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Choosing Federal Court for Determination of State Law Questions: When and Why

Ted Occhialino

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.

1. 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 from 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 trial 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 ne-

mally 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, pendnet 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 Su-

preme 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. 2903 (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 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 trial judge would apply and, thus, no reason to choose federal forum 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 must seek the precedent. 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 casts doubt on the continuing validity of the precedent, a federal judge might decide that the precedent need not be followed. See 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 1A 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
judge thus often exists. As
before the case has been
judge to rule favorably on
you in deciding whether a
sioned analysis must guide.
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decisions even though the
unreversed supreme court
trial judges must follow
which may guide the
instinct rather than rea-
guess" of the federal dis-
"Erie guess" was a
disincentive to protracted
appeals in the federal sys-
. For this reason, the
litigant who wished to
change existing law with-
out time-consuming ap-
peals 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 ap-
peals to defer to the trial
judge's "Erie guess." In-
stead, the principles under-
lying 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 un-
doubtedly will encourage
appeals by parties who are
dissatisfied with the "Erie
guess" of the federal dis-
trict court judge. Litigants
seeking a speedy and rela-
tively inexpensive resolu-
tion 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 en-
gender an appeal.
IV. Determine Whether
the Federal Court Will
Avoid the "Erie Guess"
by Use of a State Certif-
ication Statute. A federal
court may not decline to
exercise jurisdiction
merely because it must re-
solve 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 in-
creasing number of states
provide a mechanism by
which federal judges can
avoid making a difficult
"Erie guess." More than
thirty-five states have en-
acted certification statutes
which allow federal judges
to present difficult ques-
tions 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, "Ascertain-
ing State Law: The Contin-
uing Erie Dilemma," supra
(listing of states with cer-
tification procedures).
Where a certification
procedure is available and
used, a litigant will not at-
tain 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 sev-
eral states provide that
only federal appellate
courts and not district
courts may certify ques-
tions to the state supreme
court. Id.

Furthermore, certifica-
tion statutes permit but do
not compel federal judges
to seek rulings of the state
supreme court. The federal
court has discretion to de-
cline to use the certifica-
tion process and instead to
make an "Erie guess." Ar-
imjo v. Ex Cam, Inc., 843
F.2d 406, 407 (10th Cir.
1988). The federal court
should not routinely use
the certification procedure
to avoid its duty to deter-
mine all issues presented
to it, Shakopee Mdewakan-
ton 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 dis-
position 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 cer-
tification statute, there is no
guarantee that the state
court will accept the ten-
dered certification. Sta-
tory prerequisites often
exist and the state supreme
court may conclude that
the federal court erred in
determining that the pre-
requisites were met. See
e.g., N.M. Stat. Ann. Sec.
34-2-8(A) (1990 Repl.
Pamp.) (certified issue
must be determinative).
State supreme courts
may have discretion to de-
cline the proposed cer-
tification even if the
requirements for certifica-
tion 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 factual 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 intermediate state appellate court is sought, the state supreme court might deny review.

or controversy...or disposes of a pivotal issue that defines the future course of the case.” Schlieter v. Carlos, 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 constitution or an issue of substantial public interest. Id. at 511, 775 P.2d at 713.

Obviously, the presence of a certification statute increases the likelihood that a litigant will not get the benefit of an “Erie guess” from a federal judge. There is ample opportunity, however, to convince the federal court not to seek certification or to persuade the state court not to accept a tendered certification when the requirements for certification are not met or there exist persuasive arguments 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 question and the state supreme court accepts the certification, the litigants might receive 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 apply 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 reviewed by the state supreme 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 review 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 supreme court and will apply the current state law rather than outdated precedents or incorrect constructions of ambiguous or contradictory case law.

Conclusion

The combined effect of Erie and proliferating certification statutes is to diminish, but not eliminate, the advantage that a litigant might gain from having a federal judge, rather than a state court, construe state law. There continue to be cases in which the opportunity for a more favorable interpretation of state law in federal court will be an important and possibly determinative factor in choosing a federal court for the resolution of claims based upon state law. The possibility of a favorable “Erie guess” will occasionally outweigh some of the other factors which are generally considered in the choice between federal and state court and, therefore, litigants should consider this factor when choosing between 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 efficiency and weeding out unmeritorious cases prior to trial. Thus, the 1983 amendments to the Federal Rules of Civil Procedure 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 alternative 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 Electric 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. Catrett, 477 U.S. 317, 191 L. Ed. 2d 265 106 S. Ct. 2548 (1985), the Supreme Court reformulated summary judgment doctrine and practice. This ar-