Summer 1991

Choosing Federal Court for Determination of State Law Questions

Ted Occhialino

25. *Id.* at 1519, n.616.
26. Id.
27. Lorenz v. Air Illinois, Inc., 168 Ill. App. 3d 1060, 522 N.E.2d 1352 (1988); Exchange Nat'l Bank v. Air Illinois, Inc., 167 Ill. App. 3d 1081, 522 N.E.2d 146 (1988) Singh v. Air Illinois, Inc., 165 Ill. App. 3d 923, 520 N.E.2d 852 (1988).
28. *See, e.g.*, Cornejo v. State of Washington, 57 Wash. App. 314, 788 P.2d 554 (1990); Scott v. United States, 884 F.2d 1280 (9th Cir. 1989); Thompson v. Camp, 163 F.2d 396 (6th Cir. 1947), *cert. denied*, 333 U.S. 831 (1948).
29. "Hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).
30. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type resonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."
31. For example, in Cornejo v. Washington, 57 Wash. App. 314, 788 P.2d 554 (1990), testimony concerning the cost of an annuity that would provide the plaintiff with a guaranteed stream of income was challenged as hearsay. The court, relying on Washington's analog to Rule 703 of the Federal Rules of Evidence, found this evidence to be admissible. The court observed that "the costs of annuities, obtained, as here, in price quotations from insurance companies, surely are facts that would be used generally by economists and financial planners in many contexts." *Id.* at 560. The court also noted that annuities are often used in a variety of legal contexts such as the formulation of structured settlements. *Id.*

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 defendent'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.

> . . . 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.

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 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 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).

> . . . 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."

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 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. 198, 205, 100 L. Ed. 199, 76 S. Ct. 273 (1956). The same result is likely where the state supreme court has not spoken, but the state's intermediate appellate court has ruled and there is no indication that the state supreme court would rule differently. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78, 85 L. Ed. 109, 61 S. Ct. 176 (1940).

As the state precedent becomes more murky, there is a greater possibility that a federal court will construe state law differently than would a state trial judge. Where contradictory decisions of different divisions of the intermediate appellate court exist, for example, the federal judge has considerable flexibility in deciding state law. *See* Yonover, "Ascertaining State Law: The Continuing *Erie* Dilemma," 38 *De Paul L. Rev.* 1 (1989). Where there is unreversed authority from an appellate court but a developing line of authorities, dicta or ambiguities 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*

Co., 617 F.2d 567, 569 (10th Cir. 1980). The opportunity for creative law construction by the federal judge thus often exists. As Professor Charles Alan Wright notes, the federal 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.*

The availability of a certification statute does not mean that it must be used, however.

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 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 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) (1990 Repl. 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 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.

Professor Ted Occhialino is the Keleher & McLeod Professor of Law at the University of New Mexico School of Law. Mr. Occhialino received a B.A. from Siena College in Albany, New York and a J.D. from Georgetown University Law School. He has been a professor at the University of New Mexico School of Law since 1977 where he teaches courses in civil procedure and federal courts.

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 (1986), the Supreme Court reformulated summary judgment doctrine and practice. This ar-