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Choosing Federal Court for Determination of State Law Questions

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When an attorney has a choice between state and federal court in which to litigate a cause of action, what factors should influence the choice of forum? Differences between the court systems usually dictate the choice. Comparative docket congestion, perceptions concerning the relative quality of the judiciary or even the convenience of the physical facilities of the courthouse might tilt the balance in favor of one forum over the other. A plaintiff's attorney may consider these factors in deciding where to file suit, while a defendant's attorney may consider the same factors in deciding whether to seek removal of a state court action to federal court.

There is supposed to be no difference, however, in the substantive law applied in the federal and state court and, therefore, no occasion to choose between them on the basis of which court will apply more favorable substantive law. That is the ostensible lesson of Erie R. R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), in which the United States Supreme Court declared that federal judges hearing diversity cases must apply state substantive law to determine the merits. The law applied in federal and state court is not always the same, however, and the possibility that federal judges might construe state law differently from their state counterparts should factor into the decision whether to sue in state or federal court or remove a state court action to federal court.

The "Erie Guess"

Erie reduced, but did not eliminate, the possibility that federal courts might apply different substantive law than a state court. Under Erie federal judges confronted with uncertainty as to a state's substantive law are to make an "Erie guess" as to what the law of the state is. The federal judge's determination of state law is not always the same as that of state court judges. The federal district court judge might have more flexibility in deciding an issue than a state trial judge; the federal judge might be more inclined toward a liberal or conservative construction of the law than his or her state counterpart; and the federal judge's ruling will be reviewed by the federal court of appeals whose members might well have judicial philosophies different than those of the members of the equivalent state appellate court.

In an attempt to further narrow the gap between federal and state court interpretations of state law, more than thirty-five states have adopted certification statutes. These statutes allow federal judges faced with ambiguous state law to request the state supreme court to declare the applicable law so that the federal judge may get a definitive ruling rather than make an "Erie guess." Certification statutes would...
seem to assure that state and federal courts will apply the same state law, and thus to negate the possibility of differences in state law construction as a basis for choosing one forum over another. For several reasons, however, an attorney choosing between state and federal forums might still prefer the federal forum for resolution of ambiguous state law.

What follows is an outline of the factors an attorney should consider in choosing between federal and state court for resolution of disputes to which state substantive law applies.

I. Determine If the Federal Court Has Jurisdiction to Decide the State Law Claim. The first task in forum selection is to determine whether the federal forum is available as an alternative to state court for resolution of the state law claim. Usually this requires determining whether there is diversity jurisdiction—the parties on either side must each be citizens of states different than the parties on the other side and the amount in controversy must exceed $50,000. If diversity jurisdiction does not exist, check to see if there is a federal claim which invokes federal question jurisdiction and whether the state claim qualifies for pendent jurisdiction status, i.e., does the claim arise from the same nucleus of operative facts as the federal claim and form a convenient tria unit with the federal claim? See United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). Pendent jurisdiction normally applies to permit joinder of a state claim against a non-diverse defendant who is defending a claim based on federal law. Under certain circumstances, pendent jurisdiction can also be used to join additional non-diverse defendants in a lawsuit when one defendant is sued on a federal claim. In 1989, the United States Supreme Court sharply curtailed the power of the federal courts to use this doctrine of "pendent party" jurisdiction, Finley v. United States, 490 U.S. 545, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989), but Congress recently expressly authorized federal "pendent party" jurisdiction in many cases where the state claims against additional non-diverse parties are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Judicial Improvements Act of 1990, Pub. L. No. 101-650, Sec. 310, 104 Stat. 5113, 5114 (codified at 28 U.S.C. Sec. 1367).

If both the federal and state courts have jurisdiction over the state law claim, it is appropriate to explore the possibility that the federal court might construe state law more favorably to your client than would the state court.

II. Consider Whether the State Law Is Sufficiently Unclear as to Require Interpretation by the Trial Court Judge in a Federal Court. It is the presence of ambiguity or uncertainty in the state law that presents the opportunity for a federal "Erie guess" that may differ from the construction given to state law by state trial court judges. If the state supreme court has recently decided the state law issue, there is little room for a federal judge to make an "Erie guess" different than the interpretation that the state trial judge would apply and thus, no reason to choose federal court in the hope of receiving a more favorable interpretation of state law. So, too, if the state supreme court precedent is old but unchallenged, the federal judge will follow the precedent "if there is no confusion in the decisions, no developing line of authorities that casts a doubt over the established ones, no dicta, doubts or ambiguities..." Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. at 205 (1956). If only trial court rulings exist, there is also considerable room for the federal judge to reach an independent decision as to the status of state law. See IA Part 2, Moore's Federal Practice ¶ 0.307(2) (2d ed. 1978).

Where there is no precedent interpreting state law, the federal judge must seek to construe the law in the manner which the state supreme court would if faced with the same issue and must consider all sources, including related state court precedent, federal decisions and the general weight and trend of authority nationally. See, e.g., Hartford v. Gibbons & Reed
I judge "need no longer be a ventriloquist's dummy." Instead he is free, just as his state counterpart is, to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide." Wright, Federal Courts, 373 (4th ed. 1983).

III. Consider Whether an "Erie Guess" Is Likely to Benefit Your Client. At one level, guesswork and instinct rather than reasoned analysis must guide you in deciding whether a federal judge is more or less likely than a state judge to rule favorably on an open question of state law. This is especially so before the case has been filed and assigned to a particular judge for handling. There are, however, measurable considerations which may guide the choice. In many states, trial judges must follow unreversed supreme court decisions even though the precedent might be ripe for reconsideration. So, too, state intermediate appellate courts sometimes must blindly follow even outdated precedent of the state supreme court. Thus, a change in law in state court may come only at the appellate level and only if the state supreme court exercises its discretion to review lower court rulings which follow existing precedent. Federal district court judges making an "Erie guess" are not bound by these strictures and thus have more flexibility than do state trial courts to anticipate changes in state law.

In the past, federal courts of appeal usually gave great deference to the "Erie guess" of district court judges. The resulting unlikelihood of reversal on appeal of the district court judge's "Erie guess" was a disincentive to protracted appeals in the federal system. For this reason, the litigant who wished to change existing law without time-consuming appeals sometimes preferred the federal forum.

A recent decision of the U.S. Supreme Court makes such thinking anachronistic. In Salve Regina College v. Russell, 59 U.S.L.W. 4219 (U.S. March 20, 1991), the U.S. Supreme Court ruled that it is error for a federal court of appeals to defer to the trial judge's "Erie guess." Instead, the principles underlying Erie "require that courts of appeal review the state-law determinations of district courts de novo." Id. at 4223. The change to de novo appellate review undoubtedly will encourage appeals by parties who are dissatisfied with the "Erie guess" of the federal district court judge. Litigants seeking a speedy and relatively inexpensive resolution of state law questions will no longer be attracted to federal court by the hope that the district court's construction of state law is unlikely to engender an appeal.

IV. Determine Whether the Federal Court Will Avoid the "Erie Guess" by Use of a State Certification Statute. A federal court may not decline to exercise jurisdiction merely because it must resolve a difficult question of state law. Meredith v. City of Winterhaven, 320 U.S. 228, 234, 88 L. Ed. 9, 64 S. Ct. 7 (1943). But an increasing number of states provide a mechanism by which federal judges can avoid making a difficult "Erie guess." More than thirty-five states have enacted certification statutes which allow federal judges to present difficult questions of state law directly to the supreme court of the state for resolution so that the federal judge need not make an "Erie guess." See Yonover, "Ascertaining State Law: The Continuing Erie Dilemma," supra (listing of states with certification procedures).

Where a certification procedure is available and used, a litigant will not attain the benefit of a federal judge's construction of state law. The availability of a certification statute does not mean that it must be used, however. The certification statutes of several states provide that only federal appellate courts and not district courts may certify questions to the state supreme court. Id.

Furthermore, certification statutes permit but do not compel federal judges to seek rulings of the state supreme court. The federal court has discretion to decline to use the certification process and instead to make an "Erie guess." Armijo v. Ex Ccn, Inc., 843 F.2d 406, 407 (10th Cir. 1988). The federal court should not routinely use the certification procedure to avoid its duty to determine all issues presented to it, Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153, 1157 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986), but should apply for certification when the federal court finds itself genuinely uncertain about a question of state law that is vital to the correct disposition of the case. Tidler v. Eli Lilly and Co., 851 F.2d 418, 426 (D.C. Cir. 1988).

Even when the federal trial judge chooses to make use of an available certification statute, there is no guarantee that the state court will accept the tendered certification. Statutory prerequisites often exist and the state supreme court may conclude that the federal court erred in determining that the prerequisites were met. See e.g., N.M. Stat. Ann. Sec. 34-2-8(A) (1986), Pamp.) (certified issue must be determinative).

State supreme courts may have discretion to decline the proposed certification even if the requirements for certification are met. The New Mexico supreme court, for example, limits acceptance of certification requests "to
those cases in which there
is no dispute over the fac-
tual predicates to the
court's determination of
the questions certified, and
[the court's] answer either
disposes of the entire case

If discretionary
review of the interme-
state appellate
court is sought, the state
supreme court
might deny
review.

or controversy...or disposes
of a pivotal issue that de-
nies the future course of
the case.” Schlieter v. Car-
los, 108 N.M. 507, 508-09,
775 P.2d 709, 710-11
(1989). The court in
Schlieter also expressed a
preference for certified
questions which present a
significant question of law
under the state constitu-
tion or an issue of substan-
tial public interest. Id. at
511, 775 P.2d at 713.

Obviously, the presence
of a certification statute in-
creases the likelihood that
a litigant will not get the
benefit of an “Erie guess”
from a federal judge. There
is ample opportunity, how-
ever, to convince the fed-
eral court not to seek cer-
tification or to persuade the
state court not to accept a
tendered certification
when the requirements for
certification are not met or
there exist persuasive argu-
ments that the federal or
state court should decline
to use this discretionary
procedure.

Even in those instances
when the federal court
certifies a state law ques-
tion and the state supreme
court accepts the certifica-
tion, the litigants might re-
ceive a ruling on state law
different than that which
they would have gotten in
the state trial court. State
trial court judges might be
bound by state law to ap-
ply precedent from their
state supreme court until
it is reversed, even if the
precedent is outdated and
ripe for reversal. Those
rulings might never get re-
viewed by the state su-
preme court because
appeals of right may go
only to an intermediate
appellate court which also
may be bound to follow
even outdated precedent
from the state supreme
court. If discretionary re-
view of the Intermediate
state appellate court is
sought, the state supreme
court might deny review.

In contrast, successful
certification assures that
the federal court will have
access to the state su-
preme court and will ap-
ply the current state law
rather than outdated pre-
cedents or incorrect con-
structions of ambiguous or
contradictory case law.

**Conclusion**

The combined effect of
Erie and proliferating cer-
tification statutes is to di-
minish, but not eliminate,
the advantage that a litig-
ant might gain from hav-
ing a federal judge, rather
than a state court, construe
state law. There continue
to be cases in which the
opportunity for a more fa-
vorable interpretation of
state law in federal court
will be an important and
possibly determinative fac-
tor in choosing a federal
court for the resolution of
claims based upon state
law. The possibility of a fa-
vorable “Erie guess” will
occasionally outweigh
 some of the other factors
which are generally con-
sidered in the choice be-
 tween federal and state
court and, therefore, liti-
gants should consider this
factor when choosing be-
tween state and federal
courts.

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**Summary Judgment in the Federal Courts after the Supreme Court Trilogy**

Jane L. Dolkart

Over the past decade
the so-called litigation
explosion and the docket
pressures it has placed on
the federal judiciary have
led to substantial changes
in federal procedure aimed
at increasing court effi-
ciency and weeding out
unmeritorious cases prior
to trial. Thus, the 1983
amendments to the Fed-
eral Rules of Civil Proce-
dure adopted broader use
of sanctions for discovery
abuse and comprehensive
management of cases by
the federal judiciary. At the
same time, there has been
a perceptible return to fact
pleading and resort to al-
ternative dispute resolution
mechanisms by the court,
all in an effort to control
overburdened dockets.

In 1986, the Supreme
Court added summary
judgment to its list of
weapons to turn back the
litigation tide. In a trilogy
of cases, Matsushita Elec-
tric Industrial Co. v. Zenith
Radio Corp., 475 U.S. 574,
189 L. Ed. 2d 538, 106 S.
Ct. 1348 (1986), Anderson
v. Liberty Lobby, Inc., 477
U.S. 242, 91 L. Ed. 2d 202,
106 S. Ct. 2505 (1986), and
Celotex v. Catelett, 477 U.S.
317, 91 L. Ed. 2d 265 106
S. Ct. 2548 (1986), the Su-
preme Court reformulated
summary judgment doc-
trine and practice. This ar-