia law but outside the one-year time for such actions set by Kentucky law. Rather than hold that the transfer had been made pursuant to 28 U.S.C. § 1406 (because Georgia had no personal jurisdiction over at least some of the defendants), the Sixth Circuit treated the case as one transferred under 28 U.S.C. § 1404(a), but at the insistence of the plaintiffs rather than the defendants. In those circumstances, the court was able to reach a body of law (applicable at that time but since overruled) which suggested that the choice of law in such transferred cases was governed by the choice of law rules of the transferee court rather than the transferor. In the modern era, such a ploy would not work because of the holding of the United States Supreme Court that in 1404(a) transfers, the choice of law rules of the transferor state apply regardless of who initiated the transfer. The result remains correct, however, because the transfer surely was under 28 U.S.C. § 1406, so that reliance upon Kentucky

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312 See id. at 917.
313 While the corporations might ultimately have proved to be doing business in Georgia and thus subject to personal jurisdiction therein (assuming a general jurisdiction long arm statute rather than a specific jurisdiction statute), there is no conceivable manner in which the Kentucky driver would have been subject to personal jurisdiction except by waiver or personal service while physically in the state.
314 See *Carson*, 434 F.2d at 917.
315 See id. at 918.
316 The court thus distinguished the case from *Van Dusen v. Barrack*, 376 U.S. 612 (1964), so as to avoid the holding of that case that the choice of law rules of the transferor court applied. *Van Dusen* had been transferred at the insistence of the defendant rather than the plaintiff. See *Carson*, 434 F.2d at 918.
choice of law to apply the Kentucky statute was required and the action was time-barred.\footnote{See Carson, 434 F.2d at 917.}

The reported federal decision which most closely resembles the typical Kentucky statute of limitations cases is *Atkins v. Schmutz Manufacturing Co.*\footnote{Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967).} There, a Virginia resident was injured in Virginia by a machine manufactured by a Kentucky corporation and shipped to Virginia.\footnote{See id. at 762.} The injured Virginian began an action in Kentucky more than one but less than two years after the injury. Under the applicable Kentucky statute of limitations, the action would have been time-barred; under the applicable Virginia statute, the action would have been timely.\footnote{See id. at 763.} Thus, the issue of which statute of limitations applied was dispositive of the outcome. Naturally, the decision had to be made under Kentucky choice of law principles since the action had been filed in Kentucky. Under the decision of the Kentucky Court of Appeals in *Seat*, the Kentucky statute of limitations was applied and so the action was time-barred.\footnote{See id. (citing Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. 1965)).}

The cases as a group clearly demonstrate the result of application of the shorter statute of limitations under Kentucky choice of law principles. Only in federal cases transferred to Kentucky but governed by another state’s choice of law rules is another result possible.

**B. Tort Cases**

1. **Guest Statutes**

Given that the classic Kentucky tort cases all arise in the context of guest statutes, it is surprising that the reported federal case law has had so little experience with the issue raised thereby.

In *Bennett v. Macy*,\footnote{Bennett v. Macy, 324 F. Supp. 409 (W.D. Ky. 1971).} a Kentucky resident was injured in Indiana while a passenger in a vehicle driven by an Indiana resident. Suit was then brought in Kentucky and the driver defended based on the Indiana guest statute.\footnote{See id. at 410.} In reaching the conclusion that Kentucky’s law (which lacked a guest statute) applied, the court relied exclusively upon *Wessling* to
conclude that Kentucky had the more significant relationship to the parties and the events.\textsuperscript{325} Although the facts are actually much closer to \textit{Foster}\textsuperscript{326} than to \textit{Wessling}, the court could not have relied upon \textit{Foster} because it had not yet been decided. We know from the result in \textit{Foster} that the court correctly found that Kentucky law applied. What is surprising, however, is that the court relied upon the “most significant relationship” analysis rather than on the “sufficient contact” analysis which had been articulated three years earlier in \textit{Arnett}.\textsuperscript{327} One would have thought that the later analysis made the choice easier for the court to conclude that it was looking at a fact pattern in which Kentucky had an interest (the injured party was a Kentucky resident) and that alone was sufficient. It is possible, however, that the court could not see the usefulness of \textit{Arnett} because the Arnett accident had occurred in Kentucky; it is only with the application of the analysis to the out-of-state accident in \textit{Foster} that the pattern actually became clear.

Certainly the result in \textit{Bennett} is correct, but extreme care should be used in citing it as authority for anything but its result. The \textit{Second Restatement} reliance may have been shown by \textit{Foster} to be misplaced,\textsuperscript{328} unless Professor Reese’s characterization of \textit{Foster} as a “close case” is more prescient than one would think he could have known. \textit{Bennett} arguably supports the position that even the result in \textit{Foster} is consistent with the \textit{Second Restatement}.

2. \textit{Wrongful Death}

The classic conflicts rule for wrongful death was that such actions were governed by the law of the place of the injury causing death; that classic position is presumptively retained by the \textit{Second Restatement}.\textsuperscript{329} Care must always be taken to note that the rule does not necessarily look to the place where death occurs. One can easily envision cases where an injury occurs in one state but death occurs thereafter in some other state.

A major Sixth Circuit pronouncement on Kentucky conflicts rules as applicable to wrongful death occurred in \textit{Harris Corp. v. Comair, Inc.}\textsuperscript{330}

\textsuperscript{325} See id. at 410-11 (citing \textit{Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967))}.
\textsuperscript{326} \textit{Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972)}.
\textsuperscript{327} See id. at 828-29 (citing \textit{Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968)}).
\textsuperscript{328} Even this may not be as clear as Justice Reed believed in his dissent to \textit{Foster}. See id. at 830-31 (Reed, J., dissenting); Reese, \textit{supra} note 34, at 373.
\textsuperscript{329} See \textit{RESTATMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971)}.
\textsuperscript{330} \textit{Harris Corp. v. Comair, Inc., 712 F.2d 1069 (6th Cir. 1983)}. 
There, an Ohio resident employee of Harris was killed in an airplane crash in Kentucky. Harris brought suit against the air carrier, the manufacturer of the aircraft, and manufacturers of certain component parts. The employer sought to recover against the alleged tortfeasors for the death of the valued employee. Although it had been conceded at trial by all parties that such an action for wrongful death was governed by the law of Kentucky, the Sixth Circuit itself reasoned that Kentucky law would apply, upon the basis that Kentucky’s prior conflicts cases indicated that Kentucky wished to apply its own law whenever possible, and further noted that the mere fact that the accident occurred in Kentucky was “sufficient to justify application of Kentucky law.” The Sixth Circuit went still further, however, and noted that a recent Kentucky decision, Breeding, stood for the proposition that Kentucky would apply its own law in a case of sufficient contacts, even if the parties had chosen to the contrary. The Sixth Circuit thus overlooked Breeding having been a contract case (and thus possibly subject to the Second Restatement) and concluded that it stood as further evidence that “Kentucky applies its own law unless there are overwhelming interests to the contrary.” That noted, the court then addressed the problem for the employer, which was that Kentucky law did not provide for such a right by an employer. The Sixth Circuit (as had the district court) refused to create a new cause of action, reasoning that Kentucky courts would choose to marshal the normally limited assets of tortfeasors in favor of survivors rather than employers. Thus, Kentucky law was applied but to no avail for the employer, the result

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331 See id. at 1070.
333 See Harris Corp., 712 F.2d at 1071 (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967)).
334 Id. at 1071.
335 See id. (citing Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982)). Thus, Breeding’s sub silentio treatment of the choice of law clause was viewed as significantly by the federal court as we have previously observed in the state cases.
336 Or perhaps the oft-supposed distinction between tort cases and others is irrelevant (or nonexistent) if we take Breeding’s holding as having been what it did rather than what it said. The Sixth Circuit apparently ruled based upon the result rather than the language.
337 Harris Corp., 712 F.2d at 1071.
338 See id.
being the same as would have been reached under Ohio law and arguably rendering *Harris* a false conflict with no difference between the law of the two states.

A similarly novel argument attempting to secure damages for wrongful death was advanced in *Johnson v. S.O.S. Transport, Inc.* In that case, a Kentucky resident was killed (apparently in North Carolina) while driving a vehicle which had been leased to an Ohio corporation operating as a common carrier of freight upon the interstate highways. The Kentucky survivor of the decedent filed an action in Kentucky seeking damages from the lessor for having been negligent in the inspection and maintenance of the leased vehicle, thus contributing to the death of the Kentuckian. The Kentucky driver had departed from his home in Kentucky, driving the truck, and picked up a load of freight in Ohio. Thus, the decedent's trip began in Kentucky and was intended to have ended in Kentucky after delivery of the goods to North Carolina. The survivor sought recovery on the theory that the lessor had a duty to maintain the leased vehicle in a safe condition and that breach of that duty had contributed to the death. The Sixth Circuit concluded, as had the district court, that any such substantive duty would have to arise under Kentucky law, that being the law which would be dictated by Kentucky's choice of law rules. That conclusion was based on nothing more than the statement that such rules "favor the application of its own law whenever it can be justified." Absent some better connecting factor, such as Kentucky being the place of the accident which caused the death, it is actually difficult to conceive how Kentucky law could apply to the duty of a nonresident lessor who apparently performed no acts in Kentucky other than dealing with the vehicle's owner, who in turn hired the decedent. The issue turns out to be of interest only in that abstract, however, since the court concluded that Kentucky law did not

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340 The opinion is unclear on this point. After describing certain events which occurred in Ohio and Kentucky and noting that North Carolina was the intended destination, the Sixth Circuit noted that the decedent "was killed while en route to High Point, North Carolina." *Id.* at 518.

341 See *id.*

342 See *id.*

343 For the significance of Kentucky as the place where a trip began and was to have ended, see *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972), and *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967).

344 *Johnson*, 926 F.2d at 519 n.6 (citing *Grant v. Bill Walker Pontiac-GMC*, Inc., 523 F.2d 1301, 1304 (6th Cir. 1975)).
have any such substantive basis to furnish a claim against the lessor.\textsuperscript{345} Thus, a choice of law was made unnecessarily, there apparently having existed no real basis to impose liability on the lessor.\textsuperscript{346} Again, Kentucky law was applied but to no avail for the party-plaintiff, perhaps meaning that there was no real difference in the law of the two states and that the facts represented a false conflict.

Still another novel wrongful death theory was advanced in \textit{Vaughn v. United States},\textsuperscript{347} in which suit was brought in Kentucky against the United States arising from the death of two Kentucky residents who were killed by a person with a long and dangerous criminal history.\textsuperscript{348} That perpetrator was free from Ohio state custody because of his cooperation with the Federal Bureau of Investigation.\textsuperscript{349} Survivors of the deceased Kentucky residents claimed that the United States had been negligent in allowing the killer to be freed, thus rendering the United States liable under the Federal Tort Claims Act ("FTCA").\textsuperscript{350} FTCA claims are governed by the law (including conflicts laws) of the state where the act or omissions occurred.\textsuperscript{351} There was a small difficulty posed in this case because, while most acts occurred in Kentucky, at least one act also occurred in Ohio.\textsuperscript{352} Thus, the Sixth Circuit needed to determine whether the FTCA required application of Ohio or Kentucky choice of law rules. The court avoided having to reach that issue by finding that it did not matter—either state’s choice of law rules would apply Kentucky law to the merits of the litigation because Kentucky was the place of the injury which caused death.\textsuperscript{353}

\textsuperscript{345} \textit{See id.} at 521.
\textsuperscript{346} The case was actually remanded for further proceedings because of the possibility that recovery could be based on disregard for certain federal safety standards applicable to interstate carriers. \textit{See id.} at 524. Kentucky state law, however, was foreclosed.
\textsuperscript{347} \textit{Vaughn v. United States}, No. 96-6336, 1997 WL 809911 (6th Cir. Dec. 16, 1997). This is an unpublished opinion of the Sixth Circuit. According to Sixth Circuit Rule 24(c), the opinion cannot be cited for precedential value except in very limited circumstances. It is included in this discussion for informational purposes only.
\textsuperscript{348} \textit{See id.} at *2.
\textsuperscript{349} \textit{See id.}.
\textsuperscript{350} 28 U.S.C. §§ 1346(b), 2671-2680 (1994). The Act basically provides that the United States may be found liable if a private person would have been found liable for actions in the state where such actions occurred.
\textsuperscript{351} \textit{See Richards v. United States}, 369 U.S. 1, 9-10 (1962).
\textsuperscript{352} \textit{See Vaughn}, 1997 WL 809911, at *2.
\textsuperscript{353} \textit{See id.} at *3 n.2.
an easy enough solution existed under these facts, the court's analysis clearly reveals that more difficult circumstances could arise. In concluding that Ohio rules would require Kentucky law, the court noted that Ohio applied the Second Restatement and would find that Kentucky had the most significant relationship.\(^{354}\) In sharp contrast, the court was clearly aware that Kentucky would choose its own law because the mere fact of the injury having occurred in Kentucky was sufficient contact.\(^{355}\) One can easily envision other situations in which Kentucky would have "sufficient" contacts, but not the "most significant" contacts.\(^{356}\) Ultimately, no recovery was awarded for the facts present in this case.

### 3. Fraud

The normal Second Restatement position on claims by persons damaged by fraudulent conduct is that if the person has acted in reliance upon misrepresentations, with that reliance occurring in the same state wherein the representations were made, then that state's law should govern the rights and liabilities of the parties.\(^{357}\) That seems a clear enough solution, with the more difficult cases being those in which misrepresentations occur in one state but the reliance occurs elsewhere.

The federal experience with such torts has apparently involved only the more simple fact pattern. In *Tractor & Farm Supply, Inc. v. Ford New Holland, Inc.*,\(^{358}\) Tractor was a dealer for Ford New Holland, a Delaware corporation with its principal place of business in Michigan, at a Kentucky location pursuant to a franchise agreement which contained a Michigan choice of law clause. Ford canceled the agreement and placed the franchise with a new dealer. As a result, several Tractor employees left to work for the new dealership. Tractor filed suit against Ford for breach of contract and fraud. As noted elsewhere in this Article,\(^{359}\) Ford argued that Kentucky law should apply to the contract dispute rather than Michigan law as was

\(^{354}\) See id. (citing Kurent v. National Farmers Ins. of Columbus, Inc., 581 N.E.2d 533 (Ohio 1991)).

\(^{355}\) See id. (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972)).

\(^{356}\) The fact pattern that easily comes to mind is Foster, 484 S.W.2d at 827, in which most commentators would say that Kentucky's contacts, while sufficient, were not the most significant. See id. at 829.

\(^{357}\) See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 (1971).


\(^{359}\) See supra notes 291-97 and accompanying text.
called for under the contract which Ford drafted. The court upheld the choice of law clause and applied Michigan law to the contract claims in the matter. In sharp contrast, the court easily found that it would apply Kentucky law to Tractor's claims of fraud and misrepresentation. Indeed, the issue must have been quite clear to the court because it cited no authority. One can easily conclude from the prior Kentucky state court cases that a Kentucky resident damaged by wrongful conduct which occurred and had its consequences within Kentucky would be entitled to the protections of Kentucky law, so no extended discussion is necessary. One should also note the consistency of the result with the Second Restatement position despite the case having been a tort action rather than a contract action.

4. Damages/Persons Responsible

In both the modern era and under prior choice of law systems, it is normally thought that the measure of damages in an action will be governed by the same law which otherwise governs the underlying rights and liabilities of the parties. That same law is normally thought also to govern the availability of contribution among joint tortfeasors and whether one person may be held vicariously responsible for the tort of another. These issues have arisen more commonly in the Kentucky federal experience than in the state case law in the modern era but serve to illustrate these basic principles.

_Hinton v. Hoskins_ concerned an automobile accident in Kentucky in which liability was clear and damages caused to a third party were agreed upon, but in which the defendants undertook to secure a determination between themselves of responsibility for the claim. One defendant (Sizemore) was the operator of a tractor-trailer leased to the other defendant (Aetna Freight). Under the lease, Sizemore furnished the equipment and driver, receiving seventy-five percent of the gross fees;

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360 _See Tractor_, 898 F. Supp. at 1202-03.
361 _See id._ at 1203.
362 _See id._
363 _See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971).
364 _See id._ § 173.
365 _See id._ § 174.
367 _See id._ at 282.
Aetna received the remaining twenty-five percent of the fees. If, at the end of a trip taken upon the business of Aetna, Sizemore did not receive a directive from Aetna for additional work, his truck returned empty to its home base in Ohio and Sizemore received no fee for such return. In the case at hand, Sizemore’s driver made a delivery in Mississippi and had no immediate load thereafter. Sizemore contended that his driver was directed to an Aetna terminal in Tennessee and was traveling back to Ohio from this location when the accident occurred in Kentucky; thus, Sizemore contended that his driver was acting within the scope of an agency relationship with Aetna at the time of the accident. Aetna contended that Sizemore’s driver was acting upon Sizemore’s business at the time and that there was no agency relationship at that moment. Thus, Sizemore alone was responsible for the accident.

While it might appear that the issue between the parties was one of contract law governed by the terms of the lease, the court concluded that what was really at issue was more in the nature of a tort claim generated by damage to a third party because the contract hinged liability upon whose agent the driver was at the time: Aetna’s in the process of following Aetna directives or Sizemore’s returning empty to the home base. As to the status of that agency relationship, the court found that Kentucky law should apply because under modern Kentucky conflicts law, Kentucky law would apply because the mere fact of the accident happening in Kentucky was a sufficient contact. Under Kentucky law, the court concluded that the driver was acting at the time of the accident only as an agent for Sizemore and thus that Aetna had no liability for the damages. While there is no mention of the Second Restatement or discussion of why Kentucky law applied (other than it being the place of the accident), the result is consistent with the Second Restatement which provides that issues of vicarious liability for the torts of others should be governed by the law chosen to govern the underlying tort claim between

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368 See id.
369 See id.
370 See id. at 283-84.
371 See id. at 283.
372 See id.
373 See id. at 284.
374 See id. (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967)).
375 See id.
376 See id. at 284-85.
the tortfeasor and the victim. Under Arnett, the Kentucky courts would choose to apply Kentucky law to the underlying personal injury claim to the third party, and thus Kentucky law should govern the issue of responsibility via agency.

Grant v. Bill Walker Pontiac-GMC, Inc. arose when a Kentucky resident was killed in an accident in Kentucky involving a vehicle driven by a resident of North Carolina. Neither the North Carolina driver nor his employer was the owner of the vehicle he was driving. That vehicle had been procured in Michigan with the assistance of a Georgia automobile dealership, which held title to the vehicle at the time of the accident and intended to transfer title to the driver's North Carolina employer. For purposes of accepting delivery of the vehicle in Michigan, the Georgia dealership had appointed the driver its agent, and he was thereafter to drive the vehicle to North Carolina. Since the action involved the death of a Kentuckian in an accident in Kentucky, the Sixth Circuit correctly concluded that issues arising from that death would, under Kentucky law, be controlled by the law of Kentucky. Although that much is clear, the issue in the case was made more complex by the fact that what the decedent's representatives actually sought was a recovery against the Georgia dealership, with the agency relationship which was created to facilitate delivery of the vehicle being a basis to hold it vicariously responsible for the tort of the driver. As part of that argument, the decedent's representative argued that title to the vehicle was still with the Georgia dealership because under North Carolina law, title could not pass until there was registration of the vehicle in North Carolina. The Sixth Circuit assumed such to be the case as to the technical title of the vehicle but held nevertheless that there was no liability because Kentucky law governed such liability and ownership alone was not a sufficient basis to

379 See id. at 1302.
380 See id. at 1303.
381 See id.
382 The court cited Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968), which supports the conclusion because the need to apply Kentucky law to the death of a Kentucky resident is clearly greater than the need to apply it to a nonresident's death, which was the case in Arnett. See id. at 109-10.
383 See Grant, 523 F.2d at 1304.
384 See id. at 1304-05.
385 See id. at 1304.
 impose such liability.\textsuperscript{386} With title eliminated as a basis for liability, the issue in turn depended on Kentucky law as to the agency issue. Kentucky law was chosen upon the basis that it clearly governed the underlying tort liability of the driver and that vicarious responsibility for his actions was similarly governed by Kentucky law.\textsuperscript{387} The Sixth Circuit concluded that the agency relationship had existed for purposes of signing for the vehicle at the factory in Michigan but that thereafter the driver was not acting under the control or upon the business of the Georgia dealership, so that it had no liability under Kentucky law for the death caused by the North Carolina driver of the vehicle.\textsuperscript{388}

The related issue of contribution among joint tortfeasors was faced by the Sixth Circuit in \textit{Harris Corp. v. Comair, Inc.}\textsuperscript{389} In \textit{Harris Corp.}, the employer of an Ohio resident who was killed in an air crash in Kentucky sought to recover from the air carrier, the manufacturer of the aircraft, and manufacturers of certain component parts for workers' compensation benefits paid to the employee's survivors under Ohio law. The employer was forbidden to gain such recovery under the law of Ohio.\textsuperscript{390} The employer argued that under modern Kentucky conflicts jurisprudence applicable to tort cases,\textsuperscript{391} it should be entitled to the application of Kentucky law. Unlike the district court opinion,\textsuperscript{392} the Sixth Circuit did not obviate such an argument by concluding that even under Kentucky law the employer had no right to recover for such benefits. Apparently acting upon the assumption that the choice of law between Kentucky and Ohio would alter the outcome of the case, the Sixth Circuit concluded that Ohio law rather than Kentucky law was to be chosen under applicable Kentucky conflicts principles.\textsuperscript{393} Seemingly oblivious that \textit{Breeding} demonstrated an attempt to choose Kentucky law whenever possible or unless there are overwhelming interests to the contrary, the court at least implied that

\textsuperscript{386} See id. (citing Wolford v. Scott Nickels Bus Co., 257 S.W.2d 594 (Ky. 1953)).
\textsuperscript{387} See id. (citing \textsc{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 174 (1971)).
\textsuperscript{388} See id. at 1304-06.
\textsuperscript{389} \textit{Harris Corp. v. Comair, Inc.}, 712 F.2d 1069 (6th Cir. 1983).
\textsuperscript{390} See id. (citing \textsc{OHIO REV. CODE ANN.} § 4123.82 (Anderson 1998)).
\textsuperscript{391} See id. (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968)).
\textsuperscript{393} See \textit{Harris Corp.}, 712 F.2d at 1072.
Kentucky’s conflicts jurisprudence in the contracts area (as exemplified in Lewis and Breeding) made applicable an “interests or contacts analysis.”

The court interpreted Lewis for the proposition that the state of contract formation would control rather than the place in which an accident occurred and distinguished those facts from Breeding by concluding that in one case (Breeding) virtually all facts pointed to Kentucky law and in the other (Lewis) there were no facts indicating a connection to Kentucky for the issue in question. The result seems, however, consistent with the Second Restatement’s position that the law which governs the underlying merits of the claim governs contribution. Here, the party seeking contribution did so not from facts relating to the death of the worker (i.e., the typical case of a contributing tortfeasor) but of the employment relationship, which was centered in Ohio and undoubtedly governed by Ohio law as demonstrated by the fact that the benefits were paid by the employer pursuant to that state’s workers’ compensation law.

In contrast, in Adam v. J.B. Hunt Transport, Inc., members of an Ohio family were involved in an automobile accident in Kentucky. One member of the family was killed and the other two members were injured. Suit was originally brought in Ohio but was transferred to Kentucky pursuant to 28 U.S.C. § 1406, due to a lack of personal jurisdiction in Ohio over at least some of the persons or entities named as defendants. Thus, the federal court in Kentucky was obliged to apply Kentucky's choice of law rules to issues arising in the case. As regarded the wrongful death claim for the deceased Ohio resident, it was contended by the plaintiffs that the claim should be governed by Ohio law, which apparently allowed for recovery for “non-economic injuries,” while the Kentucky wrongful death statute allowed for no such recovery. Noting Kentucky’s abandonment of vested rights, the Sixth Circuit further noted that Kentucky’s choice of law rules showed an intention to apply Kentucky law “if there are significant contacts—not necessarily the most significant contacts—with Kentucky.” Drawing from its own opinion earlier in Harris, the court further noted that “Kentucky courts have apparently

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394 Id.
397 See id. at 221.
398 See id. at 221-22.
399 See id. at 230.
400 Id. (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972)).
applied Kentucky law whenever possible.\textsuperscript{401} The court was thus able to conclude that “because the Adams’ accident occurred in Kentucky . . . [the court] ‘should’ apply Kentucky law.”\textsuperscript{402} This result is correct and could more easily have been reached by the simple expedient of citing \textit{Arnett v. Thompson}\textsuperscript{403} for the position that a claim asserted for the death or injury of a nonresident arising from a Kentucky accident is governed by Kentucky law.

The cases as a group demonstrate a clear adherence to two principles: the application of Kentucky law whenever there are sufficient contacts and assignment of liability among tortfeasors based upon whatever law governs the merits of the action. It is important to recognize these principles because situations in which the underlying merits are governed by non-Kentucky law will \textit{not} be governed by Kentucky law simply because Kentucky serves as the forum.

Such a pattern is demonstrated by \textit{McGinnis v. Taitano},\textsuperscript{404} in which the plaintiff, a California resident at the time of the litigation, brought suit in Kentucky against a Kentucky resident on a claim arising in Germany at a time when both parties were in the United States military.\textsuperscript{405} There was no dispute as to liability and the action proceeded upon the question of damages. In the course of the damage litigation, the defendant wished to introduce evidence of collateral source payments.\textsuperscript{406} The plaintiff contended that the issue should be governed by Kentucky law, which made evidence of such payments inadmissible, while the defendant relied upon German law which he said would allow the admission of such evidence.\textsuperscript{407} Recognizing from \textit{Arnett} and \textit{Foster} the pattern in Kentucky tort cases to apply Kentucky law based on “sufficient contacts” rather than “significant contacts” or “weighing of interests,” the court concluded that Kentucky law could not apply to the facts at hand because (unlike the facts in \textit{Arnett}) the accident did not happen in Kentucky and (unlike \textit{Wessling}) neither of the

\textsuperscript{401} Id. at 231 (quoting Harris Corp. v. Comair, Inc., 712 F.2d 1069, 1071 (6th Cir. 1983)).

\textsuperscript{402} Id.

\textsuperscript{403} Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968).

\textsuperscript{404} McGinnis v. Taitano, 3 F. Supp. 2d 767 (W.D. Ky. 1998).

\textsuperscript{405} See id. at 768.

\textsuperscript{406} In this case, the defendant sought to introduce evidence of disability payments received, apparently for the purpose of suggesting that the plaintiff was malingering and not really hurt as badly as he was contending. See id.

\textsuperscript{407} See id. at 768-69.
CHOICE OF LAW IN KENTUCKY

parties lived in Kentucky at the time of the accident.\textsuperscript{408} Although not saying so, the court implied that the case presented a false conflict with only Germany having any interest. Thus, any application of Kentucky law to affect the outcome of the litigation on the merits would have violated due process. After concluding that German law governed, the court then found that the evidence was inadmissible anyway since German law was actually the same as that of Kentucky.\textsuperscript{409} One may wonder in such cases whether the result might more easily have been reached by foregoing the conflicts analysis, proceeding directly to conclude that the law was the same in any instance and then making the appropriate resolution.

5. Miscellaneous Torts

The tort cases available in state and federal court obviously do not run the full gamut of all the torts which exist in the legal system. Nevertheless, they run a wide enough spectrum that they provide valuable information for reaching conclusions about the Kentucky choice of law system being applied in tort cases. Before leaving the area, however, it is necessary to look at one rather strange tort case which provides some additional insight.

*Kohn v. United States*\textsuperscript{410} involved a claim against the United States for desecration of the corpse of a military policeman who was slain by a fellow soldier at a base in Kentucky, where some of the various acts relating to the corpse occurred.\textsuperscript{411} Although the family of the deceased policeman lived in New York and could bring their action there under the Federal Tort Claims Act,\textsuperscript{412} the acts in question all arose from the manner in which the policeman’s corpse was handled in Kentucky, the actions of the military relating to the family and the burial in New York.\textsuperscript{413} Under the Act (as interpreted in *Richards v. United States*\textsuperscript{414}), the trial court was required to apply the whole law of New York to those acts occurring in New York and the whole law of Kentucky to those acts occurring in Kentucky.\textsuperscript{415} Thus, a

\textsuperscript{408} Id.
\textsuperscript{409} See id.
\textsuperscript{410} Kohn v. United States, 591 F. Supp. 568 (E.D.N.Y. 1984), aff’d, 760 F.2d 253 (2d Cir. 1985).
\textsuperscript{411} See id. at 569.
\textsuperscript{413} See Kohn, 591 F. Supp. at 569.
\textsuperscript{414} Richards v. United States, 369 U.S. 1 (1962) (applying the law of the state where the acts of negligence took place).
\textsuperscript{415} See Kohn, 591 F. Supp. at 572 (citing Richards, 369 U.S. at 11).
portion of the opinion dealt with choice of law cases in Kentucky to
determine what law Kentucky would choose to govern the facts. The court
found (citing Foster) that Kentucky would choose to apply its own law to
tort issues "if there are any significant contacts with that state."416
Apparently concluding that such acts as wrongfully performing an autopsy,
embalming the body, and retention and cremation of certain body parts
occurring in Kentucky constituted a "significant contact," the court then
proceeded to apply Kentucky law.417 What is unfortunate about the case is
that there is absolutely no discussion of why these acts having occurred in
Kentucky is, taken alone, a sufficient connection. Perhaps one should
conclude from Arnett that if Kentucky's interest is activated by a nonresi-
dent injured therein, it must also be interested in wrongs committed to the
body of a soldier stationed in this state. While that may be true, one could
equally well point out that the persons who actually suffered were the
nonresidents and they suffered only vicariously from the Kentucky acts. In
any event, the case seems to continue the long pattern of applying
Kentucky law to tort cases based upon virtually any factual connection to
the state.

C. Contracts

1. Underinsured Motorists

Similar to the Kentucky state court experience in Lewis418 with
uninsured motorists and issues of liability arising between tort victims and
their own insurer, the federal courts have encountered problems with
uninsured motorists and with tortfeasors who had liability insurance but
with limits inadequate to compensate their victims. The two areas are
sufficiently related that the experiences should be similar.

Quite similar to the Lewis facts, in Owens v. DeClark,419 the plaintiff,
a resident of Indiana, was injured in an auto accident in Kentucky while she
was a passenger in a vehicle covered by an Indiana insurance policy. A
dispute arose between the injured passenger and the insurer of the vehicle

416 Id.
417 See id.
418 Lewis v. American Family Ins. Group, 555 S.W.2d 579 (Ky. 1977).
Cir. 1998).
in which she had been a passenger as to whether that policy’s underinsured motorist coverage applied to the facts at hand. Under Kentucky law (as argued by the passenger), coverage would have existed; under Indiana law (as argued by the insurer), the facts did not activate an underinsured claim. The court concluded that Indiana law applied, referring to Lewis and to the Second Restatement as relied upon in Lewis. The result is undoubtedly correct as the facts almost exactly mirror Lewis. Indeed, the court was correct in seeing beyond “the significant relationship test” and correctly stated that Kentucky’s only contact was the location of the accident: “merely a geographic happenstance.” Thus, like Lewis, the facts presented a false conflict. There was no Kentucky interest to serve by application of Kentucky law and any attempt to apply Kentucky law would have violated due process.

In another quite similar situation, Hammer v. State Farm Mutual Automobile Insurance Co., the plaintiff driver (a resident of Indiana) of an automobile was injured in an accident in Kentucky involving an underinsured automobile driven by a Kentucky resident. Plaintiff was covered by two policies of automobile insurance which included underinsured motorist benefits and which had been issued in Indiana. The driver contended that her ability to recover pursuant to underinsured provisions of her insurance policies should be governed by Kentucky law, which would have provided her higher benefits than Indiana law. The court correctly chose to apply Indiana law, noting that Kentucky had faced an identical situation in Lewis and citing with approval the result in Owens. As was true in both those cases, the facts in Hammer present a false conflict, so that far from being the state with the most significant relationship, Indiana was indeed the only interested state and the only available choice.

What Lewis, Hammer, and Owens seem to indicate as a group is that disputes involving insurance coverage issued in other states will be

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420 See id. at *2-3 (citing Lewis, 555 S.W.2d at 579).
421 Owens, 1995 WL 912492, at *2.
423 See id. at 193.
424 See id.
425 See id. at 194 (citing Lewis, 555 S.W.2d at 579; Owens, 1995 WL 912492, at *1).
426 See id.
governed by the law of other states. While it is tempting to look at the fact patterns and wonder whether some Kentucky compensation-oriented policy might not be served in some instances by applying Kentucky law, it must be kept in mind that the issue into which the courts are reaching is not directly a result of the underlying tort. Rather, the issue arises from a contract previously issued in another place, with the workings of that contract now activated by a Kentucky accident. There is not a sufficient Kentucky connection in these cases to allow application of Kentucky law. At the same time, the results in the cases in no way detract from the observed tendency of Kentucky to apply its own law whenever it has sufficient contact to do so. As described, these cases lack sufficient contacts.

2. Insurance Coverage Disputes

The disputes which have arisen from uninsured and underinsured motorist coverage are not dissimilar from another basic species of insurance litigation—the coverage dispute. Given that similarity, the lessons of the motorists insurance cases should hold true here as well.

In Security Insurance Co. v. Kevin Tucker & Associates, Inc.,427 a Kentucky city contracted with a Tennessee firm for design and construction of a golf course. Dissatisfied with the work, the city filed litigation against a member of the firm who had left the firm’s employment, taking the project with him.428 An insurance company had issued a professional liability policy to that departing member. The insurer filed a declaratory judgment action against the insured and the city, requesting a declaration that its liability did not extend to the dispute between the city and the professional.429 Although the claim arose from unsatisfactory work on a project in Kentucky, no one argued that Kentucky law governed the contract dispute between the insured and the insurer.430 The Sixth Circuit noted that in such contract cases, Kentucky applies the law of the state “with the most significant relationship to the transaction and the parties.”431

428 See id. at 1004.
429 See id. at 1005.
430 See id. at 1003-05.
431 Id. at 1005-06 (citing Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982)).
In the case at hand, the policy was issued in Tennessee to a Tennessee resident through a Tennessee insurance agent by a carrier authorized to transact business in Tennessee. Thus, it was clear that Tennessee law should apply. There is no doubt about the correctness of the result, and any attempt to apply Kentucky law to such a dispute would doubtlessly have violated due process in view of the clear lack of any Kentucky interest or factual connection. One can only wish that the authority cited would have been the Kentucky contract case so much more like the facts than Breeding; the clear authority is Lewis v. American Family Insurance Group.

3. *Life Insurance*

While there are no reported Kentucky state court cases involving conflicts issues on life insurance, it is not difficult to foresee that issues may arise in which the laws of different states may arguably apply. Given that most Kentuckians will likely be covered under policies issued in Kentucky (even though by nondomestic insurers), conflicts should be minimal because those carriers must be licensed to do business in Kentucky and their policies must conform to the requirements of Kentucky law. Thus, conflicts issues will most frequently arise in the case of persons who already have policies issued elsewhere and who move to Kentucky.

Such a situation occurred in *Blount v. Bartholomew*. Following the death of a Kentucky resident, litigation arose between persons who claimed to be entitled to the proceeds of a life insurance policy which the decedent had purchased while residing in Utah. The decedent originally designated two persons as beneficiaries. While residing in Kentucky, the decedent completed the necessary form to eliminate one of those beneficiaries but died before the form was delivered to the insurer or its agent. Under Kentucky law, the change form would have been effective although undelivered, while under Utah law the original beneficiary continued to have an interest until such time as the change form was received by the insurer. The beneficiary who argued in favor of Utah law contended to

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432 See id. at 1006.
433 Lewis v. American Family Ins. Group, 555 S.W.2d 579 (Ky. 1977).
435 See id. at 253.
436 See id. at 253-54.
437 See id. at 254-55.
the court that Kentucky, in contract cases, followed the "most significant relationship" test as exemplified by **Lewis**. The litigant arguing in favor of Kentucky law relied upon the pro-forum tort choice of law cases and further argued that the **Lewis** "most significant relationship" ideas had been abandoned in **Breeding v. Massachusetts Indemnity & Life Insurance Co.** That argument is extremely interesting because **Breeding** contained the Second Restatement language which had appeared in **Lewis**, but the litigant was requesting the court to look at what **Breeding** essentially did, not at what it said. The court agreed, stating that "Kentucky applies its own law unless there are overwhelming interests to the contrary." As support for that proposition, the court relied upon **Harris**—presumably that portion of **Harris** relating to contribution rather than the purely tort portion of the case, which involved the employer's attempt to recover for the death of a valued employee. If it is correct that Kentucky is applying a "sufficient contacts" analysis to tort cases and a "significant contacts" analysis to all others, then the court missed the distinction and thus may have failed to properly analyze the situation. Conversely, the **Blount** case may be a clear demonstration that despite facial inconsistencies, there is no real difference in Kentucky choice of law—the system applies forum law whenever there are sufficient contacts to do so. Surely, Kentucky had an interest in controlling the consequences of the attempt of its deceased domiciliary to change his beneficiary, wherever the policy may originally have been issued.

Kentucky law was similarly applied in **Travelers Insurance Co. v. Fields**, wherein a man, while he was a resident of Kentucky and married to a Kentucky resident, obtained an insurance policy through his Ohio employer. The insurance policy contained an Ohio choice of law clause. At the time of securing the policy, the employee named his wife as a

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438 See id. at 255 (citing Lewis, 555 S.W.2d at 579).
439 See id. (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967)).
440 See id. (citing Breeding v. Massachusetts Indemn. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982)).
441 Blount, 714 F. Supp. at 255 (quoting Harris Corp. v. Comair, Inc., 712 F.2d 1069, 1071 (6th Cir. 1983)).
442 See id. (citing Harris Corp., 712 F.2d at 1069).
444 See id. at 1294.
They were subsequently divorced in Kentucky and had a property settlement agreement which was silent as to the wife’s future rights, if any, under the policy. The husband then remarried, moved to Ohio, and died while married to an Ohio resident without having changed the beneficiary designation from his first wife. The insurer filed an action in Kentucky against the first and second wives to determine to whom the policy should be paid. At that time, it was clear that under Kentucky law a Kentucky divorce extinguished a wife’s rights in such a policy, regardless of whether the beneficiary designation was changed or not. Under the law of Ohio, however, a first wife retained her rights under such a policy until the beneficiary designation was changed. Thus, for the Kentucky ex-wife to prevail, she needed the law of Ohio to apply, and she based her attempt to secure its application on the Ohio choice of law provision in the policy. While recognizing that Kentucky would likely honor such a choice of law clause, the court reasoned that the clause applied only to disputes between an insurer and an insured. In the case at hand, the Sixth Circuit believed that the issue was essentially whether the first wife’s interest had been “transferred,” with no distinction to be drawn as to whether that transfer was “voluntary” or “involuntary.” Thusly characterized, Kentucky was the law of the place of the “transfer,” and the former wife’s interest therefore was governed by Kentucky law.

It is worthwhile noting that in this early application of Kentucky choice of law rules, the Sixth Circuit readily relied upon the Second Restatement for authority in the context of a contractual dispute, but the result reached was just like Kentucky’s tort cases—application of forum law. In all likelihood, a better solution would have been to regard the issue as governed by principles of res judicata, similar to the analysis previously noted for the decision in Cox v. Harrison. Certainly the property settlement of the parties, which was

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445 See id.
446 See id.
447 See id. at 1293.
448 See id. at 1295 (citing, inter alia, Bissell v. Gentry, 403 S.W.2d 15 (Ky. 1966)).
449 See id. at 1296 n.4 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192 (1971)).
450 See id. at 1298 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 209).
451 Cox v. Harrison, 535 S.W.2d 78 (Ky. 1975); see supra notes 126-31 and accompanying text.
silent as to the effects on the life insurance, was incorporated by reference
into a Kentucky divorce judgment. It is only sensible to conclude that all
rights of the parties arising from that judgment were required by full faith
to be governed by Kentucky law. With Kentucky law providing that the
wife retained no interest after the entry of the decree, the only valid
conclusion would be that her rights to the policy were lost in the judgment.
Viewing the matter as a judgments problem provides an easier and more
clear-cut solution, albeit the same one reached by the court.

These two cases thus continue, in the contracts area, a discernible
pattern to cite to the Second Restatement but to invariably reach results also
consistent with Currie, with forum law being chosen whenever there are
sufficient contacts to do so.

D. Perfecting Security Interests

In today's commercial economy, it is not unusual to see a party in a
state other than Kentucky extend credit to a Kentucky buyer or borrower
based in part on obtaining a security interest in property (real or personal)
located in Kentucky. In such circumstances, differences between the law
of the lender's state and Kentucky may present difficulties in perfecting a
security interest.

As an example, in In re McGrew, a Kentuckian purchased equipment
in Indiana from a seller whose financing branch took a security interest in
the equipment. The lender's security interest was properly perfected
under Indiana law by noting the lien upon the certificate of title. Under
the law of Kentucky, where the buyer filed for bankruptcy, the security
interest should have been perfected by the filing of an appropriate Uniform
Commercial Code form in the county of the debtor's residence or place of
business. The bankruptcy court applied Kentucky law to determine that the
security interest was properly perfected. The basis for so holding was
section 355.9-103(4) of the Kentucky Revised Statutes, which provided
that if a security interest was properly perfected elsewhere by notation on
a title, that state's law would govern the perfection of the security
interest. Thus, the provision of Kentucky's statutes was essentially a

454 See id. at 265.
455 See id. at 265-66.
456 See id. at 266-67.
457 See id. at 265-67.
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legislatively mandated choice of law, and application of Indiana law was correct under Kentucky law.

In contrast, a creditor was left in an unperfected position in In re Towery.\(^{458}\) There, an Indiana creditor advanced credit to a Kentucky borrower but failed to properly perfect its security interest under Kentucky law.\(^{459}\) In an attempt to avoid being unsecured under Kentucky law, the creditor argued that Indiana law applied to its perfection. Although it is not clear from the reported decision, one may deduce that the Indiana perfection mechanism upon which the creditor relied was not notation on a title instrument, the method which was used in In re McGrew. Whatever may have been the mechanism, the court found that it did not matter whether Indiana or Kentucky law applied because under both laws the creditor was unperfected.\(^{460}\) Thus, the case presented a false conflict in that the results would be the same under the law of either state, with the creditor being left in an unsecured status.

If the Uniform Commercial Code has succeeded in its goal to bring uniformity in secured transactions, the need to make such choices should be infrequent. In one of the two cases here observed, In re McGrew, the existence of a statutory directive to apply another state's law obviated the need for a judicial choice and thus does not impinge on the conclusion that the Kentucky courts have generally tended to apply Kentucky law whenever possible. Even in a Currie-based choice of law system, it is clear that legislative directives on choice of law must be obeyed. In the other observed case, In re Towery, there was no difference in the law of the two states and thus no conflict.

E. Products Liability

Products liability cases do not actually present a unique category for choice of law analysis. Traditionally, such fact patterns were approached by characterizing them as breach of contract actions (i.e., breach of warranty) or tort actions (i.e., negligence), with the modern theory of strict liability possibly being some hybrid of both. While the label attached would have been of obvious importance in the vested rights era, any modern analysis with an emphasis on factual connections and interests will

\(^{459}\) See id. at 76-77.
\(^{460}\) See id. at 76 n.1, 78.
treat such actions pretty much the same no matter how labeled. The modern experience of federal courts in Kentucky demonstrates these principles.

In Rutherford v. Goodyear Tire & Rubber Co., an Indiana resident was injured in an automobile accident in Indiana when a Goodyear tire on another driver’s vehicle blew out, allegedly causing loss of control of that vehicle and being a contributing factor to the accident. The tire was manufactured in Kansas but placed upon the vehicle at a Ford Motor Company plant in Kentucky. It was clear that the action in question would have been time-barred had it been brought in Indiana, but it was timely under Kentucky law. Noting the past Kentucky conflicts decisions in tort cases and comparing them to the results in Breeding, the court concluded that Kentucky law was “not... in an entirely clear focus” and further noted that the Kentucky cases had led to “confusion in Sixth Circuit cases” which attempted to interpret the Kentucky law. As to the facts before it, the court found that Kentucky had demonstrated no interest in applying its law to actions arising from Kentucky products which caused injuries elsewhere to non-Kentucky residents. Thus, the court found that “Kentucky’s true interest... is a minimal one,” going even further to note that there was “not... sufficient reason to apply Kentucky law.” Indeed, the facts presented a false conflict in which there was no Kentucky interest, and the court correctly rejected the attempt to secure the applica-

For a discussion of these principles, see Gunther Kuhne, *Choice of Law in Products Liability*, 60 CALIF. L. REV. 1 (1972). Professor Kuhne argues in favor of choosing the sufficiently connected law which is most favorable to the plaintiff. See id. at 32.


See id. at 791.

See id. at 790-91.

See id. at 792 (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967)).

See id. (citing Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982)).

Id. at 792.

Id. at 792 n.3. The court noted particularly *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069 (6th Cir. 1983), and *Johnson v. S.O.S. Transport, Inc.*, 926 F.2d 516 (6th Cir. 1991).

*Rutherford*, 943 F. Supp. at 792.

Id. at 793.
tion of Kentucky law. Given that the issue involved the statutes of limitations of the two states, one may wonder why the court could not have solved the problem as easily by noting that a Kentucky court would have (under Seat) applied the shorter Indiana statute of limitations to an action which physically arose there.471

In Tatum v. Hunter Engineering Co.,472 a Kentucky resident was injured while working on a piece of machinery at his place of employment in Kentucky. His employer, a Kentucky corporation, had purchased the equipment from a California manufacturer that later went out of business, conveying some of its assets to a successor corporation.473 The lawsuit by the injured employee was against the successor corporation. The crucial issue in the case was the potential liability of such a successor.474 Under the law of California, a successor was liable; under the law of Kentucky, a successor was liable only if the transfer documents provided for a transfer of such liability.475 What is interesting about the case is that the injured Kentucky resident was having to argue in favor of application of California law in order to get a more favorable rule for recovery, while the nonresident successor was seeking to escape the law of its own state in favor of the law of the state of the injury in order to be shielded from liability.476 These facts are the converse of what one normally finds in Kentucky, which tends to be more liability-oriented than its sister states, particularly those that border Kentucky. In this strange fact pattern, the injured resident read the Kentucky tort conflict cases to indicate application of the law of the most significant relationship, an apparent reference to the Second Restatement. The nonresident successor, however, clearly had the easier argument, at least on the face of Kentucky's cases. It pointed to the Kentucky location of the accident as a sufficient connection, relying on Sixth Circuit authority.477 The Sixth Circuit agreed, noting as it has before that "Kentucky courts have shown a strong preference for application of Kentucky law, whenever possible."478

471 See supra notes 144-52 and accompanying text.
472 Tatum v. Hunter Eng'g Co., No. 93-5526, 1994 WL 228236 (6th Cir. May 25, 1994). This is an unpublished opinion of the Sixth Circuit. According to Sixth Circuit Rule 24(c), the opinion cannot be cited for precedential value except in very limited circumstances. It is included in this discussion for informational purposes only.
473 See id. at *1.
474 See id.
475 See id. at *1-2.
476 See id. at *2.
477 Id. at *2 (citing Harris Corp. v. Comair, Inc., 712 F.2d 1069 (6th Cir. 1991)).
478 Id. (citing Harris Corp., 712 F.2d at 1071; Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982)).
What is missing totally is a recognition that the case presents a false conflict, in which application of the Kentucky rule to protect the nonresident successor furthers no interest but does frustrate the basic Kentucky tendency to try to compensate injured residents. Thus, it is a case in which application of the Kentucky rule served no legitimate Kentucky interest, while application of the California rule would have furthered a Kentucky interest (compensation) and likely furthered a California interest (deterrence of negligent manufacture of products) as well. Indeed, one should conclude that application of Kentucky law to this issue was violative of full faith because Kentucky law was chosen over California law in the absence of any Kentucky interest, and the result of that choice was destructive to the rights of the Kentucky plaintiff. This appears to have been a classic false conflict, missed by failure to analyze but decided erroneously upon abstract statements out of context from the prior cases. It stands as a stark example of one of the few instances in which another state was more liability oriented than Kentucky, so that application of another state's law would have best served a Kentucky resident while violating no Kentucky interest. What blocked the court from reaching that conclusion was an unfortunate reliance upon abstract statements and fact patterns, without any analysis of the difference which variations in the law pattern may pose.

F. Professional Malpractice

The tort of professional negligence or malpractice does not really present issues much different from other tort cases. Traditionally, such actions might have sounded in either tort or contract, but the modern trend is to treat them as their own species of damage action. For choice of law purposes, the characterization in the modern era is less important than analysis of the factual connections and state interests.

Typical of such cases is Kennedy v. Zeismann, in which a Kentucky resident sustained damages during a medical procedure, allegedly as a result of the negligence of an Ohio physician in the course of an operation at an Ohio hospital, which was also named as a defendant in the action. Although the plaintiff had been treated in Ohio, her initial contact with the doctor was at an office the doctor maintained in Kentucky. Choice of law

479 See, for example, the common treatment of nonmedical professional negligence cases for statute of limitations purposes in K.R.S. § 413.245 (Michie 1992).


481 See id. at 730.
was of particular importance in the case because Ohio required medical malpractice cases to be referred for arbitration\(^\text{482}\) while Kentucky allowed a right to sue. Giving an extreme reading to the Kentucky tort cases,\(^\text{483}\) summarizing them as being in favor of application of Kentucky law, the court concluded that its duty was to apply Kentucky law as to the merits of any tort claim against a nonresident "over which it has personal jurisdiction."\(^\text{484}\) That certainly applied to the doctor, whose actions in Kentucky gave rise to personal jurisdiction. Although reserving judgment on whether the hospital was subject to personal jurisdiction, the court hinted that the defendant doctor might have been considered to be the hospital's agent acting in Kentucky when he booked at his Kentucky office Kentucky residents for surgery in Ohio.\(^\text{485}\) The case is an extreme example of a forum-oriented choice of law system, holding that the ability to exercise judicial jurisdiction is coextensive with the ability to exercise legislative jurisdiction. It is also a departure from the normal choice of law which one might expect under the Second Restatement, which would at least preliminarily point to Ohio (the place of the injury) as governing the merits of the litigation.\(^\text{486}\) Certainly the result seems correct in view of the holding of the Kentucky courts in Foster,\(^\text{487}\) particularly as regards application of Kentucky law to the doctor.

A similar result was reached in \textit{In re Phar-Mor, Inc. Securities Litigation},\(^\text{488}\) an action pending in bankruptcy court in Pennsylvania. A Kentucky corporation which supplied items to Phar-Mor filed suit in Kentucky against Phar-Mor's accountants, contending that the Kentucky supplier relied upon negligently prepared financial statements in extending credit. The supplier first sued in state court in Kentucky, and the action was removed to federal court in Pennsylvania. Because the action had originally been filed in Kentucky, the Pennsylvania federal court was called upon to

\(^{482}\) See \textit{id.} (citing OHIO REV. CODE ANN. § 2711.21 (Anderson 1992)).
\(^{483}\) See \textit{id.} at 731 & n.3 (citing Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967)).
\(^{484}\) Id. at 731.
\(^{485}\) See \textit{id.} at 731-32.
\(^{486}\) See Restatement (Second) of Conflict of Laws § 146 (1971).
\(^{487}\) See supra notes 40-45.
apply Kentucky choice of law rules. While all of the actions of the accountants had occurred in Pennsylvania, the court noted that Kentucky's courts would choose to apply Kentucky's own substantive law "whenever possible." That was a conclusion reached from looking at two Kentucky cases. Although viewing this Kentucky legal position as "highly parochial," the court thought that Kentucky's courts would seek to apply their own law in all cases where they had jurisdiction. Given that the claim against the accountants (Coopers and Lybrand) did not arise from any actions in Kentucky, one might wonder whether Kentucky really had personal jurisdiction under the Kentucky long arm statute. The question is, however, likely meaningless because Coopers certainly did business in Kentucky and likely had a registered agent with the secretary of state, thus subjecting it to personal jurisdiction regardless of the long arm statute. One can easily see Kentucky's desire to apply its own law to harm caused to a Kentucky resident, regardless of the place where the conduct giving rise to the harm had occurred.

As a pair, Kennedy and In re Phar-Mor continue the pattern of applying Kentucky law whenever there are sufficient contacts and do so without the sort of Second Restatement references seen elsewhere. Indeed, In re Phar-Mor clearly implies that the result reached would have been different had the Second Restatement (rather than Kentucky's "highly parochial" conflicts rules) been applied. In re Phar-Mor in particular voices a concern over the forum-oriented choice of law rules of Kentucky. Indeed, the results therein were bemoaned by the district judge, who noted how clearly the result under Kentucky law differed from that reached in all the other Phar-Mor litigation in which Pennsylvania law had led to summary judgment for Coopers; the Kentucky choice of forum and attachment of

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489 See id. at *1 n.1 (citing Bankers Trust Co. v. Crawford, 781 F.2d 39 (3d Cir. 1986)).
490 See id. at *2.
491 See id. at *1-2 (quoting Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109, 113 (Ky. 1968)).
492 See id. at *2.
493 One must infer that being subject to such jurisdiction meant being subject to Kentucky's general jurisdiction because the claim clearly did not arise from Coopers' actions in Kentucky, thus not activating Kentucky's specific jurisdiction long arm statute, K.R.S. § 454.210(2) (Michie 1985). A corporation which has appointed an agent pursuant to K.R.S. § 271B.015-050(2) has arguably become more like a resident corporation than a nonresident corporation, thus subjecting itself to general personal jurisdiction. See id. §§ 271B.015-.050(2) (Michie 1989).
Kentucky choice of law rules was truly determinative of the outcome in the case.\textsuperscript{494} Nevertheless, the result in \textit{In re Phar-Mor} at least is more defensible under the \textit{Second Restatement} than was the result in \textit{Kennedy}. One must keep in mind that in \textit{Kennedy}, both the conduct and the injury occurred in Ohio, which the \textit{Second Restatement} would presumptively take to mean that Ohio law should control the merits.\textsuperscript{495} In \textit{In re Phar-Mor}, on the other hand, the conduct occurred in Pennsylvania but the injury occurred in Kentucky, in which case the \textit{Second Restatement} would presumptively look to the place of injury rather than the place of the conduct to control the merits.\textsuperscript{496} While the court voiced an opinion in \textit{In re Phar-Mor} that Pennsylvania had the most significant relationship with all the accounting malpractice claims arising from the Phar-Mor bankruptcy, one must wonder whether that was caused more by a desire to make a single choice of law for the mass of pending litigation than by the analysis necessary under the \textit{Second Restatement}. Thus, only \textit{Kennedy} demonstrates for certain a result which appears different than that which would apply under the \textit{Restatement} and (like \textit{Foster}) its result is a good bit easier to defend than the result in \textit{Arnett}.\textsuperscript{497}

\textit{G. Escrow Agents and Trustees}

Written contracts and testamentary instruments occasionally cast upon persons such as escrow agents or trustees certain enumerated duties to other persons. With disputes arising from whether such duties have been appropriately performed, it may be necessary to determine which state's law governs the duties of the escrow agents or trustees under the creating documents. In such cases, it must be stressed that what is being sought is not to impose liability upon the escrow agent or trustee (which action would typically be some species of tort action), but rather a determination of the manner in which the duties must be performed. There has been some federal experience in Kentucky with such actions.

\textsuperscript{494} \textit{In re Phar-Mor}, 1995 WL 600240, at *2.
\textsuperscript{495} The possibility must be considered, however, that (like \textit{Foster}) the result might even be justifiable under the \textit{Second Restatement} because of the "dual" connection of the doctor to both Kentucky and Ohio. \textit{See supra} notes 28-34 and accompanying text (discussing this possibility in the context of \textit{Foster}).
\textsuperscript{496} \textit{See Restatement (Second) of Conflict of Laws} § 146 cmt. e (1971).
\textsuperscript{497} \textit{See supra} notes 28-34 and accompanying text.
In Guy v. Citizens Fidelity Bank & Trust Co., a Kentucky bank served as escrow agent for certain gas leases involving realty located in New York. Upon compliance with certain contractual provisions with the owners of those leases, certain persons were to receive those leases from the Citizens Fidelity escrow. Citizens Fidelity refused to deliver and was sued by the persons who had allegedly met their contractual obligations; Citizens Fidelity interpleaded the owners of the leases. With the issue before the court located in Kentucky being framed by the interpleader as between persons contesting who was entitled to the leases, the Sixth Circuit was obliged to apply Kentucky conflicts rules. Since Kentucky had no connection to the litigation except as the place of business of the escrow agent (who disclaimed any interest and simply wanted a direction as to the party to whom delivery should be made), the Sixth Circuit concluded that such a dispute was governed by the law of New York, that being the situs of the realty in issue. There is no discussion in the case of the Kentucky authority for such a position. It is apparent that Kentucky law could not apply to any contract dispute which was as unconnected with Kentucky as this. Any attempt to apply Kentucky law to affect the outcome of the litigation on the merits would have been violative of due process and/or full faith and credit because of the absence of any legitimate Kentucky interest.

Similarly, in Boyd v. LaMaster, remaindermen under a trust created by the will of an Illinois decedent filed an action alleging that assets had been wrongfully transferred by the trustee to a nonbeneficiary. Those assets had been transferred into a brokerage account in Kentucky, which account was maintained for the benefit of a Kentucky resident. The court found that the merits of the claims of the remaindermen were to be governed by the law of Illinois since that was the state of the settlor’s domicile at the time of death. This application of Illinois law was required by Kentucky decisional law stating that the law of the settlor’s domicile at death controls disputes arising from the trust. Although the Sixth Circuit confirmed that Illinois law would govern the merits of the claim, the court noted that the

499 See id. at 829.
500 This was not a statutory interpleader but pursuant to FED. R. CIV. P. 22.
501 See Guy, 429 F.2d at 829.
502 See id. at 832.
503 See id. at 829, 832.
504 Boyd v. LaMaster, 927 F.2d 237 (6th Cir. 1991).
505 See id. at 238-39.
506 See id. at 239 (citing Santoli v. Louisville Trust Co., 550 S.W.2d 182 (Ky. Ct. App. 1977)).
timeliness of the claim was to be governed by Kentucky law. In an interesting twist on prior interpretations of Kentucky's borrowing statute, the court found that Kentucky's own statute of limitations always governs unless a claim arises "in another state or country." The court noted that both Illinois and Kentucky had five year statutes, "so it is the Kentucky statute to which the . . . claims are subject." That conclusion may be significant because, assuming that statutes of limitations may have different triggering events, being pointed to Kentucky's own statute may be important even in cases where the statutes are facially the same as to length.

The other very significant factor in the court's consideration of Illinois as potentially supplying the statute of limitations is that it must have concluded that the claim "arose" in Illinois. Given that the alleged conversion of assets physically occurred in Kentucky, one can only conclude that the concept of "arising" under the borrowing statute was taken by the Sixth Circuit to refer to the jurisdiction furnishing the rule of decision (i.e., Illinois) rather than to the place where some act physically happened. One can easily envision that being tremendously significant in later interpretations of the borrowing statute. It should be noted that such an interpretation of the "arising" concept of the borrowing statute seems different from the Kentucky state decision in Ellis v. Anderson, where the concept encompassed the physical location rather than the law governing the merits.

The case is also illustrative of the issue-selecting approach taken in modern conflicts cases, by which one issue may be governed by the law of one jurisdiction and another issue governed by another state's law. Such occurrences are not commonplace in the area of statutes of limitation, even prior to the modern era, but are worth noting.

In Guy and Boyd, the underlying obligations of the parties were held to be governed by non-Kentucky law in circumstances in which the Kentucky connection to a party arose after the underlying transaction. Although choosing not to apply Kentucky law to the merits of the two actions, both are so lacking in factual contact as to have made any different result impossible and thus are not at odds with the observed pattern of applying Kentucky law whenever constitutionally possible.

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507 Id. at 240 (citing K.R.S. § 413.320 (Michie 1992)).
508 Id.
509 See id. at 239-40.
H. A Pattern in the Federal Cases

An initial observation must be that the federal courts have had almost twice as much experience as the Kentucky courts in attempting to apply Kentucky's choice of law rules. There are thirty-seven\textsuperscript{511} reported federal decisions in the area, with fourteen of those related to "nonsubstantive" choices (i.e., choice of forum or choice of law clauses) and the remainder related to the classic conflicts situations requiring a choice between the laws of different jurisdictions. It is also clear from the language in the federal cases that the federal courts (at all levels and even in geographic regions not commonly dealing with Kentucky's choice of law rules) find them both confusing and highly parochial.\textsuperscript{512} Regardless of what the federal courts may think about the Kentucky choice of law cases, they are required to follow them. Thus, one may draw some conclusions about the content of the Kentucky system from observing the attempts of the federal courts to apply it to fact patterns, some of which have not yet been encountered in the Kentucky state court experience.

In the nonsubstantive area of choice of forum and choice of law clauses, the federal courts have on one occasion enforced a choice of forum clause in favor of another state.\textsuperscript{513} They have on three occasions\textsuperscript{514} enforced choice of law clauses in favor of states other than Kentucky. Although the results appear consistent with the Kentucky state decisions, the federal decisions are basically lacking in the analysis being applied in the later Kentucky cases and in the "skeptical" eye toward such clauses which appear to be present in state decisions. Nevertheless, the results themselves are consistent with Kentucky law and the \textit{Second Restatement}.

Looking to the substantive choice of law cases, the pattern is the same as that observed in the Kentucky state cases—that is, application of Kentucky law in all but a few isolated instances:

\textsuperscript{511} The number includes reported district court opinions which received appellate decisions, although this Article has discussed such instances primarily as indicated in the appellate courts.

\textsuperscript{512} \textit{See}, \textit{e.g.}, \textit{In re Phar-Mor, Inc. Sec. Litig.}, Civ. A. Nos. 92-1938, 93-1643, 1995 WL 600240, at *2 (W.D. Pa. Aug. 9, 1995) (illustrating a federal court's attitude toward Kentucky choice of law).


Harris Corp. v. Comair, Inc.515 Although Ohio law was applied to that aspect of the litigation which was the employer’s attempt to secure contribution from other parties for the workers’ compensation benefits it had paid regarding the deceased employee, its ability to do so could in reality only have been governed by Ohio law, which was the place of the employment relationship. The case was a false conflict in which Ohio was the only interested jurisdiction and an attempt to apply Kentucky law would have been violative of due process.

McGinnis v. Taitano.516 Obviously, there was no ability for Kentucky law to be applied to a claim arising in Germany between persons who had no connection at all to Kentucky at the time of the accident which gave rise to the claim. This was a false conflict in which there was no Kentucky interest to be furthered and no ability constitutionally to have applied its law.

Owens v. DeClark,517 Hammer v. State Farm Mutual Automobile Insurance Co.,518 and Security Insurance Co. v. Kevin Tucker & Associates, Inc.519 Each was an instance of a dispute between an insurer and an insured arising under an insurance policy issued outside Kentucky but activated by factual events in Kentucky. In these circumstances, there was no Kentucky interest to be activated by applying Kentucky law, and any attempt to impact insurance contracts entered into elsewhere would have been violative of due process.

In re McGrew.520 Although a decision was made to apply law other than Kentucky’s in a situation where Kentucky had an interest and Kentucky law constitutionally could have been applied, such result was mandated by Kentucky statute.521 Thus, the result here was legislatively dictated, and the Kentucky choice of law system would have to defer to such legislative directives. We might conceptualize this case as one in which Kentucky “law” actually was applied because Kentucky’s statutes “incorporated by

515 Harris Corp. v. Comair, Inc., 712 F.2d 1069 (6th Cir. 1983).
521 See K.R.S. § 355.9-.103(4) (Michie 1996).
reference" the law of another state to validate an alternate means of perfecting a security interest.

*Rutherford v. Goodyear Tire & Rubber Co.* \(^{522}\) While the result superficially appears to apply the law of a state other than Kentucky, that result was in fact correct because of the Kentucky borrowing statute as interpreted in *Seat*. \(^{523}\) Again, the decision to apply another state’s law was in fact in accordance with Kentucky’s own policy.

*Guy v. Citizens Fidelity Bank & Trust Co.* \(^{524}\) This was actually a false conflict in which any attempt to apply Kentucky law would not have furthered any Kentucky interest and in which an attempt to apply Kentucky law would have been violative of due process.

*Boyd v. LaMaster.* \(^{525}\) This was also a false conflict in which any attempt to apply Kentucky law would not have furthered any Kentucky interest and in which an attempt to apply Kentucky law would have been violative of due process.

The results are thus identical to those encountered in the Kentucky state cases. In virtually every instance where there was contact with Kentucky sufficient to allow application of Kentucky law without violation of due process, Kentucky law was chosen. The only “exceptions” to that pattern are the legislatively directed choices of the law of another state, i.e., statutes of limitations under the direction of the borrowing statute and another state’s security perfection mechanism under a provision of the Uniform Commercial Code.

Again, the choices appear for the most part to be consistent with the results which would have been reached under the *Second Restatement*. The cases are not as consistent as the state cases in citations to the *Second Restatement*, but the results match Kentucky’s so as to comply with the directives of *Klaxon*. These results reinforce the earlier observation that however different Currie’s theories may have been from the *Second Restatement* thirty years ago, the passage of time and the gathering of factual experience is proving them similar if not identical in result. Indeed, with the benefit of that much hindsight, only *Arnett* stands out as a certainly different result. \(^{526}\)

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\(^{523}\) See *Seat v. Eastern Greyhound Lines, Inc.*, 389 S.W.2d 908, 909-10 (Ky. 1965).


\(^{525}\) Boyd v. LaMaster, 927 F.2d 237 (6th Cir. 1991).

\(^{526}\) See supra notes 28-34 and accompanying text.
I. Tabular Depiction of the Pattern

If we place the cases, both state and federal over this thirty year span of time, into tabular form, certain dramatic aspects are revealed. Attached as Table 1 is a depiction of the state court decisions during that time period. Table 1 depicts, in chronological order, the cases by name, the result (i.e., whether Kentucky law or the law of some other state was chosen), and whether or not the Second Restatement was cited in the reported opinion. Table 1 reveals:

The Kentucky state courts have chosen Kentucky law in all but ten of the twenty-four reported cases.

That in two instances, Kentucky law was chosen when Kentucky lacked a sufficient contact to satisfy due process.\textsuperscript{527}

In five of the instances when Kentucky law was not chosen, Kentucky lacked sufficient contact to satisfy due process had it been chosen to govern the outcome of the litigation on the merits. Hence, it was not constitutionally available as a choice.

In three of the remaining instances when Kentucky law was not chosen, the failure to choose Kentucky law was based upon the parties’ choice of law clause or choice of forum clause. Thus, Kentucky law was simply deferred to the choice of the parties.

In one of the remaining instances when Kentucky law was not chosen, the choice of another state’s law was legislatively directed by the borrowing statute.

The sole remaining instance of choosing another state’s law actually involved deferring to a portion of a sister state judgment which involved an equity decree and thus was not a true choice of law or decision to defer Kentucky’s interest.

The Second Restatement of Conflicts has been cited in all but six of the reported decisions, although in at least the instances of the early tort cases (i.e., Arnett and Foster in particular) the citation may have been as contrary authority.

Two of the cases which do not cite the Second Restatement involve very short opinions directly controlled by precedent which did in fact cite the Second Restatement.

One of the remaining cases which did not cite the Second Restatement was making a “choice” in a setting where Kentucky law was identical to

\textsuperscript{527} I am certain that my identification of Arnett and Layne as violative of due process will come as a surprise. See the discussion, infra notes 540-48 and accompanying text, for the support of that position.
the nominally “competing” state law and hence no citation of authority was really needed.

What is even more interesting (but not graphically depicted) is that the cases not only cite the Second Restatement, they in fact reach results entirely consistent with and supported by the Second Restatement, with the exceptions of Arnett, Layne, and (possibly) Foster. Thus, even the tort cases (subject to those exceptions) are in fact consistent with the Second Restatement.

One must draw some sort of conclusion from this, and I suggest there are superficially two possibilities. The first is that Kentucky is choosing its own law whenever it has sufficient contact to do so unless the parties or the legislature choose to the contrary. Read in that fashion, the pattern is classically Brainerd Currie and the citations to the Second Restatement are irrelevant: the cases hold what they do, not what they say. The second is that Kentucky is applying the Currie system to tort cases and the Second Restatement to all other cases. We have seen instances in both state and federal cases where courts have had that perception and so stated. That is an assessment which I have also heard from very skilled Kentucky practitioners, who made the observation in a setting of purely academic interest and not simply in furtherance of a client’s position in a piece of litigation.

Let me suggest a third possibility. I posit that with thirty years of experience in making real, concrete, on-the-ground, fact-pattern-by-fact-pattern decisions, the two “competing” systems are revealed not to have the sorts of differences which they were perceived to have when the new era was young and there was no experience. Consider how that might be so. The basic theme of the Second Restatement was to build upon the First Restatement. Even the harshest critics of the First Restatement on theoretical grounds had to admit that surely it reached the correct result in the vast majority of actual cases. The Second Restatement basically adopted the First Restatement position on most issues and provided for an escape analysis via the “Choice-of-Law Principles” of section 6.\footnote{See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).} We might identify those in shorthand as the recipe for how to tell when a state had a “more significant relationship” than the one presumptively chosen by the black letter sections. As one looks back, how could anyone really doubt that sort of governmental interests (but without the pro-forum bias) of Currie must inherently be within section 6, and particularly subsection 2(c) of the Second Restatement?\footnote{“[T]he relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.” Id. § 6(2)(c).} With that as at least a working hypothesis,
let us take a look at the same tabular depiction of the pattern for the federal cases.

Attached as Table 2 is the same sort of format, only for the federal cases (bankruptcy, district, and circuit levels) arranged chronologically from Atkins to present, and showing the same information previously depicted for the state decisions. Here we find thirty-five reported decisions, approximately fifty percent more experience than is available from the Kentucky state courts over that time. Given the number of references we have seen by the federal courts to their opinion that Kentucky law was unclear or confusing, we might expect not to discern the same pattern. In fact, however, that is not true and the most critical aspects remain. From this table, one may conclude:

In only eleven of the thirty-five reported decisions have the federal courts chosen to apply law other than that of Kentucky.

In seven of the instances when a law other than Kentucky was chosen, Kentucky lacked a sufficient due process connection, so that Kentucky law was actually a constitutionally unavailable choice.

In three of the remaining instances where Kentucky law was not chosen, the choice of another law was a result of deference to a choice of law clause. Thus, the choice was made privately by the parties and simply honored by the court.

In the sole remaining instance of not choosing Kentucky law, the decision to defer to another state's law was mandated by a portion of the Kentucky Uniform Commercial Code. Thus, the choice was legislatively mandated.

In sharp contrast to the Kentucky case law, in only six of the thirty-five reported decisions was there a direct citation to the Second Restatement, although there was language referring to the "most significant relationship" in four additional cases.

Given the absence of significant citation to (much less reliance upon) the Second Restatement, one might expect that the results would be inconsistent with that document and solely in line with the Currie, pro-forum analysis which appears in many of the cases, often in a complaining or derogatory manner. In fact, that is not true. Viewed carefully, only three cases (Bennett, Kennedy, and In re Phar-Mor), superficially at least, reach different results than would have been reached under the Second Restatement.590 The pattern here, when considered with the pattern in the state decisions, is actually quite amazing and offers great possibilities for future refinement of the conflicts process in Kentucky.

590 See supra notes 323-25, 480-97 and accompanying text.
IV. TOWARD THE FUTURE

In reflecting upon this and my own twenty-five years of practice in Kentucky, I think that it is time to recognize the reality of what is present. For all the federal criticism of Kentucky's choice of law rules as parochial or egocentric, the results are in truth quite mainstream. It is only the semantics of "sufficient contacts" or applying Kentucky law "whenever possible" that is making the system subject to such criticism. We could in fact make a great stride forward if the Kentucky Supreme Court would endorse the Second Restatement as our choice of law system. Researching a conflicts issue has always been difficult, in large part because the West Key Number System contains no comprehensive key for conflicts; all the various areas of the law have component keys as to "law applicable," so that performing comprehensive conflicts research is difficult. Even the advent of electronic research tools has not totally cured that difficulty.

The Second Restatement is a desirable system for many reasons. First, it builds into most of its black letter sections a vested rights preference which properly reflects the realities of that prior system's merit, whatever its intellectual shortcomings may have been. Second, it has emerged as the plurality position among the various states, and endorsement would place Kentucky within that group. Third, it would provide a research tool which is otherwise lacking; the Second Restatement has black letter sections, comments, and case compilations which facilitate research by practicing attorneys and provide guidance for courts. Finally, express adoption of the Second Restatement is no more than a recognition of what has already occurred in fact if not in appearance. Getting to that conclusion will in reality impact only two of the state court cases which appeared at first blush to have different results from the Second Restatement. Those apparently inconsistent results are worth revisiting as an illustration of what should be done. In the interest of clarity, let me look at the unaffected cases which had results which had been thought to be different under Kentucky law than would have been the case under the Second Restatement.

Foster v. Leggett\(^\text{531}\) (in the state system) and Bennett v. Macy\(^\text{533}\) and Kennedy v. Zeismann\(^\text{534}\) (in the federal system) all involve essentially the same result. A Kentucky resident has been injured (or killed) in another

\(^{531}\) See Layne v. Layne, 433 S.W.2d 116 (Ky. 1968); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); infra notes 540-48 and accompanying text.

\(^{532}\) Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972).


state by a non-Kentuckian who resides in the state in which the accident has occurred. Sections 145 (injury) and 175 (death) of the Second Restatement[^25] would presumptively point to the law of the state where the injury occurred rather than Kentucky as governing the issues arising, yet the three cases all applied Kentucky law. If the issue is so simple, why did Professor Reese call Foster a "close case" and say that he would opt for Ohio law only if forced to choose? The only reason anyone finds the cases difficult is that the defendant in each has physically acted in his own domiciliary state and caused an injury—the Indiana driver in Bennett, the Ohio driver in Foster, and the Ohio doctor in Kennedy. But what the cases really demonstrate is that the concept of domicile (with its inherent singularity) as a connecting factor is simply too outdated for modern times. The drivers in Bennett and Foster were both actually employed[^36] in Kentucky and spent even their non-working hours at temporary quarters despite remaining technically the domiciliaries of other states. The doctor in Kennedy maintained an office in Kentucky, at which he regularly saw patients and began the contact which resulted in him treating the aggrieved patient in Ohio. If one would simply recognize that those sorts of defendants in fact have meaningful connections similar to domicile in more than one place, the cases are actually quite simple. If the defendants in those cases had been Kentucky domiciliaries, the results in the cases (choice of Kentucky law) would never have raised a doubt because the patterns would be almost identical to Wessling, a result with which no system could quarrel. What this demonstrates is that the presumption of the Second Restatement in each of those cases should properly have been overcome by recognition of the fact that Kentucky had a more significant relationship than did the state where the physical events occurred. Thus, the Supreme Court of Kentucky can give express approval to the Second Restatement without having to disturb even the seminal decision in Foster, and the federal precedents in Bennett and Kennedy would remain valid.

The result is less clear in In re Phar-Mor, Inc. Securities Litigation[^537]. The Pennsylvania federal court had chosen Pennsylvania as having the most significant relationship in the case of other users of financial statements prepared for Phar-Mor by Coopers but reluctantly applied

Kentucky law to a claim by a Kentucky creditor which allegedly relied upon those statements in extending credit. Looking at the facts, however, I am puzzled as to why the federal court thought that Pennsylvania in fact had the most significant relationship. If one analogizes the claim to one for personal injury, the Second Restatement has a preference for the state of the injury where action occurs in one state and damage in another. In the case of fraud or misrepresentation where such acts occur in one state and are relied upon in another state, the Second Restatement has no clear answer but shows a great deference to the state where the victim has relied upon the statements. Thus, it is not possible to say that the choice of Kentucky law in this matter was incorrect, even under the Second Restatement. Given the bankruptcy context in which the case arose, one suspects a desire on the part of the district court to see the multitude of accounting malpractice claims governed by the same law, but that really may not be possible. For myself, I think the choice of Kentucky law in In re Phar-Mor is correct under the Second Restatement, thus requiring no adjustment in existing results to confirm reliance thereon.

And that leaves only two to be resolved: Arnett v. Thompson and Layne v. Layne. We really should say one because Layne is nothing more than an exact duplicate of Arnett, with no independent reasoning. And so, what about Arnett? There is no stretch of anyone’s powers which can make the Second Restatement choose Kentucky law to apply to claims between the Ohio passenger-wife and the Ohio driver-husband in order to obviate a guest statute and spousal immunity. So we must conclude that its overruling is necessary. I urge, however, that it not be done on what one might think the obvious basis, i.e., that we are shifting to the Second Restatement. Rather, I urge it be overruled because it is wrong—it always has been. Let us reflect upon that fact pattern. It has always been assumed (see the analysis infra) that Arnett was a true conflict, that Kentucky had some sort of interest in seeing health care providers paid when they gave care to a nonresident tort victim or that Kentucky wanted to deter such negligence on its highways. One will search the opinion in Arnett in vain for any hint that the court of appeals thought that; the opinion says no more than that Kentucky as the place of the accident is a sufficient basis to apply

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538 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. e.
539 See id. § 148(2).
540 Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968).
541 Layne v. Layne, 433 S.W.2d 116 (Ky. 1968).
542 See infra notes 543-48 and accompanying text.
Since that time, commentators have imagined those policies so as to explain the result, which was a "given" in their analysis. Kentucky had adopted interest analysis and chose its own law in Arnett; therefore, a Kentucky interest must have been present. Not true. There is no evidence in the opinion about unpaid bills. Any thought that compensation deters nonintentional torts seems to fail virtually by definition. In fact, Arnett was a false conflict in which there was no Kentucky interest to be furthered by application of Kentucky law.

In fact, a very substantial argument can be made that application of Kentucky law in Arnett was violative of due process. There is authority from the United States Supreme Court that a state's attempt to apply its own workers' compensation law to the death of a worker employed elsewhere was violative of full faith and credit. Language in Bradford certainly suggests that the forum was actually so lacking in factual connection as to satisfy due process. But for the historical baggage of vested rights, one may reasonably question whether the place of the injury inevitably has an interest in applying its law to every facet of every tort claim which arises therein. The choice of Kentucky law based on the bare connection of the injury has caused great mischief for our conflicts

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543 See Arnett, 433 S.W.2d at 113.

544 One eminent conflicts scholar believed the result in Arnett was even correct because he believed (as I have argued regarding Foster) that the concept of domicile was too simplistic and that the Arnetts had close enough ties with Kentucky to be treated more as residents than nonresidents. See Russel J. Weintraub, Finding a Substitute for the Place-of-Wrong Rule: The Kentucky Experience, 61 Ky. L.J. 419, 424 (1972). If that is factually correct, even this result might be justified under the Second Restatement.

545 Professor Robert Sedler, then on the faculty of the University of Kentucky College of Law, opined in his symposium piece regarding Foster that there was no basis to find either of such policies to justify the result in Arnett. See Robert A. Sedler, Judicial Method Is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents, 61 Ky. L.J. 378, 382 (1972).


547 See id. at 162.

548 For an easy and tragically wrong example, see Tatum v. Hunter Engineering Co., No. 93-5526, 1994 WL 228236 (6th Cir. May 25, 1994). There, Kentucky law was chosen to the detriment of a Kentucky plaintiff; and a nonresident corporation was afforded a protection which it did not have under the law of its home state. See id. at *2. That result was caused by blind adherence to the "place of injury" aspect of Arnett.
jurisprudence, in intellectual quality if not in result. Let us simply face that fact, lay Arnett to rest, and proceed forward with a materially more usable system than we have had.

CONCLUSION

I am on the eve of leaving Kentucky after twenty-five years as a teacher and practicing lawyer in this state. When I arrived in Kentucky, Foster had only been decided two years earlier. Thus, I was physically present here while this body of law developed. I must confess that I never saw the pattern while it was in progress. I literally could not see this forest because I looked too hard at the trees and particularly the earliest ones, Wessling, Arnett, Foster, Lewis, and Breeding. I hope that seeing this collected set of jurisprudence will convince our bench and bar that a change is in order and that it will be only the very slightest of a shift to give us a more workable system. It would change the result in only Arnett and would provide the judiciary and the practitioners of this state with an invaluable research tool and guide to what most find a difficult area of practice. That small change in this mass of case law seems a small enough price to pay for the many advantages to be gained. Indeed, the system is already there if we will but recognize it.

### TABLE 1

<table>
<thead>
<tr>
<th>Cases</th>
<th>Law Chosen Due Process</th>
<th>2d Rest. Cite</th>
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<tr>
<td></td>
<td>Ky.</td>
<td>Other</td>
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<tr>
<td>Batchelor v. Fulcher (1967)</td>
<td>Y</td>
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<td>Wessling v. Paris (1967)</td>
<td>Y</td>
<td>Y</td>
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<td>Story v. Burgess (1967)</td>
<td>Y</td>
<td>Y</td>
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<tr>
<td>Arnett v. Thompson (1968)</td>
<td>Y</td>
<td>N</td>
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549 Although decided very shortly before Wessling v. Paris, it seems fair to include the decision in the modern conflicts era. There were no changes in the membership of court of appeals in the intervening period of less than two months.

550 The decision rested solely on Wessling v. Paris.
The decision rested solely on Arnett v. Thompson. The choice was partial, with Kentucky law being applied to invalidate the will as to Kentucky realty but upholding it as to Kentucky personalty. Although the contract had a choice of law clause in favor of Kentucky law, the holding was that arbitration was required under the Federal Arbitration Act, a result identical to that under Kentucky law. Thus, one may fairly characterize the result as consistent with choosing Kentucky law. The choice of “other” was pursuant to a choice of law clause. The application of foreign law was only to the extent of ordering child support and a dissolution of the marriage. Other issues were outside the court’s jurisdiction. The choice of “other” was pursuant to a choice of forum clause. By “other” it is meant that a choice was made to enforce the equitable portion of a sister state judgment, a position not constitutionally required. While there is no direct citation, there are references in the decision to the “most significant relationship,” the classic language of the Second Restatement. Perhaps no authority was cited because the law of the two states (Kentucky and New York) was the same.
Here, the decision to use foreign law was dictated by the borrowing statute.

"Other" is only a possibility. The case involved a forum selection clause, and the case was remanded for development of a record as to whether enforcement of the clause would be unfair or unreasonable.

As noted supra notes 253-61 and accompanying text, the case is not really a choice of law case but a door closing case. In dicta, there is exploration of an actual conflicts issue and speculation that Kentucky law would apply.
The case was remanded to determine the basis for the transfer. Only one outcome appears possible, and the opinion makes it clear that if the transfer was under 28 U.S.C. § 1406, the claim was barred under Kentucky law.

This decision was dictated by a choice of law clause.

This decision was mandated by legislative choice from the Uniform Commercial Code.

This analysis only refers to the wrongful death portion of the opinion.

This decision involved a workers' compensation payments indemnification claim.

This decision made citation to the “most significant relationship,” typical of the Second Restatement.

This result was based upon a choice of law clause.

In upholding the forum chosen by contract, the court relied solely upon federal law and cited no Kentucky law on the subject. The result appears correct under Kentucky state case law.
This decision was based upon a choice of law clause.

In upholding the forum chosen by contract, the court relied solely upon federal law and cited no Kentucky law on the subject. There are not sufficient facts given in the opinion to judge whether the result appears correct under Kentucky state case law.

Mention was made of the "most significant relationship," typical of the Second Restatement, having been argued by one of the parties.

Citation was made to Breeding v. Massachusetts Indemnity & Life Ins. Co., 633 S.W.2d 717 (Ky. 1982), and to the "most significant relationship," typical of the Second Restatement.

The court compares its result with prior results in other litigation under Pennsylvania law, apparently governed by the Second Restatement under Pennsylvania choice of law rules.

The actual issue was personal jurisdiction, but the court assumed that a choice of law clause in favor of Kentucky was valid as part of its judicial jurisdictional analysis.