Conflict of Laws: The Recent History of Montana's Rules for Contracts

Robert C. Lukes
COMMENT

CONFLICT OF LAWS: THE RECENT HISTORY OF MONTANA'S RULES FOR CONTRACTS

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The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.\(^1\)

Courts often confront facts that require them to consider the application of another jurisdiction's laws. For example, if a tort occurred or a contract were entered into in state A, but the action is brought in state B, the court of state B may find that the proper law to apply is that of state A.

When the facts presented to a court may invoke the laws of more than one jurisdiction, the court must determine which substantive law will control the case. However, if the laws of the different jurisdictions are equivalent, there is no conflict and the issue is moot.\(^2\) Although jurisdictional issues are a subset of the conflict of laws subject, the determination regarding the substantive law that a court should apply in a case is a different question. Jurisdictional questions involve whether a court can exercise power over a party or subject. On the other hand, substantive conflict of law questions pertain only to the law that a court will apply to the case and arise after it has established jurisdic-

\(^1\) RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).
A court determines the applicable substantive law by utilizing “conflict of laws” or “choice of law” rules. Although this results in a substantive determination, the process is procedural in character. Traditionally, this determination is made without regard to the actual substance of the laws which are in conflict. A court applies the rules to the facts and reaches a conclusion. The court's choice of the applicable law is crucial to the outcome of many cases because it determines which jurisdiction's substantive law will be applied.

Conflict of laws often arise in contractual disputes. When parties enter into a contract in one state, and then disputes involving that contract arise in another, the laws of the two states may conflict. When these conflicts arise, courts apply a variety of rules, nearly all of which are judge-made common law rules. The conflict of law rules, like many other procedural rules of court, have evolved throughout the history of American jurisprudence.

In Montana, the conflict of law cases concerning contracts took a new direction beginning in 1979. The Montana Supreme Court's decisions since that time are inconsistent and have created confusion regarding the rules for conflict of laws. This Comment will examine these decisions and discuss the inconsistencies in the law to help clarify the current status of Montana's conflict of law rules for contracts.

In part one, this Comment reviews the history of the more significant conflict of laws theories. Part two turns the discussion to a Field Code statute which has gained recent prominence in Montana's conflict of laws analysis. Part three focuses on three Montana conflict of law cases which rely on the Field Code statute. Part four compares these Montana decisions with cases from other Field Code jurisdictions. In part five, the most recent Montana Supreme Court conflict of laws case, Casarotto v. Lombardi, is juxtaposed with the court's prior decisions. In conclusion, this Comment presents several alternatives to the currently applied rules which should help improve Montana's conflict of law rules for contracts.

3. For a brief discussion which clarifies this basic distinction, see ROBERT A. LEFLAR, THE LAW OF CONFLICT OF LAWS § 4 (1959).
I. HISTORICAL BACKGROUND

In the 1800s, Joseph Story propounded the first predominant conflict of laws theory in American jurisprudence. Based on comity, his theory encouraged the recognition of a foreign jurisdiction's laws in the general interest of justice and sought to ensure that the presiding forum's laws would be applied reciprocally by other jurisdictions. Story's theory remained prominent throughout the states during the later half of the 1800s and had considerable influence in Europe as well.

In the early part of this century, scholars extensively criticized Story's approach to the conflict of laws. Joseph Beale's vested rights theory thereafter gained prominence. In 1934, Beale was the reporter for the original Restatement of the Conflict of Laws [hereinafter First Restatement], which substantially incorporated his views. The First Restatement dictates that the law of the place where the contract was made controls the validity and interpretation of the contract, whereas the law of the place of performance controls issues concerning performance. Beale essentially took the older rule of *lex loci contractus*, or the law of the place where the contract was entered, and expanded it to distinguish issues of validity and performance.

The First Restatement became the most influential theory adopted by courts during the first half of this century, despite widespread criticism by academics. Although a small number of jurisdictions continue to apply the rules of the First Restatement, courts and scholars generally recognize it as too rigid and mechanical, often leading to unjust results. Commentators

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7. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1865).
8. Id. § 38, at 34.
10. See Scoles & Hay, supra note 9, at 13; see also JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).
13. Scoles & Hay, supra note 9, at 15.
15. See generally James A. McLaughlin, *Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L.
have characterized Montana as one of the states that still clings to the even older rule of *lex loci contractus*. Yet, the Montana Supreme Court has denied this characterization.

General criticisms of the First Restatement and several influential New York cases led to a second Restatement on the Conflict of Laws [hereinafter Restatement Second] in 1971. The Restatement Second abandoned Beale's doctrine of vested rights and adopted the "most significant relationship" test for the conflict of laws. Section 188 of the Restatement Second lists a number of factors that a court should weigh in contract situations to determine which jurisdiction's law will apply. This balancing test from section 188 intends that the law of the jurisdiction with the most substantial connections to the contract shall control the case.

The modern conflict of laws debate has generated several other doctrines in addition to the one enunciated in the Restatement Second, some of which have been adopted by other jurisdictions. The amount of scholarship in this area is remarkable,
with the complexity and confusion engendered by this subject apparent from the different types of rules that courts use. The foregoing discussion provides a limited synopsis of the history of the conflict of laws and places Montana’s current rules in a larger context.

II. MONTANA’S FIELD CODE STATUTE

In 1865, David Dudley Field submitted an enormous body of codified laws—the Field Code—to the New York legislature. The Field Code was part of the movement to reform the system of laws in the United States during the 1800s and was intended as a comprehensive body of law that would entirely supplant the common law. Although Field’s home state of New York never adopted the substantive portions of the Code, five western states adopted it in the late 1800s, including Montana. These states abandoned the general purpose behind Field’s creation however, and adopted the Code in addition to the existing common law.

The Montana statute on conflict of laws, adopted verbatim from the Field Code, is found at section 28-3-102 of the Montana


24. Pound, supra note 22, at 10. New York adopted a Code of Civil Procedure between 1876 and 1880 which was largely based on Field’s work, but the remainder of his work was never adopted by the state which had originally commissioned the work. Id. at 9-10.

Code [hereinafter the Field Code statute]. This statutory rule for the conflict of laws remains unchanged since its enactment in 1895 and reads:

WHAT LAW AND USAGE TO GOVERN INTERPRETATION. A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made. 26

The Field Code statute is a rule of interpretation for contracts. Although historically commentators distinguished between the interpretation of a contract and its construction, it is now generally accepted that the interpretation includes both the construction and the legal effect of the contract's words. 27 Problematic to the application of the Field Code statute is the court's ability to distinguish an issue involving the interpretation of a contract from one involving a contract's validity. The Field Code statute technically applies only in cases where the issue concerns interpretation.

The Restatement of Contracts states: "Interpretations of words and of other manifestations of intention forming an agreement, or having reference to the formation of an agreement, is the ascertaining of the meaning to be given to such words and manifestations." 28 Unfortunately, the interpretation of a contract is often inexorably tied to its validity, and many of these distinctions ultimately appear to be a matter of legal semantics. 29 As the Field Code statute is founded upon distinguishing


27. JOHN D. CALAMARI & JOSEPH M. PERILLO, The Law of Contracts, §§ 3-9 (3d ed. 1987). Although the distinction between interpretation and construction is still advocated by some commentators, even they recognize that (1) in many cases it is impossible to draw a line between the interpretation and construction; and (2) courts have generally ignored the distinction. See, e.g., Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833, 837 (1964). Professor Patterson has defined the interpretation of a contract as "the process of endeavoring to ascertain the meaning or meanings of symbolic expressions used by the parties." Id. at 833. On the other hand, Patterson claims construction "is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context." Id. at 835. This lack of clarity concerning the definition of interpretation creates significant problems for applying Field Code statute. For the purpose of this Comment on Montana conflict of laws, and in line with the modern view, the word "interpretation" is taken to include construction. See also E. ALLAN FARNsworth, CONTRACTS § 7.1 (1982).


29. Calamari & Perillo, supra note 27, §§ 3-9. "It is even difficult to tell
issues of interpretation, its application becomes uncertain and enigmatic.

In juxtaposition to the interpretation of a contract stands its validity. If a contract fails basic questions of validity, issues of interpretation are rendered moot. As the Field Code statute governs only issues of interpretation, it does not apply as a conflict of laws rule when the issue concerns the validity of the agreement.

However, when issues of interpretation arise, the Field Code statute is a strict rule based on performance. In these cases, the court should determine whether it can ascertain a place of performance from the contract, and if so, the court should apply the law from that place of performance. During the past fifteen years the Montana Supreme Court has used the Field Code statute as a platform to invoke a general rule distinguishing between issues of validity of a contract and issues of interpretation. Beginning in 1979—with one major exception—the court has relied upon the Field Code statute to determine its conflict of law rules for contracts.

III. THE MONTANA CASES

In older cases involving the conflict of laws, the Montana Supreme Court largely avoided the subject for nearly half a century and never recognized the import of the Field Code statute in this arena. Although travel and commerce during the early part of this century were more limited and the potential for interstate conflict thereby reduced, the early cases on point avoided any discussion of potential conflicts. In 1931, the Montana Supreme Court first discussed the conflict of laws: the court employed the rule of *lex loci contractus* without any reference to whether the Restatement definition of interpretation refers to interpretation or construction or both.30 *Id.*

30. See infra part III.


33. See Shelton R. Williams, Conflict of Laws: Does R.C.M. 1935, Section 7537 Require the Conclusion that the "Place of Performance" Governs the Essential Validity of a Contract?, 2 MONT. L. REV. 74 (1941) (claiming that as of publication, the Montana courts had yet to discuss the Field Code statute).

34. E.g., Capital Fin. Corp. v. Metropolitan Life Ins. Co., 75 Mont. 460, 243 P. 1061 (1928); United States Fidelity & Guar. Co. v. Bourdeau, 64 Mont. 60, 208 P. 947 (1922).
the Field Code statute.\footnote{35} Yet, in a later case decided during the 1950s, the Montana Supreme Court put insurance companies on notice that they will be subject to the rule of \textit{lex fori}, or the law of the forum.\footnote{36} This meant that the court would always apply Montana law, regardless of other factual considerations.\footnote{37}

Prior to the Montana Supreme Court's most recent decision in \textit{Casarotto}, the seminal case in Montana for conflicts law was \textit{Kemp v. Allstate Insurance Co.} from 1979.\footnote{38} The only notable conflict of laws case before \textit{Kemp} is \textit{In re Estate of Dauenhauer},\footnote{39} in which the court determined a child's legitimacy for purposes of inheritance. Confronted with a conflict of laws issue, the court in \textit{Dauenhauer} did not rely upon Montana case law or statutory law, but relied instead upon the First Restatement and the Restatement Second.\footnote{40} Because \textit{Dauenhauer} did not involve a contract situation, the Field Code statute did not apply. However, the case is important in this context for the Montana Supreme Court's recognition of the general applicability of the Restatements when conflict of law questions arise. Moreover, in 1980 the Ninth Circuit looked to \textit{Dauenhauer}, not to \textit{Kemp}, for guidance to determine Montana's conflict of law rules in a contractual situation and applied "the most significant relationship" test from the Restatement Second.\footnote{41} Thus, both the Montana Supreme Court and the federal court applying Montana law employed the Restatement in a narrow area of the conflict of laws in the past.

In 1979, the Montana Supreme Court for the first time recognized the import of the Field Code statute in \textit{Kemp v. Allstate Insurance Co.}\footnote{42} \textit{Kemp} is important for several reasons. First, it

\begin{itemize}
  \item \footnote{35}{Styles v. Byrne, 89 Mont. 243, 296 P. 577 (1931). The doctrine of \textit{lex loci contractus} demands the law of the place where the contract was entered into shall control the case.}
  \item \footnote{36}{Trammel v. Brotherhood of Locomotive Firemen and Enginemen, 126 Mont. 400, 409, 253 P.2d 329, 334 (1953) (applying Montana law and public policy to include a divorced wife within the insurance contract's meaning of "dependent").}
  \item \footnote{37}{Note that regardless of the conflict of laws rule that Montana applies, this is very often the result. \textit{See infra} note 72.}
  \item \footnote{38}{183 Mont. 526, 601 P.2d 20 (1979).}
  \item \footnote{39}{167 Mont. 83, 535 P.2d 1005 (1975).}
  \item \footnote{40}{\textit{Dauenhauer}, 167 Mont. at 86, 535 P.2d at 1006.}
  \item \footnote{41}{Energy Oils, Inc. v. Montana Power Co., 626 F.2d 731, 734 n.6 (9th Cir. 1980) (holding that Montana law applied to the construction of assignments of oil and gas leases). The federal court appears to assume that Montana's recognition of the Restatement Second as valid authority in \textit{Dauenhauer} made it a legitimate source for any conflict of laws issue. The Field Code statute is not discussed in the federal court's opinion. \textit{Id.}}}
  \item \footnote{42}{183 Mont. 526, 531, 601 P.2d 20, 23 (1979).}
\end{itemize}
signals a departure from the prior cases in its recognition of the Field Code statute as determinative in conflict of laws for contracts. Second, in recognizing the efficacy of the Field Code statute in Kemp, the Montana Supreme Court acknowledged that statutory law will control court rules which in other jurisdictions are generally judge made. Finally, the court in Kemp attempted to augment the statutory rule to cover situations beyond the interpretation of contracts, thus providing a more complete conflict of laws rule for Montana.

In Kemp, the plaintiff's car accident in Montana was covered under two insurance policies: one entered into in New York and one in Vermont. The court recognized a conflict between the laws of these states and Montana concerning the possibility of "stacking" the uninsured motorist coverage.

Allstate argued that Montana followed lex loci contractus and therefore, the law of Vermont should apply to the policy entered into in Vermont, while New York law should apply to the New York policy. If the court in Kemp applied the laws of these other jurisdictions, it would have precluded the "stacking" of the plaintiff's policies and denied an increased recovery. Unlike New York and Vermont, Montana permits the insured to stack uninsured motorist policies. Therefore, under Montana law a dramatically different recovery would result.

In contrast, the plaintiff urged the court to renounce lex loci contractus as "archaic," and to apply the most significant relationship test from the Restatement Second. The court did not follow either argument, declaring that "[n]either party has correctly interpreted the affect in this case" of the Field Code statute. The court interpreted the statute to prescribe the rule of lex loci solutionis, or the law of the place of performance.

The court stated:

43. Id. at 528, 601 P.2d at 21.
45. Kemp, 183 Mont. at 530-31, 601 P.2d at 22-23.
47. Kemp, 183 Mont. at 531, 601 P.2d at 23.
48. Id.
49. Id. This is the correct characterization of the Field Code statute as a rule based on performance.
Under the statute, it is only when the contract does not indicate a place of performance that the interpretation would fall under the rule of lex loci contractus. In this situation, we look to the contract to determine if there is a place of performance indicated; if there is, the law of the place of performance controls under our statute, and there is no need to determine the law of the place where the contract was made....

The Kemp court then examined the insurance policies for indications of place of performance, noting that the policies were both valid in the United States and Canada. The court concluded that Montana, as part of the United States, was a contemplated place of performance. Once this determination was made, the court applied the Field Code statute and held that Montana law applied. Thus, the stacking of the policies was permitted which increased the plaintiff's recovery.

The Montana Supreme Court's interpretation of place of performance under the Field Code statute in Kemp was enormously broad. Because the contract was valid anywhere in the United States or Canada, the court held that the parties had therefore designated Montana as the place of performance. This is quite a stretch. If this broad standard was consistently applied, one is hard pressed to create a realistic hypothetical where Montana law would not control a contractual dispute.

Not only did the court in Kemp provide the broadest possible interpretation in its determination of the place of performance, but in its reliance upon the Field Code statute, it neglected to mention that the statute would only apply in questions regarding interpretation. As the previous quote from Kemp indicates, the court implied that if any place of performance is decipherable from the contract, the law of that place must be applied. The court's language in Kemp is markedly forceful, mandating considerations that make the place of performance primary. A reader relying upon Kemp could easily conclude that so long as a contract was valid and performable in Montana, the court would

50. Id.
51. Kemp, at 531-32, 601 P.2d at 23. But see Rhody v. State Farm Mut. Ins. Co., 771 F.2d 1416 (10th Cir. 1985). Under facts similar to Kemp, the federal court in Rhody sharply criticizes the Montana Supreme Court for determining that the policy language intended Montana as a place of performance. The court in Rhody held that no place of performance was indicated by such contractual language and looked instead to where the contact was formed. Id. at 1419-20 & n.3.
52. Kemp, 183 Mont. at 533-34, 601 P.2d at 24-25.
53. See supra note 51 and comments concerning Rhody.
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apply Montana law to the case.

Later in its opinion, the Kemp court turned to alternative sources to justify its resurrection of the heretofore idle Field Code statute. The court cited an older California case for "the longstanding rule [the Blair rule] that the law of place of performance of an insurance contract controls as to its legal construction and effect, but the law of the place where the contract was made governs on questions of execution and validity."54 When the court relied upon the Blair rule, it expanded the scope of its conflict of law rules beyond that of the Field Code statute. In addition to conflict rules for the interpretation of contracts, the Blair rule encompasses considerations of what law should apply concerning issues of validity and execution. Thus, the breadth of the Field Code statute grew to potentially become a complete conflict of laws rule for contracts.

Indeed, in later cases in Montana, the Blair rule superseded the implementation of Field Code statute.55 The Montana Supreme Court would cite to the Field Code statute, but then quote or follow the Blair rule's interpretation of the statute. Although the Blair rule's first appearance in Kemp is dicta, later cases relied heavily upon it as the final word on Montana's conflict of law rules for Montana.

The court's expansion of the Field Code statute with the Blair rule essentially augmented the rule of performance with the doctrine of lex loci contractus to cover issues of execution and validity. The main distinction in the Blair rule between execution and validity versus interpretation are similar to the First Restatement, yet the application of this distinction achieves a diametrically opposed result. The First Restatement assigns questions of interpretation to the law of the place where the contract was formed; whereas the Blair rule, as it includes the mandate of the Field Code statute, applies the law of the place of

54. Kemp, 183 Mont. at 533, 601 P.2d at 24 (citing Blair v. New York Life Ins. Co., 104 P.2d 1075 (Cal. Ct. App. 1940)). The court also claimed that the ruling is in accord with section 206 of the Restatement Second concerning "issues relating to details of performance of a contract." Yet, section 206 clearly refers to minor "details" of a contract, such as "manner, method and time" of performance. Comment b to this section explicitly contains a caveat stating that "this Section is applicable only to details of performance and not to those matters which substantially affect the nature and extent of the obligations imposed by the contract." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 206, cmt. b (1971).


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performance to questions of interpretation.

Because the Blair rule is based on distinctions similar to the those relied upon by the First Restatement, it consequently suffers from many of the same deficiencies. First, it is a rigid rule, providing little flexibility for a court to weigh the specific factors of a case. Second, as noted previously, many factual situations defy any clear distinction between interpretation and validity: often both elements are at issue. Furthermore, Kemp's introduction of the Blair rule without any discussion as to how it differed from or expanded the scope of the Field Code statute generated additional confusion. The rule that emerges from Kemp is not only antiquated and rigid but suffers from a serious lack of clarity.

The next case concerning the conflict of laws in Montana arose in the federal district court. In Omaha Property and Casualty Company v. Crosby, the issue presented was whether a parent had an insurable interest in an automobile insurance contract. In Crosby, a parent purchased an automobile insurance policy in Montana and the son was later in an accident in Alaska. Initially, the court addressed whether the law of Alaska or Montana would control the validity of the insurable interest. The court treated the conflict of law issue in summary fashion, relying entirely upon the direction provided by the Montana Supreme Court in Kemp.

In its reliance on Kemp, the federal court cited the Field Code statute, then noted the Kemp interpretation of the statute which pronounced the Blair rule. The Crosby court distinguished between the "legal construction and effect" and the "execution and validity" of the contract; it then concluded that since the validity of the agreement was at issue, the law of the place where the contract was formed would control. The court correctly recognized that under the Blair rule the insurable interest involved a question of validity of the contract and therefore, the location specified for performance in the contract was immaterial. Because no interpretation of the contract was necessary,

56. Patterson, supra note 27.
58. Id. at 1381.
59. Id. at 1381-82.
60. Id. at 1382-83.
61. Id. at 1383.
62. Crosby, 756 F. Supp. at 1383. Some commentators claim that the distinction
the Field Code statute did not apply and only the broader Blair rule from Kemp was relevant. The federal court accordingly applied Montana law and determined that the insurable interest was valid.63

Following Crosby, the conflict of laws issue was again presented to the Montana Supreme Court in Youngblood v. American States Insurance Co.64 Youngblood involved an insurance policy issued in Oregon and a subsequent accident that occurred in Montana.65 The main issue in the case was whether the subrogation clause in the policy would enable the insurance company to recoup from the plaintiff medical payments made on her behalf after she settled with the tortfeasor.66 The court quoted the Blair rule from Kemp, but did not actually state whether the issue of the case revolved around the interpretation or the validity of the contract.67 The court applied the rule without making this prerequisite distinction.

In Youngblood, the court identified language in the policy that "requires American States to pay whatever damages are required in Montana; that is, the contract is to be performed in Montana."68 Although unclear, it appears that the court must have concluded that the issue concerned the interpretation of the contract and applied the performance aspect of the Blair rule. If the subrogation clause's applicability involved the validity of the contract, the court should have applied the law where the contract was entered into, i.e. Oregon. Under Oregon law, subrogation clauses are valid.69

The Youngblood decision extended further the conflict of law rules in Montana. The court supplemented its analysis, as based on the rules from Kemp, with additional considerations primary
to conflict of law rules in contracts. First, the opinion noted that Montana recognizes choice-of-law provisions within contracts as a valid expression of the parties' intention to select the law that will govern all questions concerning a contract. Second, Youngblood concluded that Montana is not bound to uphold a clause within a contract, even if bargained for, if it is repugnant to the public policy of the state.

These additional rules account for the somewhat confusing analysis in the Youngblood opinion. After recognizing that the insurance policy indicated Montana as the place of performance, thereby determining Montana as the applicable law, the court recognized that the contract included a choice-of-law provision. This provision indicated that Oregon law controlled the application of the subrogation clause. After noting that such clauses are enforceable and valid under Oregon law, the court applied

70. Youngblood, 262 Mont. at 395, 866 P.2d at 205. The majority of conflict of law rules require a court to consider the facts to procedurally determine which jurisdiction's law should be applied. However, one should note that some of these conflict rules do concern choices of "internal law," where the court goes beyond the mere facts of the case to compare the possible substantive laws and determine the result of their application in the case. As we shall see, this is the type of factor that the Montana court included with its considerations of public policy in Youngblood.


Although Youngblood has characterized the imposition of public policy as part of contract law (which it undoubtedly is), in this context it is more often recognized as the final stage in the conflict of laws determination. That is, once the determination of a foreign jurisdiction's law is reached, this law can be compared to the public policies of the forum state to ensure that no injustice is permitted through the hands of the presiding court. For further discussion, see generally, Michael G. Guajardo, Note, Texas' Adoption of the Restatement (Second) of Conflict of Laws: Public Policy is the Trump Card, But When Can it be Played?, 22 TEX. TECH. L. REV. 837 (1991).

The reader should note the Montana Supreme Court's tendency to apply Montana law. This is not atypical of other jurisdictions. The flexibility provided by the current confusion in conflict of law rules has created a situation where the court would be free to choose a rule which achieved a particular outcome, if it so desired. Additionally, the application of Montana public policy by the court can easily be seen as the final trump, which can be exercised by the court on any given occasion to select Montana law.

73. Youngblood, 262 Mont. at 394-95, 866 P.2d at 205.

74. Id. at 395, 866 P.2d at 205. The agreement states that "the Company shall be entitled to reimbursement or subrogation in accordance with the provisions of [Oregon Revised Statutes] 743.825." Id.
Montana public policy to invalidate the clause. To reiterate: the court first recognized the applicability of Montana law because of the Blair rule, but retracted it because of the choice-of-law provision in favor of Oregon law, then finally reinstated Montana law because of public policy considerations. Thus in Youngblood, public policy considerations trumped all other conflict of law factors.

The conflict of law rules from Kemp through Youngblood are very unclear. Kemp recognized the authority of the Field Code statute as a rule of performance for conflict of laws in contractual situations. The Kemp court, in dicta, then augmented the statute with the Blair rule. The federal court in Crosby utilized the Blair rule, correctly distinguishing between issues of validity and those of interpretation. The Montana Supreme Court in Youngblood next cited the Blair rule from Kemp, operated de facto under a determination of place of performance, but neglected to address whether the issue concerned one of validity or interpretation. Despite Youngblood's affirmation of Montana's recognition of choice-of-law provisions in contracts, the court used Montana public policy as a final trump in the conflict of laws analysis to eviscerate the choice-of-law provision.

IV. CRITICISMS OF THE KEMP ERA

The conflict of law rules, as stated and followed by the Montana Supreme Court during the Kemp era, are problematic for four reasons. First, as noted above, the court's strong language in Kemp concerning the Field Code statute leads the practitioner to believe that courts should follow indications of the place of performance in all circumstances. Second, the court expands the Field Code statute in dictum without adequately discussing the concepts of validity or interpretation of a contract. The court in Kemp should have alerted the practitioner that this initial distinction is necessary and prescribed some guidelines for this task.

The third reason that the conflict of law rules during the Kemp era are problematic is that, even with a complete under-

75. Id.
76. Id.
standing of the distinction between validity and interpretation, it is nearly impossible to distinguish between these two issues in many cases. As noted, many times both elements are at issue. The result is a rule that is based upon an unclear distinction which creates an arbitrary conclusion.

Fourth, even when clearly defined and implemented, the Blair rule, like many of the older conflict of law rules, is antiquated and poorly suited for a modern court. The world has changed since the nineteenth century. Commerce and travel are now international. Litigation is no longer centered around technical rules of pleading. The modern conflict of law rules have likewise evolved markedly since the creation of the Field Code statute and the Blair rule, generally reflecting the other changes in law and society since that time. Most courts have adopted modern rules to provide greater flexibility in weighing the diverse interests and contractual situations which are brought before them. Courts found the older conflict of law rules, such as the Blair rule, to be too rigid in their application, resulting in unjust verdicts for the litigants.

Beyond these enumerated problems, Montana's conflict of law rules from the Kemp era suffer from other more general inadequacies. For example, one primary rule of contracts that all courts attempt to follow is to fulfill the intentions of the parties. To discern these intentions, courts will often carefully scrutinize a contract or admit extrinsic evidence. In cases involving the conflict of laws in contracts, courts generally have this same purpose. With the modern complexity of contracts, commerce and laws, it is difficult to imagine that a court can ascertain the intentions of the parties simply by determining a place of performance or through often arbitrary discernment of validity and interpretation.

A good example of the potential inflexibility and harshness of the older rules is evident from the facts in State Farm Mutual Automobile Insurance Co. v. Estate of Braun, a recent Montana case. In Braun, a Montana resident was in a fatal car accident in Canada, and Canadian law drastically restricted the recovery available under his insurance policy. The main issue

80. This is demonstrated by Youngblood. Does the issue in Youngblood relate to whether the subrogation clause is valid, or does the issue involve the clause's interpretation, its legal effect requiring repayment?
82. Braun, 243 Mont. at 126, 793 P.2d at 253-54. Imposition of Canadian law would have limited the damages to funeral expenses only. Id. at 132, 793 P.2d at
in *Braun* was whether Canadian law would operate to limit the damages available under the insurance contract. As an issue of interpretation, under the Field Code statute and the court's broad conception of "place of performance" from *Kemp*, a court applying the statute should have concluded that Canada was a place of performance as indicated in the policy and applied Canadian law. This interpretation would have reduced the available recovery under the policy from $200,000 as permitted by Montana law, to simply the costs of funeral expenses, as provided for by Canadian law.\(^{83}\)

Nevertheless, the court in *Braun* claimed that "[t]he question of whether Montana law or Canadian law should govern the measure of damages available to Appellants is a conflict of laws question regarding tort law." It is unclear from the opinion why the court distinguished these facts from *Kemp* or *Crosby*, which applied contractual rules for conflict of laws. The Montana Supreme Court does not mention the Field Code statute or the Blair rule from *Kemp*. Perhaps the strangest element of the *Braun* opinion is the court's declaration that neither party had argued that Canadian law should apply to the contract,\(^{85}\) when that appeared to be the main issue in the case.

The court in *Braun* did little to clarify Montana conflict of law rules and the decision perhaps best serves as an example of just how confused this area of the law has become in Montana. Because the dispute in *Braun* involved how much recovery the insurance contract permitted, the issue can best be characterized as one of interpretation. In Montana, the Field code statute applies to issues of interpretation. Without the availability of the public policy exception provided for in *Youngblood*, the court

257 (Weber, J., dissenting). Justice Weber's dissent would have limited Braun's recovery to this amount on basic contract theory. The insurance policy contained a clause which stated that the policy limited damages to those "legally entitled to collect from the owner." *Id.* at 131, 793 P.2d at 257 (Weber, J., dissenting).

83. *Id.* at 131-32, 793 P.2d at 256-57 (Weber, J., dissenting).

84. *Id.* at 127, 793 P.2d at 254 (emphasis added). The court states that "no question exists that Montana law governs the interpretation of the insurance contract at issue here." *Id.* For this reason, and given other inconsistencies in the opinion, this Comment has treated *Braun* as an anomaly. Thus, it was not included in the substantive analysis on Montana's conflict of law rules.

Although conflict of law rules regarding torts are rarely addressed by the Montana Supreme Court, it appears that even under these rules, the court should have applied Canadian law in *Braun*. Prior case law indicates that Montana follows the rule that "the law of the place of the injury controls." Lewis v. Reader's Digest Ass'n, Inc., 162 Mont. 401, 406, 512 P.2d 702, 705 (1973).

under the Field Code statute would have been forced to apply
Canadian law and essentially remove any insurance recovery af-
fter a wrongful death. Those would have been harsh results in-
deed, and it is no surprise that the court in *Braun* refused to
permit it.

In *Kemp* and its progeny, the Montana Supreme Court rec-
ognized the rigidity of the Field Code statute. As previously
noted, the court's recognition of the rigidity and incompleteness
of the Field Code statute accounts for its modification of the
statute in *Kemp* with the Blair Rule and the imposition public
policy considerations in *Youngblood*. Yet, these modifications
have only made an old and mediocre law more confusing and
arbitrary. Unlike the federal court in *Crosby*, both Montana
Supreme Court cases fail to discuss the necessary distinction
between interpretation and validity. Furthermore, the public
policy exception created in *Youngblood* could be interpreted to
lead to the doctrine of *lex fori*, or the law of the forum. Many of
the modern conflict of law rules do provide for public policy con-
siderations, but at least they attempt to delineate the scope and
application of public policy.

However, the court has altered Montana's rules for conflict
of laws since *Youngblood*. In its most recent case, *Casarotto v.
Lombardi*, the Montana Supreme Court has abruptly moved
away from the *Kemp* rules without resolving any of the prior
confusion or indicating for the future whether the court will
return to *Kemp* and its progeny. Indeed, time may prove that the
court has discarded the Field Code statute and *Kemp*. However,
at the present time *Casarotto* still leaves the door open on this
older line of cases. Yet before turning to *Casarotto*, it is neces-
sary to first complete the analysis of the *Kemp* era and the Field
Code statute, for despite *Casarotto*, there is a strong possibility
that the court may resurrect the Field Code statute at any time.
With this in mind, the following discussion of how the courts of
other Field Code jurisdictions have operated should be instruc-
tive. In the late nineteenth century, California, North Dakota,
South Dakota and Oklahoma also adopted the same Field Code
statute on the conflict of laws as Montana. The discussion now
turns to the courts of these other jurisdictions and their conflict
of law rules under the Field Code statute.

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86. 268 Mont. 369, 886 P.2d 931 (1994).
87. See Cormack, supra note 25, at 362.
V. OTHER FIELD CODE JURISDICTIONS

A. California

In California, despite earlier recognition of the efficacy of the Field Code statute, the courts have recently applied the statute inconsistently, demonstrating a definite tendency for California to depart from the application of the rule based on performance. One should initially note that California departed from the strict application of the Field Code statute by augmenting it with the Blair rule, which the Montana Supreme Court later followed in Kemp. Although a recent California case indicates in dicta that the Field Code statute entirely controls the conflict of laws in California, what this recent case espouses has not been historically practiced by the court.

A large exception to the application to the Field Code statute was created by the California Appellate Court in Henderson v. Superior Court. In Henderson, the court stated that "where the application of [the Field Code statute] is obscure, California courts are guided by the factors set out in Restatement, Conflict of Laws 2d, section 188, in determining what law to apply to the contract." The courts in several cases since Henderson have employed this exception to use the Restatement Second for the conflict of law analysis instead of relying upon the Field Code statute. Consequently, Henderson provides an easy escape from the application of the Field Code statute.

89. E.g., In re Grace’s Estate, 200 P.2d 189, 193 (Cal. Ct. App. 1949) (“The law of the place determines the manner and method as well as the legality of the acts required for performance.”).
92. Gitano Group, Inc. v. Kemper Group, 31 Cal. Rptr. 2d 271, 275, n.4 (Cal. Ct. App. 1994) (ruling that no true conflict was presented between the laws of the alternate jurisdictions, so the determination of which law controlled was moot).
93. See Shippers Dev. Co. v. General Ins. Co. of America, 79 Cal. Rptr. 388, 396 (Cal. Ct. App. 1969) (finding that the Blair rule should be followed “unless the terms of the contract provide otherwise or the circumstances indicate a different intention”).
94. 142 Cal. Rptr. 478 (Cal. Ct. App. 1978) (ruling on a contract similar to a common law marriage).
95. Henderson, 142 Cal. Rptr. at 483.
The federal courts have also noted the progression of the California’s conflict of law rules and the general supplementation of the Field Code statute. Even before Henderson, the Ninth Circuit noted that “[u]nder the leadership of former Chief Justice Roger Traynor, the California law moved away from a mechanical choice of law process to employ the ‘governmental interest analysis’ approach.” Although California does not rely solely upon the Field Code statute, its case law on the subject is somewhat unclear. The court has incorporated the conflict of law rules from the Restatement Second, but has failed as yet to disentangle itself from a confused history of precedent. This is quite similar to the current situation in Montana. The Field Code statute still looms in the background of California case law, permitting continued confusion and threatening to raise its head without warning again in the future.

B. North Dakota

In the early 1970s, the North Dakota Supreme Court heard a case which questioned the interest charges on a payable note in a sister state (Montana) as usurious and therefore unenforceable. The court recognized that the interest charges were illegal according to the law of North Dakota. However, because of the constraints of the Field Code statute, the court was compelled to find that the laws of Montana controlled the question. The opinion of Judge Paulson made the court’s disdain for the statutory limitations on its conflict of laws choice clear, yet the court nevertheless followed the Field Code statute to determine that Montana law should control.

In the following year, responding to the court’s candid decision, the North Dakota Legislature repealed its Field Code statute. In two cases decided since the statute has been re-

97. Strassberg v. New England Mut. Life Ins. Co., 575 F.2d 1262, 1263-64 (9th Cir. 1978). The “governmental interest analysis” considers the stake that the concerned states have in the litigation to determine which law should be applied. Although originally designed for application in the tort area of conflict of laws, the federal court in Strassberg claims that the rule is “applied to contracts cases as well as the more familiar tort context.” Id. at 1264.


100. Dreher, 202 N.W.2d at 671-72.

101. Id. at 672.

pealed, the parties agreed to employ the “most significant contacts” test as described by Professor Leflar. This test provides for “choice-influencing considerations” in a process somewhat similar to that adopted by the Restatement Second. The North Dakota Supreme Court has now clearly adopted this test, and has applied it in several recent cases.

C. South Dakota

Unlike its sister state to the North, South Dakota retains its Field Code statute on the conflict of laws. The state has recently undergone a drastic revision of its conflict of law rules in tort, but a corresponding revision is lacking in contracts. Although in the past, the South Dakota court has ignored the Field Code statute and applied the general doctrine of lex loci contractus, the statute has regained its full import.

The Supreme Court of South Dakota’s correction of a lower court ruling in Anderson v. Taurus Financial Corporation makes this very clear. In Anderson, the trial court applied the “most significant contacts” test to determine which law applied in an action claiming usury interests and deceptive advertising. However, on appeal the Supreme Court of North Dakota relied entirely upon the Field Code statute, determining that since the contract provided for payments to be made in California, it was the place of performance of the contract and therefore the governing law. The court specifically noted that the lower court had “erred in using the theory of significant contacts to

104. Robert A. Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267 (1966). The main factors that Professor Leflar focuses on are: 1) predictability of results; 2) maintenance of interstate and international order; 3) simplification of the judicial task; 4) advancement of the forum’s general interests; and 5) application of the better rule of law. Id. at 282.
110. Anderson, 268 N.W.2d at 488.
111. Id.
determine what law should apply." Furthermore, the higher
court applied the Field Code statute as written and refused to
apply public policy considerations to invalidate the allegedly
usurious interest.  

Despite the revision regarding tort rules for conflicts previ-
ously noted, South Dakota has not had revisited the conflict of
laws in contracts since the time of Anderson. However, a federal
court sitting in South Dakota applied a provision in the state's
Uniform Commercial Code to determine which law would apply
to the breach of a contract for the sale of sugar beet pulp. Because the Uniform Commercial Code has limited application,
the Field Code statute presumably retains its preeminence under
South Dakota law as declared in Anderson. 

In contrast to the application of the Field Code statute in
Montana, South Dakota courts apply the statute in a straightfor-
ward method, without the assistance of the Blair rule, or other
interpretive devices. The location of performance is often de-
termined by the last act or place of payment of a contract. Although the Federal Court of Appeals in the Eighth Circuit has
criticized South Dakota's reliance upon this analysis, these rules
nearly always ensure that the place of performance of a contract
is discoverable. 

Thus, the Field Code statute is alive and well in South Da-
kota. The court in Anderson resolutely applied the rule. The
court created no additional flexibility through public policy con-
siderations. Although South Dakota may be criticized as operat-
ing under an antiquated or unfair conflict of laws rule, its rule is
relatively straightforward and does not suffer from the lack of
clarity that attends Montana case law.

112. Id. at 488.
113. Id. at 488-89.
89 (W.D.S.D. 1984). The UCC provision recognizes the parties may agree to apply
any state or nation's law so long as that jurisdiction bears a reasonable relation to
the transaction. Although there was no election by the parties to choose any
jurisdiction's law, the court held that because of the Field Code statute's preference
for place of performance, Nebraska, as the place of delivery, satisfied the "appropri-
ate relation" test. The court applied Nebraska law. Id. at 990-91.
115. See Anderson, 268 N.W.2d at 488.
116. Id.
117. See American Serv. Mut. Ins. Co. v. Bottum, 371 F.2d 6, 9, n.2 (8th Cir.
1967).
D. Oklahoma

The Oklahoma legislature adopted the Field Code statute in 1890. Although the Oklahoma court has used the Field Code statute to aid in determining the content of terms in an ambiguous contract, the statute has more recently been the center of discussion involving conflict of laws in contracts. In 1990, the Oklahoma Supreme Court in Panama Processes v. Cities Service Co. acknowledged that the Field Code statute controls conflict of laws for contracts in Oklahoma. The court determined that “the contract was to be performed in major part in Brazil” and therefore applied Brazilian law. The court clearly was not comfortable in its reliance upon the Field Code statute and in support of its conclusion supplemented its analysis by applying the Restatement Second’s test to reach the same result.

Only a year after Panama Processes, the Oklahoma Supreme Court was again confronted with a conflict of laws issue and moved further from its reliance upon the Field Code statute. In Bohannan v. Allstate Insurance Co., the court acknowledged that the reasons previously enunciated for abandoning lex loci delictus for tort conflicts in favor of the Restatement Second test were “equally compelling for abandoning and rejecting the lex loci contractus rule in contract law.” The court elaborated up-

118. The Oklahoma statute is located at OKLA. STAT. ANN. tit. 15 § 162 (West 1993).
119. See Samson Resources Co. v. Quarles Drilling Co., 783 P.2d 974 (Okla. Ct. App. 1989). In Montana, see MONT. CODE ANN. § 1-4-106 (1993) for a statute that is designed to limit the interpretation of the language in the contract to its colloquial meaning. Although the wording of this statute is somewhat similar to the Field Code statute, it has never been relied upon by the Montana courts for either any limitation of a word or any issue of interpretation. The use of the term “language” in the statute indicates that it was not designed as a conflict of laws provision, but as a rule of contracts in general.
120. 796 P.2d 276 (Okla. 1990).
121. Panama Processes, 796 P.2d at 287. The court correctly noted that the Field Code statute states the rule of lex loci solutionis and not lex loci contractus. “It is only when there is no indication in the contract where performance is to occur that the interpretation would apply the lex loci contractus rule.” Id. Although correctly describing the internal function of the statute, the Oklahoma Supreme Court failed to emphasize that the statute is applicable only in disputes over interpretation. This is precisely the same error the Montana Supreme Court has made.
122. Id. at 288.
123. Id. The court notes that it already applies the Restatement Second test with regards to conflict of laws in torts. Id. at 288, n.50.
125. Bohannan, 820 P.2d at 795 (relying upon their reasoning in Bricknner v. Gooden, 525 P.2d 632 (Okla. 1974)). One should note how frequently the courts have mischaracterized the Field Code statute as stating the rule of lex loci contractus.
on the inadequacy of the Field Code statute, declaring, "[N]either the lex loci contractus rule, nor the lex loci solutionis rule allows full consideration of the statutes and public policies of the several states in motor vehicle insurance disputes." 126 The court applied the test of the Restatement Second to determine the applicable law in the case. 127

The Oklahoma Supreme Court is clearly moving away from the application of the Field Code statute as a conflict of laws rule. The court in Bohannan has effectively removed the Field Code statute from application when there is an insurance dispute with competing state statutes and public policies. As noted above, this is one of the areas in which conflict of laws most frequently arises. 128 The Oklahoma court has indicated its dissatisfaction with the Field Code statute, and in the future it will probably apply the test of the Restatement Second in all contractual conflict of law cases.

In contrasting these other Field Code jurisdictions with Montana, we find some similarities as well as some differences in the manner that the courts have applied the statute. In California, the courts have used the statute in the past, but are now largely freed from its constraints. North Dakota has repealed the statute, and the court now uses a test similar to the Restatement Second. The courts of South Dakota strictly apply the statute, with no augmentation. Finally, in Oklahoma, the court has moved away from the application of the Field Code statute, and has indicated a strong preference for the rules of the Restatement Second. To complete the picture on how these jurisdictions differ from Montana, this Comment must now turn to the most recent conflict of laws case in Montana, and the Montana Supreme Court's apparent acceptance of the Restatement Second.

VI. BEYOND THE FIELD CODE: CASAROTTO V. LOMBARDI

A. Determining the Law

In the most recent Montana case involving the conflict of laws, the Montana Supreme Court has ventured into new grounds, without attempting to resolve the confusion created in the not so distant past. In Casarotto v. Lombardi, 129 the plain-
tiffs entered into a franchise agreement to open a Subway sandwich shop in Great Falls, Montana; the store later failed when another franchise opened in a more desirable location in the town. The Casarottos claimed a breach of a verbal agreement providing that they could move their store to an alternate location if one became available. Yet, the contract included a choice of law provision selecting the application of Connecticut law and an arbitration clause requiring the Montana plaintiff to submit to arbitration in Connecticut. The District Court stayed further judicial proceedings in Montana pending the arbitration in Connecticut.

On appeal, the plaintiff subsequently argued that the arbitration clause was invalid because Montana law requires that the clause be conspicuously displayed on the first page of the contract. The defendant contended that the choice of law provision in the contract, indicating that Connecticut law controlled the validity of the agreement, resolved any such dispute. The court identified the first issue as whether, "[b]ased on conflict of law principles, is the franchise agreement entered into between the Casarottos and [the defendants] governed by Connecticut law or Montana law?"

To determine the governing conflict of law rules, the court looked neither to Kemp and the Field Code statute, nor to Youngblood for guidance. The court unpredictably relied on Emerson v. Boyd. In Emerson, the issue was whether an Indian tribe's exercise of jurisdiction preempted the district court's jurisdiction. The court in Emerson relied on the Restatement Second to determine if a contract had sufficient connection to the reservation for the tribal court to assume jurisdiction over the case. The court weighed the different factors from section 188(2) of the Restatement Second and determined that a sufficient connection existed between the contract and the tribal

130. Casarotto, 268 Mont. at 371, 886 P.2d at 932-33.
131. Id.
132. Id. at 372, 886 P.2d at 933.
133. Id.
134. Casarotto, 268 Mont. at 372, 886 P.2d at 933 (relying on MONT. CODE ANN. § 27-5-114(4) (1993)). The arbitration clause was on page nine of the agreement.
135. Casarotto, 268 Mont. at 373, 886 P.2d at 933.
137. Emerson, 247 Mont. at 242, 805 P.2d at 588.
138. Id. at 242-43, 805 P.2d at 588.
reservation so as to preempt the district court’s jurisdiction.\textsuperscript{139}

The main problem with the court’s reliance upon \textit{Emerson} in \textit{Casarotto} stems from the fact that jurisdictional questions differ from questions involving the substantive law determination under conflict of law rules in contracts.\textsuperscript{140} The conflicts issue in \textit{Casarotto} involved a contract dispute and, therefore, logically followed \textit{Kemp} and its progeny. Even in the Restatement Second, jurisdictional matters are treated under entirely different rules than contractual conflict of laws.\textsuperscript{141} As Justice Gray pointed out in her dissent to \textit{Casarotto}, the court’s encapsulation of \textit{Emerson} was correct, yet the application of the conflict of law rules from the analogy resulted in an “inapplicability of that decision to the case before [the court].”\textsuperscript{142} Regardless of any incompatibility between the cases, the results of the analogy to \textit{Emerson} are clear: the court in \textit{Casarotto} did not rely on the Field Code statute or the \textit{Blair} rule, but instead applied the rules of the Restatement Second to decide the conflict of laws issue.

\textbf{B. Applying the Law}

\textit{Casarotto} is factually difficult to discuss without creating confusion. As noted above, the contract between the parties had both a choice of law provision \textit{and} an arbitration clause.\textsuperscript{143} If the choice of law provision was valid and Connecticut law applied, the court would have enforced the arbitration clause. However, if the choice of law provision were invalidated, then the court must determine which jurisdiction’s laws would apply; the court would have decided this by employing the conflict of law rules for Montana. Then, in applying that substantive law, the court could have discovered whether the arbitration clause was valid.

The Montana Supreme Court in \textit{Casarotto} tested the validity of the choice of law provision by employing a two step process: first, the court made a determination whether Montana law would apply “absent an ‘effective’ choice of law by the parties;” second, upon determining Montana law applied, the court investigated whether the “application of Connecticut law was contrary

\begin{itemize}
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{See supra} text accompanying note 3.
  \item \textsuperscript{141} \textit{See generally} \textit{RESTATED (SECOND) OF CONFLICT OF LAWS} (1971).
  \item \textsuperscript{142} \textit{Casarotto v. Lombardi}, 268 Mont. 369, 392, 886 P.2d 931, 945 (1994) (Gray, J., dissenting).
  \item \textsuperscript{143} \textit{Id.} at 372, 886 P.2d at 933.
\end{itemize}
to a fundamental policy" of Montana.\textsuperscript{144} In essence, the first part ensured that the court's application of conflict of law rules did not already indicate Connecticut law, thus rendering reliance upon the choice of law provision in the contract moot. The second part of the court's test ensured if the choice of law provision was recognized and yet Montana had a materially greater interest, that this recognition of Connecticut law did not offend the public policies of Montana.\textsuperscript{145}

This two step process was taken from the Restatement Second, section 187(2). The court properly ignored part (1) of section 187, because it only arises when the parties have no connection to the chosen forum or the choice is arbitrary.\textsuperscript{146} The comments to the Restatement Second indicate that as the materiality of the local forum's interest increases, the fundamental character of the public policy required to trump the choice of law lessens.\textsuperscript{147} Accordingly, the analysis in Casarotto, which determined that Montana had the most significant relationship to the contract, reduced the weight required of the public policy needed to override the choice of law. As a result, upon a finding that Montana had the most significant relationship, the entire choice of law provision may be invalidated if the recognition of Connecticut law would offend any Montana law or policy.\textsuperscript{148} Thus, once a sufficient connection to Montana was established, public policy was again the trump.

To bolster its heavy reliance upon public policy considerations in conflict of law determinations, the Montana Supreme Court relied upon Youngblood: "[T]his state's public policy will ultimately determine whether choice of law provisions in con-

\textsuperscript{144} Id. at 375, 886 P.2d at 935.

\textsuperscript{145} See id. .

\textsuperscript{146} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 187 cmt. f (1971).

\textsuperscript{147} Id. at § 187 cmt. g.

\textsuperscript{148} But see \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 187 cmt. g, stating:

The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law. Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of § 188, would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue.

This is basically the test that the court used in Casarotto. The only departure of the court from this analysis is found in the court's historical deference to discover in any Montana law a fundamental public policy. See, e.g., Trammel v. Brotherhood of Locomotive Firemen and Enginemen, 126 Mont. 400, 253 P.2d 329 (1953) (holding that a public policy of the state is created by legislative enactment).
tracts are 'effective.' The court quoted extensively from *Youngblood* and included a recitation of that case's reliance upon *Kemp* and the Field Code statute. Although it relied on *Youngblood* for the imposition of public policy, ironically, all available legal authority concerning the conflict of law rules from the past fifteen years of Montana precedent was presented in the quote, with no clear direction on how it all applied. The court relied upon public policy from *Youngblood* and its analysis under the Restatement Second to invalidate the choice of law provision in the contract.

C. Casarotto as Precedent for Conflict of Law Rules

In light of the difficulties present in conflict of law rules in Montana during the *Kemp* era, the court's decision in *Casarotto* to use the Restatement Second is somewhat understandable. In attempting to discard the rigidity of the Field Code statute and the *Blair* rule, the Montana Supreme Court is trying to remove these historical restraints on its conflict of law rules. However, the court's reliance upon the Restatement Second in *Casarotto* to resolve the conflict of laws issue leaves many questions unanswered. Most importantly, what is the current state of the law?

In this context, a hypothetical evaluation of the facts from *Casarotto* without the choice of law provision is instructive. Turning to *Kemp* and the Field Code statute as precedent, one would first determine whether the issue was one of interpretation. Because the validity of the arbitration clause was the main issue, no interpretation of the contract was at stake, and therefore, the Field Code statute would not apply. If the *Blair* rule was applied—as extracted from the dictum in *Kemp*—again one initially would determine whether the dispute involved a question of validity or interpretation. Because the issue concerned validity, under the *Blair* rule, the law of the place where the contract was formed would control. Ironically in this case, neither Montana nor Connecticut law would govern, for the contract was entered into in New York. Thus, under the *Blair* rule, the court would apply New York law to determine if the arbitration clause was valid. This is another example of how rigid and sometimes arbitrary these older conflict of law rules can be.

Yet, the Montana Supreme Court did not follow the rules

150. *Id.* at 375, 886 P.2d at 935.
from *Kemp* and its progeny. Instead, the court turned to the Restatement Second for guidance in the conflict of laws. In the court’s reliance upon *Emerson* for its acceptance of the Restatement Second, the court has left an entire line of cases hanging in a void.

*Kemp* and its progeny are still good law in Montana. The *Youngblood* decision, which the court relied upon for imposing Montana public policy in *Casarotto*, was also the most recent reiteration of the court’s continued reliance upon the Field Code statute and the *Blair* rule. The court in *Casarotto* appears to have extracted part of the fruits from *Youngblood*, but has refrained from importing the remainder of the tree, threatening to cut it off at the roots.

Ultimately, the Montana Supreme Court must resolve the inconsistent precedent by chopping this tree down in a more effective and comprehensive manner. The present status of the conflict of laws in Montana is far too confused to continue effectively without further clarification from the authoritative judicial body of the state. The ruling in *Casarotto*, although helping to extract Montana jurisprudence from historically antiquated rules, unfortunately also added to the confusion. The Montana rules for conflict of laws currently appear to include the Field Code statute, the *Blair* rule, the Restatement Second and the public policy trump as enunciated in *Youngblood*. It is unclear which of these rules, or combination thereof, the Montana Supreme Court will apply in the future.

The minimum repair required of the court is to clarify which rule will be used. The present panoply of applicable rules is not consistent with the predictability that practitioners require to determine the law prior to trial. During the past several decades, many aspects of the judicial system have undergone revision to encourage the parties in litigation to settle before trial. Yet, when basic determinations cannot be accurately predicted, such as which law will be applied to a case, it becomes difficult to narrow the settlement range to a mutually agreeable compromise. The current confusion in the law actually encourages a trial, for it increases the difficulty of the practitioner to realistically predict an outcome to the litigation and thereby discourages settlement by the parties.

151. For a fine example of the Montana Supreme Court cutting off inconsistent precedent to eliminate confusion in the law, see Estate of Shaw, 259 Mont. 117, 855 P.2d 105 (1993).
In *Kemp*, the Montana Supreme Court acknowledged the applicability of the Field Code statute to decide conflict of law issues. The court's augmentation of the statute through reliance upon the *Blair* rule has failed to clarify the important distinction between validity and interpretation. The federal court in *Crosby*, citing *Kemp*, did not use the Field Code statute, but relied on the *Blair* rule. Later, in *Youngblood*, the Montana Supreme Court recognized that regardless of which law applied to a contract, a contract or parts of it could be invalidated if it conflicted with the public policies of Montana. Finally, in *Casarotto*, the court largely ignored *Kemp* and its progeny, and employed the rules from the Restatement Second—while reasserting public policy considerations—to decide a conflict of laws issue.

One may claim that the Field Code statute binds the court to certain rules. Ideally, the legislature should repeal the Field Code statute, recognizing it as an outdated and incomplete rule that leads to arbitrary results inconsistent with the intention of the contracting parties. The court could serve as a catalyst to achieve this goal by announcing its objections to the Field Code statute in its next opinion, as recently accomplished by the North Dakota Supreme Court. With the statute repealed, the court could adopt the Restatement Second as its guide with no possible friction from a statutory directive.

As noted above, the conflict of law rules are largely procedural in character, and the court should enjoy the freedom to choose its rules of operation. The Restatement Second provides an excellent source of authority in this area. It offers both the practitioner and judge a flexible doctrine, based on modern principles, which is clearly documented with comments and annotations. Numerous jurisdictions have adopted the Restatement Second and the Montana Supreme Court looks upon it with favor. An announcement by the court that the Restatement Second is the authoritative guide for the resolution of conflict of law issues in Montana would solve the confusion that now exists. If the court in *Casarotto* intended to accomplish this, it has not fully achieved its goal.

The Montana Supreme Court should resolve the present uncertainty and confusion in the conflict of laws for contracts. The combination of inconsistent precedent and conflicting reli-

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152. See *Restatement (Second) of Conflict of Laws* § 6 cmt. a (claiming that a state must apply its local statutory provisions directed to conflict of laws).
ance upon statutory law creates a situation which fosters confusion in an important area. It is a problem that can be easily fixed: the court simply needs to recognize the problem and state clearly which rule will apply in the future.