INTRODUCTION
The author was chagrined to discover that his most recent article on “Montana Law and the Out-of-State Policy” (Trial Trends, Autumn 1998) is now twelve years old when the guiding cases were only Kemp v. Allstate (1979) and Youngblood v. American States Ins. Co. (1993). The Montana Supreme Court has since issued at least seven opinions involving conflicts of law and out-of-state auto policies, and the decisions signal change important to claimants’ counsel. As late as 2007 in Wamsley v. Nodak Mutual Ins. Co., Justice Warner complained in his dissent that the court was virtually following a rule that, if an accident happened in Montana, the out-of-state insurance policy “had to be interpreted according to Montana law. After the same court’s subsequent decisions in Moodro v. Nationwide Mutual Fire Ins. Co. (2008), Tenas v. Progressive Preferred Ins. Co. (2008) and Tucker v. Farmers Insurance Exchange (2009), Justice Warner would make no such charge. A sea change is underway in how the court determines which law applies to out-of-state policies, and that change will make for tougher sailing for claimants.

Whether Montana law applies to an out-of-state policy involved in an accident in Montana is critical, because Montana has well-developed common law for protection of auto insurance consumers that other states generally lack. Consider, for example, just these few Montana rules and their case precedents:

- An insurer is not entitled to subrogation until the insured is made whole including costs and attorney fees. Skauge v. Mountain States Tel. & Tel. Co. (1977), DeTienne Assoc. v. Farmers Union Mut. Ins. (1994); Swanson v. Hartford Ins. Co. of the Midwest (2002).

In Trial Trends articles entitled “Invalidating Auto Policy Provisions in Montana” (Winter 1999) and “Voiding Auto Insurance clauses for Violating Public Policy” (Autumn 2004), the author identified over twenty standard auto policy exclusions, conditions, or offsets that have been declared invalid by the Montana courts. Arguably, Montana Law provides some of the strongest public policy protections for auto insurance consumers in the nation. In nearly all cases, it is in the injured claimant’s interest to apply Montana law to the out-of-state auto policy providing coverage for a Montana auto accident.

In the 1998 article on the out-of-state policy, I noted that the courts around the nation had previously established a general rule that auto insurance policies were governed by the law of the place in which the contract was made. However, the Montana Supreme Court had purported to reject the “modern approach” which applied to auto insurance contracts the law of the state having the “most significant relationship” to the issue to be decided. While rejecting what it described as the “revisionist” modern approach, the Montana Supreme Court used a “place of performance” test that resulted in applying Montana law to out-of-state policies involved in accidents in Montana.
This could be first seen in the seminal and nationally noted case of Kemp v. Allstate in 1979. Julie Kemp, a resident of New York, was a passenger in an auto garaged in Vermont when she was struck and killed in Butte, Montana by an auto driven by a Montana resident. The car in which Kemp rode was insured with Allstate in Vermont and driven by her grandfather, a Vermont resident. In all, Kemp was an “insured” for Uninsured Motorist coverage under a Vermont policy covering two autos of her grandparents with whom she rode and an Allstate policy covering three autos of her parents in New York. Both policies involving separate premiums for each auto they covered. Montana allowed stacking of the Uninsured Motorist coverage of such policies while Vermont and New York law prohibited stacking. Neither of the policies contained a choice-of-law provision.

The Montana Supreme Court declined to adopt what the justices termed the “revisionist” approach of the Restatement of Conflicts § 6 which would require the court to analyze the contract to see which state had “the most significant relationship with the parties, the transaction or the occurrence with regard to the issues in dispute.” The court elected instead to follow the Montana statute governing choice-of-law for contracts concluding that “place of performance” and not place of execution governed:

MCA §28-3-102 – 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.

The court noted three parts of the Allstate policies that indicated place of performance:
First, the basic insuring agreement promised “to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . including death . . . sustained by the insured, caused by accident arising out of the ownership, maintenance or use, of such uninsured automobile.” Second, the territorial coverage agreement provided coverage within the United States which agreement the court found to contemplate payment in any state where the insured was liable. Third, the standard “payment of loss” provision would result in payment of the Silver Bow County judgment being made to the deceased’s representative in that court in Montana, the judgment having been made final.

Consequently, the court concluded that the place of performance was Montana so that the policy would be construed under Montana law to allow stacking of the UM coverages. As a conflicts-of-law holding, this was gratifying to claimants’ counsel in Montana because the standard policy provisions and the factors the court noted would likely be present in almost any accident case involving an out-of-state auto. Hence, absent a choice-of-law provision, one could predict that Montana law would apply in such cases.

The case of Youngblood v. American States Ins. Co. in 1993 involved an Oregon auto policy that contained a choice-of-law provision that the Montana Supreme Court found “expresses the intention of the parties to apply Oregon law no matter where the accident occurred or where the contract is to be performed.” The court conceded that an unambiguous choice-of-law provision had to be enforced unless it was against Montana public policy.

However, at issue in Youngblood was the subrogation clause in the Medical Pay coverage of the Oregon policy under which American States wanted to recover amounts paid from any money the tortfeasor paid its insured insured. Oregon allowed such subrogation, but Montana law forbade it as against public policy under Allstate Ins. Co. v. Reitler (1981).

Plaintiff father and daughter were residents of Oregon and Washington respectively. The auto was apparently garaged in Oregon and the policy issued in Oregon. The accident happened in Montana. The question then, was whether Montana or Oregon law would control the issue.

The Youngblood court noted that, in general, “[T]he law of the place of performance controls legal construction and effect, while the law of the place where the contract is made governs on questions of execution and validity.” As in Kemp, the court found dispositive the fact that the general policy language required American States to pay whatever damages were required in Montana, so that the contract was deemed to be performed in Montana.

However, the court conceded that the policy’s choice-of-law provision, if not ambiguous, would have to be enforced unless it violated public policy. The court then found that the medical pay subrogation provision violated Montana public policy, which prohibited such subrogation, and refused to enforce it. Hence, the court established that a choice-of-law provision in the insurance policy could determine place of performance and require application of another state’s law to govern policy interpretation. However, if application of that state’s law would
give effect to a provision void as against public policy under Montana law, a Montana court could refuse to enforce it.

Hence, Kemp meant that, absent a choice-of-law provision, the policy would be governed by “place of performance,” which, under the standard basic insuring agreement and standard provisions for territorial coverage and payment of loss, would likely be the place where the accident happened. Youngblood meant that a choice-of-law provision would govern which state’s law applied but could not force a Montana court to enforce a provision void as against Montana’s public policy.


In Swanson v. Hartford Ins. of the Midwest (2002), the Montana Supreme Court accepted certification in the federal court of issues involved when a Colorado insurance policy applied to an accident in Montana. The Swansons, who resided both in Montana and in Colorado during any given year, were severely injured in a collision with a USF/Reddaway tractor-trailer at Ravalli, Montana. They incurred over $50,000 in medical expenses in Montana, which they submitted under their policy issued in Colorado. The Colorado “no-fault” policy contained PIP, “personal injury protection” that covered medical expenses with a subrogation clause giving the carrier the right to recover any payments made under PIP from any third party regardless of whether the insured has been “made whole.” Importantly, the policy also contained a “choice of law” provision stating disputes would be governed by Colorado law.

Hartford asserted its subrogation with Continental, the insurer for USF/Reddaway, causing Continental to put Hartford’s name on a $26,000 check for advance medicals. Hartford held the check and refused to endorse it for fifteen months until Swansons sued for bad faith. The case was removed to federal court, which certified to the Montana Supreme Court questions of: (1) whether medical pay subrogation is against public policy in Montana; (2) whether the “made-whole” doctrine is public policy in Montana regardless of policy language to the contrary; and (3) whether a Colorado “choice of law” provision violates Montana Public Policy if Colorado law allows subrogation regardless of whether the insured has been made whole.

The Montana Supreme Court held that “[i]t is public policy in Montana that an insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation regardless of contract language to the contrary.” It then followed Youngblood in first recognizing that it must apply Colorado law in the face of the choice-of-law provision and then refusing to enforce the subrogation provision reasoning that it was void as against public policy in Montana for allowing reimbursement of the insurer before the insured has been made whole. Notably the court said, “Therefore we conclude that application of the Colorado choice-of-law provision violates Montana public policy, and that Montana’s ‘made whole’ doctrine shall be applied to the subrogation provision.” One might ask whether it is application of the choice-of-law provision or the application of the subrogation clause that violates public policy. Can we assume that the choice-of-law provision would still apply to any clause that did not violate Montana public policy?


In 1994, the Montana Supreme Court applied Restatement (Second) of Conflict of Laws §§ 187 and 188 and Youngblood to resolve the issue of which state’s law applied in a franchise contract case. Casarotto v. Lombardi involved a restaurant franchise dispute and the issue of legality of a mandatory arbitration provision in the franchise contract. The agreement expressly provided that it “shall be governed by and construed in accordance with the laws of the State...
§ 188. Law Governing in Absence of Effective Choice of Law by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the context to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

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

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of that state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

The court noted the language "in the absence of an effective choice of law" and used Youngblood to support the proposition that a choice of law cannot be "effective" if it is against public policy. The court found Youngblood consistent with § 187(2) of the Restatement which it quoted in part:

(2) the law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of the state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

The court then determined that Montana had a "materially greater interest" than Connecticut because franchise negotiations, franchise location, operation, contract performance, and residence of franchise owners were all in Great Falls, Montana. Finally, the court concluded that the arbitration clause and lack of notice of that clause were contrary to a fundamental public policy of the State of Montana. Hence, Montana law applied so that the arbitration clause would not be enforced.

It seems fair to conclude from the court's reasoning that, having concluded that there was no "effective choice of law," the court used the "most significant relationship to the transaction" test of § 188 (2) by applying the five factors of subsection (3). However, equally important

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is the fact that the court appeared to find that application of the Connecticut choice-of-law provision “would be contrary to a fundamental policy” of Montana which the court expressly found had a “materially greater interest” than Connecticut. Hence, Casarotto seems to consider the five factors for “most significant relationship to the transaction” and, separate and apart, “materially greater interest” based in Montana’s public policy involving invalidity of some arbitration provisions.


Mitchell v. State Farm Auto. Ins. Co. (2003) involved a California auto policy with no choice-of-law provision. Mitchell, a Californian attending school in Montana, was injured in an auto accident in Montana while a passenger in a vehicle owned by as. He settled with Haas’s carrier, Farmers Insurance Company, for the $50,000 BI coverage limits and then sought to stack UIM benefits under the coverage for the five vehicles his parents insured with State Farm in California.

The State Farm policy contained three provisions at issue, which provisions Montana had declared void as against public policy. The provisions were: (1) an unduly restrictive definition of an underinsured motor vehicle; (2) an offset of BI benefits received against UIM benefits due; and, (3) a UM/UIM anti-stacking provision. All three provisions were valid in California and void as against public interest in Montana, so that recovery hinged on which state’s law applied. The lower court applied the Restatement to find California law applied.

Having resolved Casarotto on the basis of the Restatement and Youngblood, the die appeared cast when Mitchell presented in the Montana Supreme Court. Indeed, the court began by acknowledging that consistency with Casarotto required the district court to apply the Restatement (Second) Conflicts of Laws. However, the court said the district court’s application that resulted in the conclusion that California law applied was erroneous, and the Supreme Court returned to the law of Youngblood to resolve the conflict of law. The court focused on the reference in § 188(1) above to § 6 which provides:

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

Citing § 6(1), the court faulted the district court for not following Montana’s statutory directive which provides:

MCA § 28-3-102. What law and usage to govern interpretation.
A contract is to be interpreted according to the law in usage 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.

The court then followed the Kemp analysis concluding that the standard provisions such as territoriality indicate place of performance to be where the claim arises and the judgment would be paid, that being Montana. The court explained that Kemp was still good law after adoption of the Restatement, because § 6(1) of the Restatement “requires a court to first look to relevant state law when determining applicable law.” Accordingly, the court held that Montana law applied as the law of the place where the contract was to be performed. Applying Montana law, the court found the UIM definition, UIM offset provision, and UIM anti-stacking provisions all void as against public policy.

Mitchell reinforced Kemp in the principle that, absent a choice-of-law provision, the Montana statute, MCA § 28-3-102 controls the law to be applied by specifying that “place of performance” is determinative. Moreover, the standard auto insurance provisions on territoriality, grant of coverage, and payment of claims indicate the place of performance will be the state where the auto accident claims arise.


Oberson was the conservator for Musselman who was a Michigan resident working for a Michigan Engineering firm in Montana when he was catastrophically injured. Federated, the work comp insurer, wanted to subrogate against a large but inadequate verdict Musselman won in a Montana court. Federated filed a subrogation action in the Workers’ Compensation court for Michigan, and Musselman filed a declaratory action in Montana. Michigan allowed such subrogation, and Montana prohibited it as against public policy. The issue was whether Michigan law would apply or that of Montana.

The Montana court refused to grant comity to the decision of the Michigan work comp court on the ground that comity is entirely voluntary and need not be granted when Montana has a strong public policy interest in not allowing the subrogation. The court refused to adopt § 185 of the Restatement which governed subrogation in work places.
saying that it adopted Restatement sections only after evaluating Montana public policies and the Legislature’s statutory guidance. The court said, “Moreover, in choice of law cases, this court has consistently rejected rigid rules, favoring the modern trend toward a more flexible approach which permits analysis of the policies and interests underlying the particular issue before the court.”

The court refused to apply Michigan law citing Article II, Section 16 of the Montana Constitution for its guarantee of a right of full legal redress for injury in employment. The court then cited Youngblood (1993) and Swanson (2002) as examples of cases in which court applied Montana law to prohibit subrogation by out-of-state insurers. While Oberson is a workers’ compensation case, it is notable because it refused the inflexible approach of applying Restatement § 185, favoring instead an approach that would allow consideration of Montana public policy. We will see later that, in the area of auto insurance, adherence to the Restatement would indeed result in a rote approach that would completely ignore Montana’s strong public policy protecting auto insureds.

**Kilmer v. State Farm (2005): Applying Mitchell to the Montana Policy in Another State**

Mitchell’s reaffirmation of Youngblood and Kemp was salutary for claimants’ lawyers. However, under those cases, if a Montana policy is involved in an accident in another state, one might say that every silver lining has a dark cloud. Kilmer v. State Farm Mutual Auto. Ins. (2005) was litigated in the United States District Court in Billings. Plaintiff, Kilmer, a North Dakota resident, was rendered quadriplegic in an auto accident near Beach, North Dakota while insured under a State Farm policy issued in Montana. He sought the court’s ruling that Montana was the place of performance of the insurance contract so that he would be entitled to Underinsured Motorist coverage benefits. Kilmer wanted the protection of Montana’s definition of an “Underinsured Motor Vehicle” and the freedom that Montana law would provide from the policy’s anti-stacking provision.

Kilmer lived on a ranch near Beach, North Dakota, which straddles the Montana/North Dakota border. Kilmer introduced much evidence that he conducted his affairs in Montana including the facts that he was getting medical treatment at Sidney, had a Montana driver’s license, did seasonal work in Montana, and was conducting some of his litigation in Montana. Accordingly, he argued that Montana law should apply.

Unfortunately for Kilmer, the federal court was bound to follow the Montana precedents of Mitchell and its reliance on Kemp in holding that “place of performance” dictates the law that applies to the auto insurance contract. The court followed an analysis virtually identical to that of Mitchell and found dispositive the facts that the accident happened in North Dakota and involved people who neither lived nor worked in Montana at that time. The court concluded that the place of performance was North Dakota in spite of the fact that the plaintiff had much personal business contact, medical treatment, and some litigation in Montana.

**Wamsley v. Nodak (2008): Denying Full Faith and Credit to North Dakota in a Race to the Courthouse**

The cases discussed so far have all involved Montana courts deciding if Montana law applied. The situation is more complicated where a court in another state is intent on making the same decision at the same time. Wamsley v. Nodak Mut. Ins. Co. (2008) reflects the response of some insurers to the Mitchell/Kemp analysis which seemed to inevitably conclude that Montana law would apply to out-of-state policies. Insurers began filing actions in the courts of the states that issued the out-of-state policies seeking declarations that the law of the issuing state as opposed to Montana applied. The actions were often filed immediately after Montana counsel advised the insurer of intention to interpret policy provisions under Montana law.

The Wamsleys, residents of North Dakota, were driving their Chrysler mini-van near Bozeman, Montana. Stanton, a Montanan, who was intoxicated and passed out at the wheel, crossed the center divide, hitting the Wamsleys. The two cars proceeded to hit a motor home traveling behind them. The Wamsleys and Stanton died from the accident. The Wamsleys had three cars insured with Nodak in North Dakota, each providing $100,000 per insured in UIM coverage. The two other cars were garaged in North Dakota. The company paid a single limit of $100,000 UIM for each death but refused to pay the $400,000 UIM limits available if the two other policies were stacked.

North Dakota law does not allow stacking. Montana counsel demanded that the policies be stacked under Montana law, and the insurer requested and received additional time to study the request but actually used the time to prepare and file a declaratory action in North Dakota before the plaintiffs could file in Montana. Plaintiffs then immediately filed in Montana. The Montana District Court refused Nodak’s request for a stay of the Montana proceedings. Subsequently, the court refused Nodak’s request to validate the summary judgment it received in North Dakota under the Full Faith and Credit clause of the constitution. Nodak also argued Montana did not have personal jurisdiction over it. The
Montana court ruled Nodak had waived the personal jurisdiction defense by failing to perfect it procedurally.

On appellate review, the Montana Supreme Court recited a careful step-by-step approach in which Restatement § 6(1) is considered first, requiring the court to look at the relevant state law — in this case MCA § 28-3-102. As noted earlier, that statute provides a contract is to be interpreted according to 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. The Nodak policies contained standard provisions nearly identical to those in Mitchell including the territoriality provision. The accident occurred in Montana; damages were suffered in Montana; suit was filed against a Montana tortfeasor in Montana; the insurer had already paid $200,000 in UIM claims in Montana. Hence, the court followed Mitchell (2003), in ruling that the place of performance, pursuant to MCA § 28-3-102, was where an insured is entitled to receive benefits, has incurred accident related expenses, or is entitled to judgment. Hence, the Wamsley decision was entirely consistent with Mitchell/Kemp.

However, the Montana Supreme Court had to deal with the early conflicting judgment won in North Dakota in the race to the courthouse. The North Dakota Supreme Court in the interim had upheld that judgment holding that North Dakota law applied and did not allow stacking.35 Nevertheless, the Montana Supreme Court held that the Montana District Court did not err in refusing to give full faith and credit to the North Dakota Supreme Court decision reasoning that a court need not accord full faith and credit if the action of the foreign court would “impermissibly interfere with Montana litigation.” The court noted the “back door” tactic used by the insurer of requesting time to study the matter while racing to the North Dakota courts to avoid having the matter litigated in Montana and concluded it was an attempt to impose “interlocutory control” over State District Courts in Montana. The court determined that the North Dakota decision could be treated as an “advisory opinion.” Note however, that the Montana court refused the argument that Full Faith and Credit should not be honored where the North Dakota judgment would violate public policy of the State of Montana saying that is not an adequate ground for refusal. The court said, “[A]s a general rule, a judgment must be afforded full faith and credit regardless of how greatly it offends the public policy of Montana.”36

Notable also was the sharp dissent of Justice Gray, Warner, and Judge Wayne Phillips from the majority’s refusal to accord full faith and credit and from the finding that Montana prevails under conflicts-of-law principles. They contended that MCA § 28-3-102, read the way the court was reading it, ultimately meant that, whenever an accident happened in Montana, Montana law would be applied. In hindsight, the dissent signaled a gathering storm.


In Modroo v. Nationwide Mutual Fire Ins. Co. (2008),37 Justice Leaphart, writing for the majority, focused his Restatement analysis in that conflicts-of-law case to consideration of which state has the “materially greater interest” in the subject matter and issues. In Modroo, University of Montana student, Mamie Hardy, a resident of Ohio, died a couple days after being injured as a passenger in a single-vehicle accident in Mineral County, Montana. On behalf of the driver, Allstate paid $50,000 limits of BI coverage without a release, and Mamie’s mother, Mary Modroo, as personal representative of her estate, sued the tortfeasor and three Nationwide insurers that provided the family UIM coverage under farm business and personal auto policies in Ohio. Nationwide’s personal auto policy (ultimately at issue in the case) insured two vehicles for UIM coverage of $300,000 per person. The UIM coverage, which contained an offset for any amounts paid
by liable parties and an anti-stacking provision, contained a choice-of-law provision that Ohio law would govern interpretation.

Modroo sought to stack the limits of the Ohio personal auto policy UIM as a result of Mamie's injury and death. The issue was whether the court should apply Ohio law that would enforce provisions barring stacking and allowing offsets against the UIM coverage, which provisions would each violate Montana public policy. On its facts, Modroo was the Youngblood case, and Youngblood was still good law, so one could have predicted that the court would hold that Montana law applied. Both cases had choice-of-law provisions, which, if applied, would result in violation of Montana public policy. For that reason, the court could find that the policy contained no "effective" choice-of-law provision and find that Montana had a "materially greater interest" that would allow its public policy to override the offending insurance provisions.

On appeal, however, the court held that, by the terms of the policy, the law of Montana, where the accident occurred, governed the compensatory damages available in tort under the UIM coverage, while the law of Ohio governed the interpretation of the policy contract. The court reasoned that the personal auto policy UIM coverage said it would pay compensatory damages that you "...are legally entitled to recover from the owner or driver" of an underinsured motor vehicle "under the tort law of the state where the motor vehicle accident occurred." The policy also provided that the "contract law of the State of Ohio governs the interpretation of this contract." The Montana Supreme Court said these differing provisions are not in conflict and produce no ambiguity.

The court then held that the stacking and offset provisions of the policy are not matters of tort compensation, but matters of coverage governed by the contract and contract law. Hence, Ohio law barring stacking and allowing the offsets is properly applied. However, this raised the issue whether it is error to apply Ohio law which allows offsets and precludes stacking which would violate Montana public policy. Recall that the Montana court had refused to enforce an Oregon choice-of-law provision in Youngblood in 1993 and held in Casaroito v. Lombardi in 1994, that a Connecticut choice-of-law provision could not be an "effective choice-of-law provision" within the meaning of the Restatement (Second) of Conflicts § 188(2), if it resulted in violation of Montana public policy. And in Swanson in 2002, the court refused to enforce a Colorado choice-of-law provision because it would result in granting the auto insurer subrogation which was against public policy in Montana. Finally, under the Restatement, if Montana has a "materially greater interest in the determination of the issue" it can override the law of the state chosen by the parties to govern their contract.

The court noted that Modroo had not appealed the District Court's decision that Ohio law applied to the auto policy but had instead simply argued that the policy's language should not be enforced because it violated Montana law, an argument consistent with Youngblood, Casaroito, and Swanson. The court opined that its decision in Swanson (2002) may have confused the situation and attempted to clarify by reference to the Restatement § 187(2)(b):

Stated differently, we will not apply the law of the state chosen by the parties if three factors are met: (1) if, but for the choice-of-law provision, Montana law would apply under § 188 of the Restatement;

(2) if Montana has a materially greater interest in the particular issue than the state chosen by the parties; and (3) if applying the state law chosen by the parties would contravene a fundamental policy of Montana.

With regard to factor (1), the court turned to § 188 which the court said "governs situations where the contracting parties fail to select an effective choice of law."

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6[Choice-of-law Principles].

Recall that § 6 refers the court to the state's statutory directive which, in Montana, is the previously quoted MCA § 28-3-102 providing that the "contract is to be interpreted according to the law and usage of the place where it is to be performed ..." The court compared the facts in Mitchell with those of Modroo, the Modroo facts being:

Policy promise to pay damages "under the tort law of the state where the motor vehicle accident occurred..."

Insured attending UM in Montana

Insured working and living in Montana

Insured paid taxes in Montana

Insured incurred medical expenses in Montana

Insured settled with tortfeasor giving rise to UIM claim in Montana

Judgment will be rendered and paid in Montana
Following Mitchell, the court concluded that, as the place of performance, Montana law would apply but for the choice-of-law provision. However, the court pointed out that the policy in Mitchell contained no choice-of-law provision while the personal auto policy in Moodro did.

The court then turned attention to the second inquiry, whether Montana had a “materially greater interest” than Ohio, the pre-condition to the third inquiry of whether applying Ohio law would violate Montana public policy.

Whether Montana had a materially greater interest required analysis under Restatement (Second) of Conflict of Laws § 187 and 188 (1971). Restatement § 187(2) sets forth the factors to consider and weigh:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract,
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Analyzing under those factors, the court found as follows:

The policy was purchased from an agency in Ohio, so Ohio is place of contracting. Moodro is an Ohio resident and Nationwide is headquartered in Ohio. The court pointed out that the Restatement comments say these contacts “bear little significance when considered separately, but gain importance based on their relationship to the contract issue involved and the other contacts.”

Location of the subject matter bears no significance because there is no specific physical thing or localized risk involved. Any negotiations occurred in Ohio. The Restatement accorded weight to negotiations. However, the court noted that “insurance policies are not the result of negotiating and bargaining by the parties,” but are adhesion contracts, so the court accorded little weight to the negotiation factor.

Montana, as previously discussed, was the place of performance. The Restatement gives this weight because such a state “has an obvious interest in the nature of performance and in the party who is to perform.” However the Restatement warns that place of performance has little weight when it was unknown at the time of contracting. The court noted that Montana did not become the place of performance until the accident occurred and accorded it little weight.

Considering those contacts and the weight accorded each, the court found that Montana did not have a materially greater interest than Ohio that would warrant applying Montana law over Ohio’s. Hence, Montana public policy would not override Ohio law.

There appear to be two significant errors in the reasoning here. First, the assertion that the Montana court would give little weight to place of performance (Montana) because it was unknown at the time of contracting is arguably error. Place of performance was known at the time of contracting, because the insurer

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agreed that, under the territoriality provision, "the United States of America, its territory and possessions" including Puerto Rico or Canada are the places it would perform. In essence, the insurer agreed Montana (and every other state in the union) would be the place of performance. Furthermore, Montana was a place of performance even before the accident occurred as were New York and Florida. Moreover, where the insurer has agreed to cover accidents in all 50 states and the territories and possessions of the United States, what difference does it make which state's law applies?

Second, the rote application of the Restatement § 187(2) principles takes no account of a state's strong public policy pronouncements, and this decision was a major deviation from Montana jurisprudence. Moodro suddenly removed any test that would allow consideration of Montana's strong public policy pronouncements on validity of auto insurance policy provisions. Under Moodro, for instance, there would be no way to factor in Montana's abhorrence of a family or household exclusion that would prevent a child from suing her negligent parent for rendering her paraplegic in an auto accident. Montana, in Transamerica v. Reyle (1983) held such a provision to be void as against public policy. As insurance scholar, Professor Ken Abraham, has said:

Automobile insurance coverage issues have so predominant an impact on ordinary individuals and account for so large a portion of the personal injury law suits brought in the United States that the field is necessarily special. The result is that consumer-protection and victim-protection concerns often operate more strongly in this area of insurance than others.

Accordingly, Justice Cotter vigorously dissented of the majority's determination of "materially greater interest," and Justice Nelson concurred in that dissent. Justice Cotter argued and pointed out substantial authority for the position that "the Restatement itself ... posits the 'materially greater interest' inquiry as separate and apart from the § 188(2) factors analysis. The majority, she said, conflated the two analyses allowing the § 188(2) analysis to constitute the materially greater interest determination. The court should have determined "materially greater interest" separate and apart from the § 188(2) analysis which would give Montana's important public policy protecting UIM coverage much greater weight. Justice Cotter said that the court has been conflating the two tests in error thereby denying Montana the materially greater interest that should come from the public policy protections it has developed around UIM coverage.

This most important dissent sets out the bad flaw in the court's recent and ongoing treatment of out-of-state auto policies. The court has now adopted the Restatement and is applying the § 188(2) factors. But the factors, i.e., place of contracting, place of negotiation, place of performance, location of subject of the contract, and domicile or residence, do not allow any consideration of the fact that Montana has a strong tradition of public policy protections that apply to auto policy provisions. Conflating the § 188(2) factors to constitute "materially greater interest" is error that explains the apparent about-face that has caused the court to suddenly decide that Montana has no materially greater interest in interpreting out-of-state auto policies after a long history of providing consumers of such policies the protections of our well-developed public policy.


In the case of _Tenas v. Progressive Preferred Ins._ in 2008, Justice Morris followed the application of § 188(2) of Moodro to find that Nevada's interest outweighed Montana's. Ironically, the court made special note of the fact that the insureds were only visiting Montana, a fact present in virtually every previous case that had gone the other way.

Barbara Barnes had two Nevada auto insurance policies with Progressive. She and her daughter were visiting in Montana when the daughter suffered injuries while a passenger in an uninsured auto in Lake County, Montana. She incurred $34,000 in medical expenses. Barbara's policies each had $25,000 UM limits and contained anti-stacking clauses and a choice-of-law provision requiring application of Nevada law to resolve policy disputes. Progressive eventually paid a single limit of UM and refused the demand to stack the second UM coverage.

Progressive filed an action in Nevada to declare that the policy prohibited stacking. A week later, Tenas filed suit in State District Court in Montana seeking a determination that the UM coverage could be stacked. Progressive moved to dismiss the Montana action based on comity and "priority jurisdiction." Judge Christopher asserted that the issue was choice-of-law and not jurisdiction and denied Progressive's motion to dismiss. Christopher found that application of Nevada law would violate Montana public policy against anti-stacking provisions and granted.

On appeal, the court said, “The district Court properly subordinated the discretionary principle of comity to the important public policy implications.” A court need not honor comity to relinquish jurisdiction where the result will violate public policy. Also, no Montana court has adopted the general doctrine of “priority jurisdiction.” Agri-West (1997) was narrowly limited to the federal law surrounding Indian tribal jurisdiction.

However, the court said the District Court improperly applied Montana law to a Nevada policy because, under conflicts of law principles, Nevada has a “materially greater interest” in the matter than Montana. The court cited Casarotto (1994) as stating the most current rule where the contract contains a choice of law provision. Under Casarotto, the Restatement (Second) Conflict of Laws § 187(2) (1971) governs. That section provides:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or
(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

No one asserted that (a) applied. The court must look next to § 188 which refers to § 6 of the Restatement. Section 6, in return, provides that “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.” If there is no such directive, § 6(2) “provides seven principles relevant to choice of applicable law, and § 188(2) provides factors to aid in that consideration. Applying Montana’s statute, § 28-3-102, MCA, the court held that Montana is the place of performance because:

(1) The policy didn’t limit place of performance.
(2) The accident occurred in Montana.
(3) The medical expenses were incurred in Montana.
(4) Damages in Montana.
(5) Tortfeasor resided in Montana.
(6) Initial claim payments made in Montana.

However, the court then determined that Montana does not have a “materially greater interest” than Nevada, the chosen state under the § 187(2) factors:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Consequently, the court said the District Court improperly gave summary judgment by applying Montana stacking law, and improperly awarded attorney fees, since summary judgment for Tenas was improper.

Justices Cotter and Nelson in their concurrences both referred to their previous dissents in Moodro to the use of § 188(2) factors to determine “materially greater interest” but did not, in fact, file dissents in Tenas. Again, the sole use of the Restatement factors from § 187(2) to determine whether Montana had a “materially greater interest” allowed no consideration for Montana’s consumer protections in the auto insurance policy provisions.

Justice Leaphart simply concurred in the decision. Justice Rice concurred believing that the court should have granted comity to Nevada, and Justices Gray and Warner joined in that concurrence.


*Tucker v. Farmers Ins. Exchange* in 2009, involved an Idaho policy with no choice-of-law provision. Justice Morris summarily followed the *Moodro* application of the 188(2) factors to find that Montana had no materially greater interest than Idaho. In *Tucker*, an 11-year-old Idaho resident, Cady Tucker, was killed on Montana Highway 83 at Seeley Lake while riding in a vehicle owned and operated by Cushman, a Montanan. Montana resident, Janie McNair negligently crossed the centerline causing the collision. Cady Tucker died after living an appreciable length of time.

Cady Tucker was an insured on the Underinsured Motorist coverage
on her Idaho stepfather's $1,000,000 umbrella policy with Farmers Insurance Exchange (FIE). Issues developed around potential offsets to the UIM coverage and whether emotional distress of Tucker's mother constituted compensable "bodily injury" under the FIE UIM coverage. Ultimately, the case was tried against FIE in Missoula Montana where a jury awarded $516,000.

Ironically, on appeal in Tucker, it was the insurer that argued that Montana law applied, and the insured's personal representatives who argued Idaho law applied. The Montana Supreme Court said, in Moodro v. Nationwide Mut. Fire Ins. Co. (2008), it had adopted the "most significant relationship" approach from Restatement (Second) Conflict of Law. (The FIE umbrella policy at issue did not specify choice of law.) The court noted, "...that the policies had been issued in Idaho, to Idaho residents, providing coverage to Idaho vehicles." The court conceded that Montana was the place of performance but indicated that "place of performance bears little weight in choice-of-law determinations, however, when the place of performance is uncertain or unknown at the time of contracting" noting that Montana did not become the place of performance until the accident. (Author's note: this has been true in virtually all of the prior decisions.) The court asserted that "Montana's interest in this dispute derives solely from its status as the place of performance" which fact doesn't create a materially greater interest over Idaho. As the court said, "We are left to resolve a dispute that centers on the interpretation of the Idaho insurance policies issued to Idaho residents by corporations doing business in Idaho." This time, Justices Cotter and Nelson concurred making no mention of their Moodro dissents. Justice Leaphart concurred, and Justice Warner wrote a special concurrence explaining why judicial estoppel would not apply to the positions the plaintiff took in Idaho and Montana.

Tucker, then is a classic case of an out-of-state policy with no choice-of-law provision applying to an accident and injuries in Montana. Considering Kemp, Youngblood, Swanson, Wamsley, Kibler, and Mitchell, it is shocking to see the court now finding no material interest where Montana is the place of performance and there is no choice-of-law designation in the policy. The decision cannot be made consistent with prior decisions and the conflation of the Restatement § 187(2) factors with "materially greater interest" is like a car careening through the cases and sending them sprawling. One might ask whether there is anything left of Youngblood.
CONCLUSION

Reviewing the conflicts of law cases in Montana in chronological order, as we have here, reveals that the Montana Supreme Court followed a clear and predictable set of principles in dealing with the issue of what law applies to the out-of-state auto policy involved in an accident in Montana for almost thirty years from Kemp in 1979 until Moadro in 2008. If the policy contained no choice-of-law provision, MCA § 28-3-102 controlled, and the court looked to place of performance as in the Kemp, Mitchell, and Kilmer cases. Analysis of the standard policies’ basic insuring agreement, territoriality provision and promise to pay judgments where rendered determined place of performance for the court. If the policy contained a choice-of-law provision, the court would enforce it as written unless it would result in violation of Montana’s public policy as the court determined in Youngblood, Casaretto, and Swanson.

The court in Casaretto adopted §§ 187 and 188 of the Restatement and made those sections consistent with its prior decision in Youngblood by finding that a choice-of-law provision that violates public policy is not an “effective choice of law” under those sections. Mitchell too relied on the Restatement, Kemp, and Youngblood. Oberson, a work comp insurance case, cited Youngblood and Swanson for their refusal to enforce subrogation by out-of-state insurers in violation of Montana public policy. The Montana Federal District Court in Kilmer summarily ruled that Mitchell and Kemp dictated that Montana law could not apply where a Montana policy was involved in a North Dakota auto accident, North Dakota being the place of performance. As late as 2008, the court in Wamsley carefully followed Restatement § 6(1) in its requirement that the court look to the relevant statute and applied MCA § 28-3-102 and the Mitchell and Kemp analyses to find that Montana law applied to a North Dakota policy in an accident in Bozeman.

The dissent’s criticism in Wamsley of the extent to which the court was finding Montana law to apply should be taken with a grain of salt. Remember that every decision in which the court applied Montana law over a choice of law provision calling for another state’s law to apply involved an auto insurance provision whose application would clearly violate Montana’s strong public policy. Each of the cases has involved an insurer attempting to enforce one of three provisions the Montana Supreme Court has repeatedly found repugnant as against public interest: (1) a provision allowing the insurer to subrogate against the recovery of its insured who has not been made whole, a practice that this court has simply not allowed; (2) placing in an insurance policy a provision that defeats coverage for which the insured has paid valuable consideration; or, (3) allowing the insurer to reduce UM or UIM coverage by amounts recovered by the injured insured from the tortfeasor’s bodily injury coverage.

Inexplicably, in Moadro and Tenas in 2008, the court became mired in what it had previously described as inflexible approaches of the Restatement and to determine whether Montana had a “materially greater interest” that would allow it to refuse application of a provision that would violate a fundamental public policy of Montana. The court began rote application of the § 187(2) factors as the only apparent factors in determining “materially greater interest.”

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract,
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Those factors completely remove from consideration Montana’s materially greater interest by reason of its strong public policy protections for consumers of auto insurance. The court does this by discounting place of performance on the ground that it is not known at the time of contracting and is only apparent after the accident happened, dubious assertions in light of the insurer’s promise to perform in all fifty states. Furthermore, the court simply is not talking about its strong public policies in place for protection of auto insurance consumers.

Perhaps most stunning is the court’s application of this process in Tucker in 2009, a case in which the policy contained no choice-of-law provision. Application of the Restatement there previously dictated looking to our state’s statutory directive, MCA § 28-3-102, which would mean applying the place of performance standard. The court has never overturned Kemp, Mitchell, or Kilmer. Why would it be analyzing “materially greater interest” in a case where there is no choice of law provision?

The Montana Supreme Court has a tradition of protecting auto policy insureds by clearly identifying policy provisions that are repugnant as against public policy. The end result of the Moadro, Tenas, and Tucker cases in the last two years is a confused abandonment of Montana’s materially greater interest in its public policy protection. When an insurer promises to perform in any one of fifty states, it has no particular interest in what state’s law applies. However, when an accident causes people to be injured or killed in Montana, this state has a materially greater interest in whether policy provisions deemed void as repugnant to public policy deprive the insureds of their coverage. This
interest needs to be inserted back into the decisions and not "conflated" into a reversal of thirty years of well-reasoned precedent without expressly overruling that precedent. Until 2008, Montana law has been quite clear in the area of law applicable to out-of-state policies. Ignoring the principles established in such cases as Kemp, Youngblood, Casarotto, and Mittell introduces an unpredictability in the decisions. This is an opportunity for counsel in the next case to clarify for the court the wisdom in the line of cases from 1979 to 2007 and persuade the court of the error of the last two years of ignoring Montana’s materially greater interest in its public policy protections for consumers of auto insurance.

ENDNOTES

1. The author thanks editors, Pat Sheehy and Dan Buckley, for editing; Jonathon McDonald for his review; and Rob Olsen for research assistance.
3. 262 Mont. 391, 866 P.2d 703.
8. 172 Mont. 521, 565 P.2d 628.
9. 266 Mont. 184, 879 P.2d 704.
12. 261 Mont. 386, 862 P.2d 1146.
17. 2003 MT 102, 315 Mont. 281, 68 P.3d 703.
18. 2003 MT 85, 315 Mont. 107, 67 P.3d 892.
19. 2000 MT 150, 300 Mont. 91, 3 P.3d 626.
23. Restatement (Second) of Conflicts §§ 6, 168.
25. 262 Mont. at 395, 866 P.2d at 205.
27. 262 Mont. at 394, 866 P.2d at 205;Kemp, 183 Mont. 526, 601 P.2d 20.

Insurance Industry Profits Through the Roof! The property/casualty insurance industry is systematically overcharging consumers leading to record profits, according to the Consumer Federation of America (CFA). Insurer overcharges over the last four years amount to an average of $370 per household. Said J. Robert Hunter, the Director of Insurance for CFA:

A major reason why insurers have reported record-high profits and low losses in recent years is that they have been methodically overcharging consumers, cutting back on coverage, underpaying claims, and getting taxpayers to pick up some of the tab for risks the insurers should cover.


"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."

~ John Adams