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An Erie Silence: Erie Guesses and Their Effects on State Courts, Common Law, and Jurisdictional Federalism Note

Connor Shaull

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INTRODUCTION

Ricardo and Marisol Soto were stuck. In January 2017, the couple sued Swift Transportation Company in federal court[1] for, among other things, its failure to properly select and retain its semitruck driver.[2] On November 15, 2016, shortly after 10:00 PM, Swift's semitruck driver was traveling on I-90 near Luverne, Minnesota.[3] The driver swerved into the median to

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1. Soto v. Shealey, 331 F. Supp. 3d 879 (D. Minn. 2018). The Honorable Chief Judge John Tunheim has granted the author, who was his judicial extern when *Soto* was written, permission to use *Soto* throughout this Note as is.

2. Amended Complaint ¶¶ 26–48, *Soto*, 331 F. Supp. 3d 879 (Nov. 1, 2017) (Civil No. 17-124), ECF no. 35).

3. *Id.*

avoid hitting six deer standing on the interstate, but in the process, he overturned his trailer.[4] The Sotos were driving behind the semitruck and collided with the underside of the trailer.[5] Specifically, the Sotos claimed Swift was negligent in its selection[6] and retention[7] of the semitruck driver.[8] Although Minnesota law recognizes a direct-liability claim for negligent retention, it is silent regarding negligent selection.[9] Consequently, Chief Judge John R. Tunheim of the Federal District Court of Minnesota was left unguided when interpreting state substantive law simply because such law was nonexistent.[10] Ultimately, the federal court recognized the negligent selection claim.[11] In doing so, Judge Tunheim relied on prior Minnesota Supreme Court decisions and other common law while also considering how his decision may impose tensions on current state laws.[12] The Sotos therefore survived summary judgment on this issue and a new cause of action—negligent selection—obtained a foothold in Minnesota.

This practice—federal courts predicting how a state court would decide an unresolved issue—is commonly referred to as an *Erie* Guess.[13] In other words, "[a]n '*Erie* Guess' is an attempt to

4. *Id.*

5. *Id.*

6. *Id.* at 885 ("Negligent selection is the independent-contractor analogue to the tort of negligent hiring in an employee-employer relationship . . . .").

7. *See* Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983) (recognizing negligent retention as "an employer[s'] . . . duty to exercise reasonable care in view of all the circumstances in [retaining] individuals who, because of the employment, may pose a threat of injury to members of the public").

8. *See Soto*, 331 F. Supp. 3d at 883 (citing Amended Complaint, *supra* note 1, at ¶¶ 26–48).

9. *Id.* at 885 ("The Minnesota Supreme Court has not expressly adopted the tort of negligent selection." (citing Larson v. Wasemiller, 738 N.W.2d 300, 306 (Minn. 2007))).

10. *Id.* ("The Minnesota Supreme Court has not expressly adopted the tort of negligent selection. Thus, the Court must decide—pursuant to *Erie*—whether the Minnesota Supreme Court would recognize the tort of negligent selection of an independent contractor.").

11. *Id.*

12. *Id.* (quoting *Larson*, 738 N.W.2d at 304).

13. *See, e.g.*, Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625 (2010) (explaining the general background of *Erie* Guesses and arguing for certification of state law questions); Frank Chang, Note, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State C*ourts, 85 GEO.

predict what a state's highest court would decide if it were to address the issue itself."[14] These federal interpretations include not only recognizing new causes of action, but also defining the particular elements of an existing cause of action.[15] Some state courts are generally more receptive to *Erie* Guesses, while other states have a tendency to criticize and reject such federal projections. Missouri, for example, has disapproved of the Eighth Circuit's *Erie* Guesses regarding the insurance industry[16] and the secondary loan market.[17] In contrast, Minnesota has approved federal interpretations of landmark tort actions—such as tortious publication of private facts.[18]

Erie Guesses are not a novel legal concept. Federal predictions arising out of the *Erie* Doctrine[19] and its progeny include federal predictions of how state courts will rule on novel causes of action, novel defenses, and even whether state precedent will be overruled.[20] These predictions create an overlap between state and federal courts, and challenge the *Erie* Doctrine's purported goals, which include "discouragement of forum-shopping

WASH. L. REV. 251 (2017) (addressing the background of *Erie* Guesses and articulating the argument against certification).

14. Schaffer & Herr, *supra* note 13, at 1626.

15. *See id.*

16. *See, e.g.*, Farmland Indus. v. Republic Ins. Co., 941 S.W.2d 505, 510 (Mo. 1997) (holding that the Eighth Circuit "misconstrue[d]" Missouri insurance law in Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., 842 F.2d 977, 985 (8th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 821 (1988)).

17. *See* Baker v. Century Fin. Grp., Inc., 554 S.W.3d 426, 435–36 (Mo. Ct. App. 2018) (criticizing the Eighth Circuit's interpretation of the Missouri Second Mortgage Loan Act §§ 408.231–.241 in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012)).

18. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553, 555 (Minn. 2003) (upholding the federal district court's *Erie* Guess regarding the elements of tortious publication of private fact in *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F. Supp. 2d 1080, 1084–86 (D. Minn. 1999)).

19. *See generally Erie Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining this doctrine as "[t]he principle that a federal court exercising diversity jurisdiction over a case that does not involve a federal question must apply the substantive law of the state where the court sits"). *See generally infra* Part III.A.

20. *See generally* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495–1516 (1997) (explaining the history of *Erie* Guesses and providing several courts that have used *Erie* Guesses in the early 1990s).

and avoidance of inequitable administration of the laws."[21] Notwithstanding these contentions, *Erie* Guesses have existed since the Supreme Court created the *Erie* Doctrine eighty years ago[22] and continue to exist today.[23]

This Note explores the *Erie* Guess's history and practicality and investigates how states within the Eighth Circuit[24] have generally responded to such predictions. Part I provides doctrinal background information on both the *Erie* Doctrine and the sub-category of *Erie* Guesses. That Part then explains how federal courts have applied *Erie* Guesses and how critics of *Erie* Guesses are calling for federal courts to employ alternative judicial methods. Part II offers an empirical analysis that categorizes how the highest state courts "respond" to the Eighth Circuit courts'[25] *Erie* Guesses. This study categorizes the states' responses into three groups: (1) states that agree with the Eighth Circuit; (2) states that acquiesce or do not respond to the Eighth Circuit; and (3) states that disagree with the Eighth Circuit.[26] Finally, Part III outlines the attributes of *Erie* Guesses that allow for federal courts to accurately predict state law and looks to the examples cited in Part II to prescribe solutions for federal courts forced to interpret legal questions vacant of state decisions. Ultimately, because the vast majority of states within the Eighth Circuit either frequently validate or implicitly acquiesce to the federal court's predictions, this Note proposes that federal courts continue interpreting novel state claims through *Erie* Guesses and argues that alternative methods, like mandatory

21. Hanna v. Plumer, 380 U.S. 460, 468 (1965). *See generally* Chang, *supra* note 13, at 266–67 (noting that *Erie* Guesses raise constitutional problems because of the inequitable administration of justice associated with inconsistent holdings by different courts, along with the dilemma of federal courts interpreting traditionally state-controlled areas).

22. *See* West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236–37 (1940) (noting that in the absence of clear state interpretations, federal courts must "ascertain from all the available data what the state law is").

23. *See supra* notes 1–11 and accompanying text.

24. Confining this analysis to the Eighth Circuit is a way of obtaining a dataset with a manageable size while exploring a federal circuit with the second largest amount of states (seven) behind the Ninth Circuit, which has nine.

25. Thus, the study focuses on the seven Supreme Courts of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota and the ten federal district courts of the Eighth Circuit.

26. *See infra* Appendix Figure 1.

certification or abstention, are antithetical to the *Erie* Doctrine's main purposes.

I. TRACING THE HISTORY OF THE *ERIE* DOCTRINE AND *ERIE* GUESSES

In *Erie*, the Supreme Court noted that "[t]here is no federal general common law."[27] This lesson taught to first-year law students[28] appears simple enough: federal courts, when applying any substantive state law, must defer to the respective state's highest court.[29] However, the *Erie* Doctrine's purposes are much more difficult to grasp. Indeed, both state and federal courts have debated the *Erie* Doctrine's purposes since its inception, which has shaped how contemporary courts view and apply the *Erie* Doctrine.[30] Among such issues that *Erie* did not explicitly address itself are *Erie* Guesses. Thus, *Erie*'s progeny have influenced what an *Erie* Guess exactly is and when such federal predictions are appropriate. Section A of this Part provides some background on the *Erie* Doctrine and context in which this doctrine arose. Section B then discusses how and when *Erie* Guesses have been applied and two alternative methods that seek to sidestep issues posed by *Erie* Guesses: discretionary abstention and mandatory certification.

27. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (citing Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

28. This is, of course, one of many lessons that the complex *Erie* doctrine entails. *See generally* Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 40 n.207 (2002) ("Proximate cause in torts and the *Erie* doctrine in civil procedure . . . are two concepts most students seldom comprehend on the first try.").

29. *See generally* BLACK'S LAW DICTIONARY, supra note 19 (defining the *Erie* Doctrine).

30. *Compare* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536–38 (1958) (noting that the *Erie* doctrine's main purpose was to avoid "forum shopping"), *with* Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945) ("In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."). *See generally* Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("[The] twin aims of the *Erie* rule [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

A. THE ESTABLISHMENT OF THE ERIE DOCTRINE: DEFINING THE JUDICIARY'S BOUNDARIES SURROUNDING STATE LAW

The separation of powers between the judicial branch and the executive and legislative branches is perhaps most delineated[31] by issues involving Article III of the United States Constitution, which established a "limited" judiciary.[32] The Constitution limits the judicial power to "cases" or "controversies,"[33] and Congress has the authority to define the judiciary's proper role through the "Exceptions and Regulations Clause."[34] Still, and perhaps ironically, the Supreme Court has historically determined what the Constitution specifically invests in Congress.[35] In other words, because the Supreme Court has the final say on Constitutional interpretations,[36] it is the ultimate decider of how much power Congress actually has through the "Exceptions and Regulations Clause." Notwithstanding the Supreme Court's prerogative, Congress and the Supreme Court itself are traditionally suspicious[37] of the judiciary's unique undemocratic threat.[38]

31. *See, e.g.*, Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341–42, (2006) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997))).

32. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546–47 (2016) (quoting U.S CONST. art. III, §§ 1–2).

33. U.S. CONST. art. III, § 2.

34. *Id*. §§ 1–2 (emphasis added) ("The judicial [p]ower of the United States, shall be vested in one [S]upreme Court, and in such inferior [c]ourts as the *Congress may from time to time ordain and establish* . . . [T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with *such Exceptions*, and under such Regulations as the Congress shall make.").

35. *Compare id.* (noting that Congress can except certain classes of cases from the federal courts), *and* United States v. Klein, 80 U.S. 128 (1872) (holding that Congress has the right to change the law), *with* Plaut v. Spendthrift Farm, 514 U.S. 211, 218–19 (1995) (holding that Congress cannot interfere with Article III prerogatives or override judicial action in a particular case).

36. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

37. *See* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1386 (2014) ("[C]ommonly, . . . [C]ongressional grants of jurisdiction are stricter than what the Constitution permits.").

38. *See id.* at 1381 ("[C]ourts have the ability to invalidate democratically enacted legislation without being democratically accountable themselves . . . ."). *But see* THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (noting that "the judiciary is beyond comparison the weakest of the three departments of power"

The Supreme Court therefore has strictly interpreted both Article III and congressional definitions of the federal courts' authority to limit its jurisdiction.[39]

A quintessential example of such limitations is the Supreme Court's eventually broad[40] interpretation in *Erie* of the Judiciary Act of 1789.[41] In relevant part, this Act was Congress's attempt to define federal courts' authority to rule on matters involving state law. The Act stated: "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[42] In sum, the Judiciary Act mandated that federal courts must defer to state "rules of decision."[43] The Supreme Court's interpretation regarding whether such "rules of decision" included state common law has changed over the years, but ultimately, the Court has narrowed federal courts' jurisdiction by including state common law in the Judiciary Act.[44]

Pre-*Erie*, the Supreme Court determined in the 1842 case of *Swift v. Tyson* that such "rules of decision" included only state legislative action, not state common law.[45] *Swift* narrowly interpreted the Judiciary Act of 1789 to apply only to "local statutes and local usages of the character before stated, and [not] . . . to

because it can act only when called (citing 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 181 (Thomas Ruddiman 1793) (1748))).

39. For example, see the Court's interpretation of "standing" as a jurisdictional requirement. Jordan Z. Dillon, *Standing on the Wrong Foot: The Seventh Circuit's Eccentric Attempt to Rescue Risk-Based Standing in Data Breach Litigation*, 56 WASHBURN L.J. 123, 128, 128 n.41 (2017) ("Though [Article III] of the Constitution does not contain the actual phrases 'standing' or 'injury-in-fact,' these concepts flowed naturally from its language limiting the court's power to cases and controversies." (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992))).

40. In traditional legal complexity, a broad interpretation of the Judiciary Act actually caused *more* limits on the judiciary because the relevant statutory provision mandated when federal courts must defer to state law. *Lujan*, 504 U.S. at 559–60.

41. Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2012)).

42. 28 U.S.C. § 1652.

43. *Id.*

44. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–74 (1938).

45. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. at 79.

contracts and other instruments of a commercial nature."[46] Thus, *Swift* effectively allowed federal courts to rule independently on matters of common law and consequently undermine conflicting state courts' interpretations of common law principles.[47] Indeed, in the years following *Swift*, several cases epitomized such unintended consequences of widening the federal courts' power. Notably, in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, the plaintiff Kentucky taxi corporation sought to execute an agreement with a railroad company in which the taxi corporation would have a monopoly on soliciting passengers at the corresponding railroad station.[48] Because Kentucky's highest court held such an agreement was illegal under Kentucky common law,[49] the plaintiff taxi corporation dissolved and reincorporated in Tennessee, where such an agreement was legal.[50] Relying on *Swift*,[51] the Supreme Court upheld the disputed agreement, which allowed the plaintiff to circumvent the relevant state law.[52] Hence, this case demonstrated the ability of plaintiffs to "forum shop" via the *Swift* Doctrine and successfully determine the case's outcome solely by bringing suit in a different jurisdiction.[53] *Black & White Taxicab* also revealed the problem of inconsistent verdicts between federal and state courts, which inherently harm judicial fairness and finality.[54]

After almost a century of such forum shopping and inconsistent verdicts, the Supreme Court, in an opinion by Justice

46. *Id.* at 18–19.

47. *Cf. Erie*, 304 U.S. at 73–74 (criticizing the unintended consequences of *Swift*).

48. 276 U.S. 518, 522–24 (1928).

49. *Id.* at 526 (citing Palmer Transfer Co. v. Anderson, 115 S.W. 182, 182 (Ky. 1909)).

50. *Id.* at 523.

51. *Id.* at 530 (citing Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842)).

52. *Id.* at 532 (Holmes, J., dissenting) (explaining that the majority "went its own way regardless of the Courts of this State").

53. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73 (1938) (describing *Black & White Taxicab* and the ability of the plaintiff to prevail solely because of the jurisdiction that the actions were brought (citing *Black & White Taxicab*, 276 U.S. at 530)).

54. *See generally* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard doctrine*, 9 STAN. L. REV. 281, 304 (1957) (explaining through his pedagogical "train victim hypothetical" how inconsistent verdicts inherently harm fairness in the judicial process in the context of mutual claim preclusion).

Louis Brandeis, overruled *Swift* sua sponte[55] in the landmark case: *Erie Railroad Co. v. Tompkins*.[56] *Erie* broadly interpreted the Judiciary Act to include state general common law,[57] which restricted the federal courts' powers.[58] Relevantly, in *Erie*, the Supreme Court reconsidered the Judiciary Act of 1789.[59] Similar to both *Swift* and *Black & White Taxicab*, *Erie* involved an individual who did not have a solid common law claim in state court, but used federal "general common law" as a more favorable landscape.[60] The federal district court in *Erie* ignored state common law and instead applied a higher standard of care, which the Second Circuit affirmed.[61] The Supreme Court reversed, holding that such federal general common law applications were unconstitutional.[62] Perhaps infamously, the majority never specified what part of the Constitution *Swift* violated, which has led to more debates surrounding *Erie*'s purposes.[63] *Erie* was explicit,

55. Latin for "of one's accord; voluntarily," in the judicial context this term generally means "[w]ithout prompting or suggestion; on its own motion." *Sua Sponte*, BLACK'S LAW DICTIONARY (11th ed. 2019).

56. 304 U.S. at 74 ("Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue.").

57. *Id.* at 71 (holding that, in matters of general jurisprudence, the Judiciary Act's phrase "laws of the several states" includes "the unwritten law of the State as declared by its highest court").

58. *Id.* at 78 ("Congress has no power to declare substantive rules of common law applicable in a State . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts.").

59. *Id.* at 71 (citing Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2012))).

60. The plaintiff in *Erie* was struck by the defendant train company's train and thus, his arm was severed. *Id.* at 69; *see also* David L. Stebenne, *Reining in the Federal Judiciary: Louis D. Brandeis and* Erie v. Tompkins, 29 REVS. AM. HIST. 93, 93 (2001) (book review). However, because the plaintiff was a trespasser, the defendant was only liable if it inflicted "willful or wanton injury." *Id.* at 80 (citing Falchetti v. Pa. R.R. Co., 160 A. 859, 860 (Pa. 1932)). The plaintiff therefore sued the defendant in federal court, hoping for a broader duty, which was ultimately applied by the lower courts. *Id.* at 70.

61. Tompkins v. Erie R.R. Co., 90 F.2d 603, 603–04 (2d Cir. 1937).

62. *Erie*, 304 U.S. at 79 ("[*Swift* is] 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

63. *See supra* note 30 and accompanying text.

however, that "there is no federal general common law" and federal "[s]upervision over either the legislative or the judicial action of the States *is in no case permissible* except as to matters by the Constitution specifically authorized or delegated to the United States."[64] Therefore, federal courts dealing with substantive state law—including general common law—must defer to the highest state court's decision.[65] Such deference does not apply to "procedural matters, constitutional issues, or matters specifically governed by acts of Congress."[66] Notwithstanding such exceptions, the *Erie* Doctrine has clearly served as a strong indicator that Congress—via the Judiciary Act of 1789[67]—limited federal courts' ability to undermine state decisions in both state statutory and common law contexts.[68]

In sum, Congress has the power to define the scope of federal courts through the Exceptions and Regulations Clause.[69] Thus, Congress is ultimately the final voice on what "cases or controversies" federal courts may hear and the Supreme Court has typically respected this power.[70] *Erie* followed this trend as the Court delineated the federal judiciary's power regarding state law.

64. *Erie*, 304 U.S. at 78–79 (emphasis added) (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

65. *Id.* at 78 (holding that federal courts have "no power to declare substantive rules of common law applicable in a State").

66. Schaffer & Herr, *supra* note 13, at 1625. *See generally Erie*, 304 U.S. at 78 (holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the [s]tate").

67. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2012)).

68. *Erie*, 304 U.S. at 86 (Butler, J., dissenting) ("Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law."). *See generally* Clark, *supra* note 20, at 1461–62 (explaining the *Erie* doctrine's history and its purposes regarding jurisdictional federalism).

69. U.S. CONST. art. III, § 2 (emphasis added) ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with *such Exceptions*, and under *such Regulations* as the Congress shall make.").

70. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1869) (noting that Congress can except certain classes of cases from the federal courts).

B. ERIE'S PROGENY AND THE ALTERNATIVE METHODS OF ABSTENTION AND CERTIFICATION

Although *Erie* held that federal courts should defer to state general common law, it did not explicitly address what the federal courts should do if the highest state court has not addressed the question of state law at issue. The Supreme Court and lower federal courts have attempted to address this issue through *Erie* Guesses. Regardless, courts and scholars have advocated for the *Erie* Guess's demise by endorsing and employing abstention and certification procedures. This Section will first analyze the caselaw surrounding such federal predictions before describing these alternative methods and the momentum they have gained.

1. *Erie* Guesses Are Influenced by a Variety of Precedential Factors and Occur in a Variety of Contexts.

Post-*Erie* Supreme Court decisions have interpreted the *Erie* Doctrine to require a response to two main questions: (1) is state law involved in the case or controversy; and (2) has the state's highest court ruled on this issue.[71] If a federal court sitting in diversity,[72] supplemental,[73] or even bankruptcy[74] jurisdiction answers both questions affirmatively, then such state decisions are binding on the federal courts. For example, in *Butner v. United States*, the Supreme Court held that because "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law," the federal courts should defer to relevant state decisions.[75] Similarly, in *United Mine Workers v. Gibbs*, the Supreme Court cautioned federal courts that they are "bound to apply state law to [state claims in supplemental jurisdiction]."[76]

Erie's progeny have addressed what a federal court should do if state law is involved in the case or controversy but the state's highest court has *not* ruled on the disputed issue. Such

71. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958).

72. *See, e.g.*, *Erie*, 304 U.S. 64 (adjudicating a suit between a Pennsylvanian plaintiff and defendant, a New York corporation).

73. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (providing an example of *Erie* being applied in supplemental jurisdiction).

74. *See, e.g.*, Butner v. United States, 440 U.S. 48 (1979) (applying *Erie* within the context of bankruptcy proceedings).

75. *Id.* at 54.

76. *Gibbs*, 383 U.S. at 726.

matters of "unclear state law"[77] include: issues that are of "first impression";[78] conflicting interpretations from the state's intermediate appellate courts;[79] and situations where the federal court anticipates that the state court would overturn its own precedent.[80] In situations involving this ambiguity, the Supreme Court has held that a federal court should "apply what [it] find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the [s]tate."[81] The Supreme Court has also made clear that a federal court ought not disregard a "rule of law" announced by an intermediate appellate state court "unless [the federal court] is convinced by other persuasive data that the highest court of the state would decide otherwise."[82] *Soto v. Shealey* implicitly applied this final principle when the federal court required an employee's conduct to be within the scope of her employment for a plaintiff to succeed on a claim of negligent hiring or retention.[83] Although the Minnesota Supreme Court had not ruled on this element, a state appellate court had affirmatively rejected such a requirement in *M.L. v. Magnuson*.[84] Despite the intermediate court's position, the federal court held

77. *See generally* Chang, *supra* note 13, at 263–65 (discussing examples of "unclear state law").

78. *See, e.g.*, *id.* at 264 n.111 ("[S]tate law [was] unclear because the Maryland Court of Appeals has not yet had the chance to construe the terms in the applicable state statute." (citing Gardner v. Ally Fin. Inc., 488 F. App'x 709, 713 (4th Cir. 2012))).

79. *See, e.g.*, *id.* at 264 n.115 ("[S]tate law [was] unclear as to 'whether the insurance contracts' anti-assignment clauses bar post-loss assignments to the State' because there was no precedent from the Louisiana Supreme Court and intermediate courts conflicted with each other." (quoting *In re* Katrina Canal Breaches Litig., 613 F.3d 504, 509–10 (5th Cir. 2010))).

80. *See, e.g.*, *id.* at 264 n.117 ("[S]tate law [was] unclear because the court questioned whether the Alabama Supreme Court would grant absolute immunity for jailers . . . ." (citing LeFrere v. Quezada, 582 F.3d 1260, 1268 (11th Cir. 2009))).

81. Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967).

82. West v. Am. Tel. & Tel. Co., 311 U.S. 223, 235 (1940); *see also* N.Y. Life Ins. Co. v. Stoner, 109 F.2d 874, 878 (8th Cir. 1940) (stating that "[w]e are not bound to follow the decisions and reasoning of the intermediate appellate courts of Missouri"), *rev'd*, 311 U.S. 464 (1940).

83. Soto v. Shealey, 331 F. Supp. 3d 879, 884–85 (D. Minn. 2018).

84. 531 N.W. 2d 849, 857 n.4 (Minn. Ct. App. 1995) (ruling that that the employee's conduct did *not* have to occur within the scope of her employment for the plaintiff to prevail on a negligent hiring claim). *Soto* did not rely explicitly on this principle because its facts turned on another element of Negligent Hiring

that there was enough "evidence" that the state Supreme Court would require the "inside the scope" element if it was confronted with this issue.[85]

Notwithstanding such direction from the Supreme Court, disputes remain regarding how federal courts should make *Erie* Guesses and what "evidence" courts should rely on when making these predictions. Some federal district courts appear to rely more on intermediate state court decisions, even if these decisions conflict with existing federal court holdings.[86] Other federal courts apply a more flexible and broader standard. The Third Circuit, for example, in *Jackman v. Equitable Life Assurance Society*, ruled that: "In order to apply local law where there is no authoritative local decision or statute, . . . a federal court [must] ascertain and apply w*hat it believes to be the law* which a court, authorized to speak the law of the particular [s]tate, would apply."[87] In contrast, other federal courts have applied a more rigid, yet holistic review. For example, the Minnesota Federal District Court has held that the Minnesota Supreme Court relies on four specific factors when deciding whether to recognize a common law tort:

> (1) whether the tort is inherent in, or the natural extension of, a well-established common law right, (2) whether the tort has been recognized in other common law states, (3) whether recognition of a cause of action will create tension with other applicable laws, and (4) whether such tension is out-weighed by the importance of the additional protections that recognition of the claim would provide to injured persons.[88]

and Retention. *Soto*, 331 F. Supp. 3d at 884–85 (holding that the plaintiffs cannot state a claim for negligent hiring and retention because they did not allege that the defendant committed an intentional tort). Nonetheless, it is a common and longstanding principle that federal courts can ignore lower state courts only if there is sufficient evidence that the higher court would rule contrarily. *See* West v. Am. Tel. & Tel. Co., 311 U.S. 223, 235 (1940).

85. *Soto*, 331 F. Supp. 3d at 884–85.

86. *See, e.g.*, Holden Farms, Inc. v. Hog Slat, Inc., 347 F.3d 1055, 1066 (8th Cir. 2003) (applying an intervening decision from state intermediate court of appeals rather than contrary Eighth Circuit precedent); *cf.* Freeman v. MH Equip. Co., No. 4:15CV1473, 2016 U.S. Dist. LEXIS 57901, at *5–6 (E.D. Mo. May 2, 2016) (focusing on the "Missouri Court of Appeals' decision . . . because the Missouri Supreme Court ha[d] not yet spoke[n] on the issue").

87. Jackman v. Equitable Life Assurance Soc'y, 145 F.2d 945, 947 (3d Cir. 1944) (emphasis added).

88. *Soto*, 331 F. Supp. 3d at 885 (quoting Larson v. Wasemiller, 738 N.W.2d 300, 304 (Minn. 2007)).

Specifically, the Eighth Circuit has held that federal courts should consider "relevant state precedent, analogous decisions, considered dicta, . . . and any other reliable data."[89] Eight of the other district courts within the Eighth Circuit have also applied this approach.[90] Another district court, the District of Nebraska, has applied a similar approach, although with less explicit factors.[91] The absence of clear guidance from the Supreme Court[92] on how federal courts should apply *Erie* Guesses has resulted in the circuits using *Erie* Guesses slightly differently. Still, the majority of circuits have implemented *Erie* Guesses since the *Erie* Doctrine's inception and inherently clarified how such predictions are to be applied.[93]

89. Lindsay Mfg. Co. v. Hartford Accident & Indem. Co., 118 F.3d 1263, 1267–68 (8th Cir. 1997) (quoting Ventura v. Titan Sports, Inc., 65 F.3d 725, 729 (8th Cir. 1995), *cert. denied*, 516 U.S. 1174 (1996)).

90. Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc., No. 09-CV-175-LRR, 2010 U.S. Dist. LEXIS 42273, at *10 (N.D. Iowa July 19, 2010); Mahony v. Universal Pediatric Servs., 753 F. Supp. 2d 839, 852 n.8 (S.D. Iowa 2010); Hoff v. Elkhorn Bar, 613 F. Supp. 2d 1146, 1149 (D.N.D. 2009); Auto-Owners Ins. Co. v. Mid-America Piping, No. 4:07-CV-00394, 2008 U.S. Dist. LEXIS 26038, at *4–5 (E.D. Mo. Mar. 17, 2008) (quoting *Lindsay*, 118 F.3d at 1267); Crussell v. Electrolux Home Prods., 499 F. Supp. 2d 1137, 1138–39 (W.D. Ark. 2007); Meredith v. Buchman, 101 F. Supp. 2d 764, 767 (E.D. Ark. 2000); Brown v. Youth Servs. Int'l of S.D., Inc., 89 F. Supp. 2d 1095, 1100 (D.S.D. 2000); *cf.* Trilogy Dev. Co. v. BB Syndication Servs., 437 B.R. 683, 685 (Bankr. W.D. Mo. 2010).

91. Cudahy Co. v. Am. Labs., Inc., 313 F. Supp. 1339, 1342 (D. Neb. 1970) ("It is also generally the rule that in the absence of state law a federal court should make use of all available data on the questions involved, including restatements and treatises and where appropriate may assume state law will follow the majority rule.").

92. Clark, *supra* note 20, at 1517 ("[T]he Court has neither squarely endorsed [*Erie* Guesses] nor suggested that such an approach is the exclusive means that federal courts must employ to resolve unsettled questions of state law.").

93. *See, e.g.*, LeFrere v. Quezada, 582 F.3d 1260, 1268 (11th Cir. 2009) (using an *Erie* Guess to ascertain how Alabama courts would rule on absolute immunity for jailers); Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351 (8th Cir. 1983) (applying Nebraska law in adjudicating a breach of contract claim); Stafford v. Int'l Harvester Co., 668 F.2d 142, 148 (2d Cir. 1981) (employing an *Erie* Guess in a suit between Pennsylvanian plaintiffs and a defendant New York company); Jackman v. Equitable Life Assurance Soc'y, 145 F.2d 945, 947 (3d Cir. 1944) ("[A] federal court [must] ascertain and apply what it believes to be the law which a court, authorized to speak the law of the particular state, would apply.").

Contextually, these federal predictions include how state courts will rule in a variety of settings.[94] First, post-*Erie* caselaw has upheld the practice of federal courts making predictions of how state courts will interpret novel causes of action[95] and novel defenses.[96] Second, post-*Erie* caselaw has upheld the practice of federal courts predicting that state courts will overrule existing precedent.[97]

For example, in *DeWeerth v. Baldinger*,[98] a federal district court assumed that a state law defense was not satisfied, although the state itself had not ruled on the subject.[99] The Second Circuit reversed because the case presented an "unresolved state law issue."[100] The Second Circuit noted: "When presented with an absence of controlling state authority, we must 'make an estimate of what the state's highest court would rule to be its law.'"[101] Ultimately, the circuit court relied on policy considerations and the law of other jurisdictions[102] in its finding that a valid defense was present.[103] The United States Supreme Court denied certiorari.[104] Interestingly, in *Solomon R. Guggenheim Foundation v. Lubell*,[105] the New York Court of Appeals rejected the federally-established defense and held that the Second Circuit's rule was incorrect.[106] Notwithstanding this rejection by the

94. *See supra* notes 77–80 and accompanying text. *See generally* Clark, *supra* note 20, at 1495–516 (explaining the history of *Erie* Guesses and providing several courts that have used *Erie* Guesses in the early 1990s).

95. *See supra* notes 115–25 and accompanying text. Another valuable source that details such federal "predictions" of novel state law is 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed. 2018).

96. *See generally* Clark, *supra* note 20, at 1508–14 (describing several cases in which federal courts recognized and upheld novel defenses).

97. *See generally id*. at 1514–17 (describing several cases in which federal courts overturned state law).

98. 658 F. Supp. 688 (S.D.N.Y.), *rev'd*, 836 F.2d 103 (2d Cir. 1987).

99. *See id*. at 698.

100. *DeWeerth*, 836 F.2d at 108 n.5.

101. *Id.* at 108 (quoting Stafford v. International Harvester Co., 668 F.2d 142, 148 (2d Cir. 1981)).

102. *Id.* ("In making that determination, this Court may consider all of the resources that the New York Court of Appeals could use, including New York's stated policies and the law of other jurisdictions." (citation omitted)).

103. *Id.* at 112.

104. DeWeerth v. Baldinger, 486 U.S. 1056 (1988) (denying petition for writ of certiorari).

105. 569 N.E.2d 426 (N.Y. 1991).

106. *See id.* at 431 (noting that the Second Circuit's defense unjustly

state court, the Second Circuit reaffirmed its decision to recognize the defense when *DeWeerth v. Baldinger* came up to the court again on a second appeal.[107] The Second Circuit admitted it was wrong, but nonetheless, upheld its original decision because of the nature of the United States' "dual justice system."[108] The federal court explained that: "The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court's interpretation of state law."[109] Regarding *Erie*, the court noted that "[t]here is nothing in *Erie* that suggests that consistency must be achieved at the expense of finality, or that federal cases finally disposed of must be revisited anytime an unrelated state case clarifies the applicable rules of law."[110] In other words, the court held that *Erie* does not require absolute harmonization among federal and state courts.[111] That is, state courts are free to disagree with federal interpretations of state law and federal courts are not required to retroactively change a particular case result based on clarifying state decisions.[112] Even though the federal court was ultimately incorrect in its prediction of a novel state defense, *Baldinger* provides an excellent example of a federal court interpreting novel state defenses when the state court was silent and the state thereafter rejecting the federal courts' guess.[113]

Post-*Erie* caselaw has also upheld the practice of federal courts predicting that state courts will overrule existing precedent.[114] For example, *Meredith v. City of Winter Haven* presented a question of state law that involved a Florida city's bond repayments.[115] The federal district court granted the city's motion to dismiss despite evidence suggesting the Florida Supreme Court

"place[s] the burden of locating stolen artwork on the true owner . . . [which] encourage[s] illicit trafficking in stolen art").

107. 38 F.3d 1266, 1269 (2d Cir. 1994) (holding that the district court "abused its discretion in ordering relief from the final judgment based on Rule 60(b)").

108. *Id.* at 1274.

109. *Id.* at 1273–74.

110. *Id.* at 1274.

111. *Id.* at 1272.

112. *Id.* at 1272–73.

113. *Id.* at 1273–74.

114. *See generally* Clark, *supra* note 20, at 1514–17 (describing several cases in which federal courts overturned state law).

115. 320 U.S. 228, 233 (1943).

would overrule its prior decisions.[116] The Fifth Circuit declined to exercise its jurisdiction because the state law was unsettled.[117] On appeal, the petitioners claimed the U.S. Supreme Court should reverse on the basis that the current state law is "inconsistent with earlier decisions of the Supreme Court of Florida."[118] In a unanimous decision, the Supreme Court remanded and ordered the lower court to apply an *Erie* Guess "predictive" approach.[119] Specifically, the Court held that "the rulings of the Supreme Court of Florida" are not controlling if "it can be said with some assurance that the Florida Supreme Court will not follow them in the future."[120]

Likewise, in *Mason v. American Emery Wheel Works*, the First Circuit held that the Mississippi Supreme Court[121] would "reconsider and revise" its past decisions "whenever it may have before it a case that squarely presents the issue."[122] The First Circuit explained that the Mississippi Supreme Court "indicate[d] its awareness of the modern trend in the area," but it "was able to dispose of the particular issue on another ground without the necessity of expressly overruling its earlier decision."[123] After nine years, this federal prediction proved true when the Mississippi Supreme Court overruled its previous decision.[124] Although these federal predictions are more contentious because of the inherent power they give to federal courts,[125]

116. *Id.* at 230.

117. *Id.* at 229.

118. *Id.* at 233.

119. *See id.* at 234 (explaining how the federal court should determine if the state court is likely to overrule itself).

120. *Id.* The case was ultimately remanded because of the Fifth Circuit's refusal to exercise its jurisdiction "on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty." *Id.* at 229.

121. *Mason* provides an interesting, albeit not necessarily rare, example of a federal court ascertaining the laws of a state that is not within its direct jurisdiction. *See* 28 U.S.C. § 41 (2012) (establishing the First Circuit as presiding over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island).

122. Mason v. Am. Emery Wheel Works, 241 F.2d 906, 910 (1st Cir. 1957).

123. *Id.* at 909. (relying on E.I. Du Pont de Nemours & Co. v. Ladner, 73 So. 2d 249, 254–55 (Miss. 1954)).

124. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966) (overruling Ford Motor Co. v. Myers, 117 So. 362 (Miss. 1928)).

125. *See* Clark, *supra* note 20, at 1515 ("For nine years (from 1957 to 1966), federal courts recognized and applied 'substantive rules of common law' that

federal courts continue to exercise such *Erie* Guesses to ensure they are applying accurate state law.

In sum, since *Erie*, federal district and appellate courts have interpreted the *Erie* Doctrine to allow them considerable discretion to decide matters of unclear state law. This discretion includes recognizing novel causes of action and novel defenses and predicting that the state supreme court will overrule past decisions. Therefore, federal courts have provided a strong precedent of implementing and upholding *Erie* Guesses.

2. The Alternative Methods: Critics of *Erie* Guesses Advocate for Alternatives Including Abstention and Certification Procedures

Despite such precedent, critics of *Erie* Guesses have gravitated towards alternative procedures including abstention and certification.[126] Like *Erie* Guesses, both alternatives are also rooted in precedent and based on supporting the *Erie* Doctrine's purposes.[127] For example, three years after *Erie*, in *Railroad Commission of Texas v. Pullman Co.*, the Supreme Court recognized the problem of federal courts incorrectly predicting state law, that it inherently created inconsistent verdicts.[128] The Court realized that: "Obeying *Erie* is straightforward if state law

Mississippi had yet to adopt (and might have never adopted)." (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))).

126. Critics have also advocated for a "static approach" where federal courts "'rule upon state law as it presently exists' rather than 'surmis[ing] or suggest[ing] its expansion.'" Clark, *supra* note 20, at 1535 (alterations in original) (quoting Tritle v. Crown Airways, Inc., 928 F.2d 81, 84 (4th Cir. 1990) (per curiam)). However, such proponents generally prefer certification because it "avoids the 'political and social' defects associated with [the static approach] by reducing both the incentives for forum shopping and the potential for inequitable administration of the law." *Id.* at 1544. Indeed, "the static approach may lead federal courts to continue to apply existing rules of decision even *after* state courts are prepared to abandon them." *Id.* at 1541.

127. *See generally* Chang, *supra* note 13, at 267 ("Certification allows federal courts to avoid *Erie* problems regarding federalism, forum shopping, and inequitable administration of justice."); Clark, *supra* note 20, at 1517–24 (explaining the historical development of the abstention doctrine); Schaffer & Herr, *supra* note 13, at 1627 (arguing that "[c]ertification grew out of the Supreme Court decision in *Erie*").

128. R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (noting that *Erie* Guesses, at times, create "needless friction with [the] state"). *See generally* Schaffer & Herr, *supra* note 13, at 1628–29 (discussing the creation of the "abstention doctrine" and its purposes of avoiding inconsistent verdicts).

is clear, but predicting how the state supreme court would decide an unclear issue is neither easy nor value-free. For unsettled issues implicating state policy, a federal court's *Erie*-based prediction creates 'needless friction with [the] state.'"[129] Thus, in *Pullman*, the Supreme Court created an "abstention" option for federal courts.[130] This discretionary doctrine allows "a federal court, in narrow circumstances, [to] refuse to decide a case involving unclear issues of state law when a decision on the state law issue might raise a federal constitutional question."[131] Specifically, *Pullman* explained that "abstention [is] appropriate . . . whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary."[132]

Proponents of abstention emphasize that Supreme Court opinions merely "contain dicta suggesting that federal courts should employ a predictive approach" and that "the Court has neither squarely endorsed that model nor suggested that such an approach is the exclusive means that federal courts must employ to resolve unsettled questions of state law."[133] In contrast, the Court, at times, has required federal courts to abstain from deciding unsettled questions of state law.[134] Further, advocates contend that because abstention avoids federal courts interpreting state law, this avenue has the ability "to avoid the potential for inequitable administration of the law."[135] Abstention is also

129. Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 73 (2008) (quoting *Pullman*, 312 U.S. at 500).

130. *Pullman*, 312 U.S. at 501.

131. Richard Alan Chase, Note, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN'S L. REV. 407, 411–12 (1992).

132. *Pullman*, 312 U.S. at 501.

133. Clark, *supra* note 20, at 1517.

134. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943) (requiring the federal court to "leave these problems of Texas law to the State court where each may be handled as one more item in a continuous series of adjustments" (internal quotations omitted)); Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483–84 (1940) (mandating the federal court to submit the question of unsettled state law to the corresponding state courts).

135. Clark, *supra* note 20, at 1520 (citing La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 26 (1959)).

supported by the *Erie* Doctrine's purpose to avoid "forum shopping"[136] because, in theory, parties will not be incentivized to bring novel state claims in federal court if the federal courts are unlikely to rule on such issues.

Another alternative to *Erie* Guesses is certification, which allows "federal courts to receive instruction from a state's supreme court about unsettled questions of state law while avoiding the expense and delay associated with abstention."[137] Certification is "[a] procedure by which a federal appellate court asks . . . the highest state court to review a question of law arising in a case pending before the appellate court and on which it needs guidance."[138] Courts were slow to accept certification.[139] For example, Florida, in 1945, "authorize[d] its state supreme court to adopt rules for accepting questions certified from federal courts."[140] Regardless of this opportunity, "the Florida Supreme Court did not accept the legislature's invitation to create a certification rule for fifteen years."[141] Similarly, other state and federal appellate courts were reluctant to use such certification procedures until the Supreme Court, in *Clay v. Sun Insurance Office Ltd.*, suggested that the Fifth Circuit should "certify . . . [a] question of state law to the Supreme Court of Florida."[142] Significantly, the Supreme Court frequently used certification itself[143] and opined that certification is more efficient and effective than

136. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (noting that one of the *Erie* doctrine's aims was the "discouragement of 'forum-shopping'").

137. Schaffer & Herr, *supra* note 13, at 1628–29.

138. *Certification*, BLACK'S LAW DICTIONARY (11th ed. 2019).

139. Michael Klotz, Comment, *Avoiding Inconsistent Interpretations:* United States v. Kelly*, the Fourth Circuit, and the Need for a Certification Procedure in North Carolina*, 49 WAKE FOREST L. REV. 1173, 1174–75 (2014).

140. Schaffer & Herr, *supra* note 13, at 1629.

141. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 165 (2003); *see also* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 226 (1960) (Black, J., dissenting) ("[T]he Supreme Court of Florida has never promulgated any such rules, and evidently has never accepted such a certificate.").

142. 363 U.S. 207, 212 (1960).

143. *See, e.g.*, Fiore v. White, 528 U.S. 23, 29 (1999) (certifying to the Pennsylvania Supreme Court); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395–97 (1988) (certifying to the Virginia Supreme Court); Zant v. Stephens, 456 U.S. 410, 416–17 (1982) (per curiam) (certifying to the Georgia Supreme Court); Bellotti v. Baird, 428 U.S. 132, 150–53 (1976) (certifying to the Supreme Judicial Court of Massachusetts).

abstention.[144] Specifically, the Supreme Court noted that: "[certification] procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions."[145]

Following the Supreme Court's lead of promoting certification, the Uniform Certification of Questions of Law Act (UCQLA) proposed a unified standard for certification procedures in the late 1960s.[146] The UCQLA proposed that the adopting state's supreme court can certify a question from the federal court "if the answer may be determinative of an issue pending in litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State."[147] Because "[t]he Comments clarify that 'a court of the United States' includes all federal courts, . . . [t]he Uniform Act provides the broadest scope of certifying courts."[148] Through legislative or judicial rule making, nineteen states have effectively adopted the UCQLA by accepting certified questions from all federal courts.[149] Specifically in the Eighth Circuit, three out of the seven states fall into this category of broad certification.[150] Additionally, every state except North Carolina[151] has some certification procedures.[152]

144. Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997).

145. *Id.*

146. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1 (amended 1995), 12 U.L.A. 86 (1967).

147. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, 12 U.L.A. 74 (1995).

148. Cochran, *supra* note 141, at 167.

149. *Id.* at app. A, at 223.

150. *Id.* (citing IOWA CODE ANN. § 684A.1 (West 1998); MINN. STAT. ANN. § 480.065(3) (West 2014); N.D. R. APP. P. 47(a)). Missouri's certification procedure, MO. ANN. STAT. § 477.004 (West 1993), was held unconstitutional. Grantham v. Mo. Dep't of Corrections, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc) (holding certification questions as outside the court's jurisdiction).

151. A House Bill that would have permitted federal courts to certify questions to the North Carolina Supreme Court is currently pending in the state House of Representatives. H.B. 157, Gen. Assemb., 2017 Sess. (N.C. 2017), https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H157v1.pdf [https://perma.cc/8GTD-RFGG].

152. Klotz, *supra* note 139, at 1175 n.22.

Despite such widescale acceptance of *some* certification procedures, many states remain reluctant to increase this procedure.[153] For example, seven of the ten largest states—California, Texas, Florida, New York, Pennsylvania, Illinois, Georgia—"chose the narrowest scope for certification."[154] That is, such states prohibit certified questions from particular courts, including other state courts,[155] federal district courts,[156] and even some federal appellate courts.[157]

Although "[t]he Supreme Court has never indicated the necessary conditions before a court can resort to certification,"[158] several state supreme courts, specifically within the Eighth Circuit, have indicated when they will accept certified questions. For example, in 2003, the Arkansas Supreme Court declared that: "[c]ertification will only be necessary when our substantive law is unclear on an issue 'which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.'"[159] Likewise, the Minnesota Supreme Court has explained that certification is permissible "if there are . . . questions of law . . . which may be determinative of the cause then pending in the certifying court and as to which it

153. *See, e.g.*, Kidney v. Kolmar Labs., 808 F.2d 955, 957 (2d Cir. 1987) (recognizing that "issues of state law are not to be routinely certified to the highest courts of New York or Connecticut simply because a certification procedure is available. The procedure must not be a device for shifting the burdens of this Court to those whose burdens are at least as great"); *Grantham*, 1990 WL 602159, at *1.

154. Cochran, *supra* note 141, at 167 (defining "narrowest scope" as states that "omit federal district courts").

155. *See, e.g.*, FLA. STAT. ANN. § 25.031 (West 2014) (permitting certification questions only from federal courts of appeals and the U.S. Supreme Court); GA. CODE ANN. § 15–2–9(a) (2012) (same); LA. REV. STAT. ANN. § 13:72.1(A) (2011) (same); MISS. R. APP. P. 20(a) (same); PA. R. APP. P. 3341(a) (same); TEX. R. APP. P. 58.1 (same).

156. CAL. APP. R. 8.548(a) (permitting certification questions only from federal appellate courts and state supreme courts); N.Y. CT. R. 500.27(a) (same); WIS. STAT. ANN. § 821.01 (West 2007) (same); *see also supra* note 155.

157. *See, e.g.*, ILL. SUP. CT. R. 20(a) (permitting certification questions only from the U.S. Supreme Court and the Seventh Circuit). *See generally* Cochran, *supra* note 141, app. A, at 223 (comparing states with broad, moderate, and narrow certification procedures).

158. Fiat Motors of N. Am. Inc. v. Mayor of Wilmington, 619 F. Supp. 29, 33 (D. Del. 1985).

159. Longview Prod. Co. v. Dubberly, 99 S.W.3d 427, 428 (Ark. 2003) (quoting ARK. SUP. CT. R. 6–8(a)(2)).

appears to the certifying court there is no controlling precedent in the decisions of the supreme court."[160] Because of such standards, federal courts within the Eighth Circuit are generally aware of when their certified questions will be answered or rejected by the corresponding state supreme court.[161]

Regarding federal court tendencies, some favor infrequent certification by holding that: "[t]he mere difficulty in ascertaining local law provides an insufficient basis for certification."[162] One federal court noted that "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law."[163] Other federal courts may choose *Erie* Guesses over certification for questions that "may never recur, and . . . lack broad general significance."[164] More specifically, within the Eighth Circuit, some federal courts rely on concrete factors to determine whether to certify, including (1) how unsettled the issue under consideration is by state courts, (2) how likely legal resources "would aid the court in coming to a conclu-

160. Wolner v. Mahaska Indus., Inc., 325 N.W.2d 39, 41 n.1 (Minn. 1982) (quoting MINN. STAT. § 480.061, subd. 1 (1980)).

161. *See, e.g.*, Bornsen v. Pragotrade, 804 N.W.2d 55, 58 (N.D. 2011) ("Certified questions from foreign courts are appropriate when the legal issue 'may be determinative of the proceeding' pending in that court." (quoting N.D. R. APP. P. 47(a))); Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186, 188 (Iowa 2011) (noting the Court may "answer questions of Iowa law certified to us by a federal court that concludes controlling precedent is lacking when the answer may be determinative of the federal proceeding"); Amen v. Astrue, 822 N.W.2d 419, 423 (Neb. 2012) (explaining how the state legislature limited the court's certification "answers to questions of law which are certified").

162. Duryee v. U.S. Dep't of Treasury, 6 F. Supp. 2d 700, 704 (S.D. Ohio 1995). For an explanation of the diverse tests used to determine whether to certify, see generally, John L. Watkins, Erie *Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What To Do About It*, 21 CONN. INS. L.J. 455, 479–81 (2014).

163. Potter v. Synerlink Corp., No.08-CV-674-GKF-TLW, 2012 WL 2886015, at *1 (N.D. Okla. July 13, 2012) (citations and internal quotation marks omitted).

164. Diginet, Inc. v. W. Union ATS, Inc., 958 F.2d 1388, 1395 (7th Cir. 1992); *cf.* Barnes v. Atd. & Pac. Life Ins. Co. of Am., 514 F.2d 704, 706 (5th Cir. 1975) (choosing certification over an *Erie* Guess because "repetitive contract interpretations" have a recurring "nature involving literally hundreds of contracts with many public policy factors affecting the welfare of local citizens"). *See generally* Rowson v. Kawaski Heavy Indus., 866 F. Supp. 1221, 1225 (N.D. Iowa 1994) (noting factors that federal courts should apply when deciding to certify questions).

sion on the legal issue," (3) how familiar the court is with relevant state law, (4) both the federal and state courts' dockets, (5) "the frequency that the legal issue in question is likely to recur," and (6) the current litigation's age and "the possible prejudice to the litigants which may result from certification."[165]

Ultimately, proponents have called for certification over *Erie* Guesses because of its ability to limit the risk that federal courts will incorrectly interpret unsettled state law.[166] Like abstention, certification eliminates the possibility of inequitable administration of justice because state judges are allowed to decide unsettled questions of state law.[167] Additionally, "forum shopping" is limited because litigants seeking to bring a case in federal court for a more favorable landscape will virtually fall back into state court via certification.[168]

In sum, precedent has supported *Erie* Guesses, abstention, and certification when federal courts are faced with ascertaining the unsettled laws of states. Scholars and courts emphasize the *Erie* Doctrine's "twin aims" when advocating for a particular method.[169] Notably, the Supreme Court has recommended and required certain procedures in narrow circumstances but has never come close to mandating a universal response to this *Erie* problem, even within specific procedures themselves.[170]

II. AN EMPIRICAL STUDY OF STATE "REACTIONS" TO *ERIE* GUESSES WITHIN THE EIGHTH CIRCUIT

In an effort to quantify the state courts' responses to federal courts' *Erie* Guesses, this Part focuses on a random 100 cases[171]

165. Leiberkneckt v. Bridgestone/Firestone, Inc., 980 F. Supp. 300, 310 (N.D. Iowa 1997).

166. Schaffer & Herr, *supra* note 13, at 1630.

167. *Id.*

168. Clark, *supra* note 20, at 1545.

169. *See generally* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (emphasizing avoiding both forum shopping and the inequitable administration of justice).

170. *Supra* notes 133 and 134 and accompanying text.

171. For a list of the cases examined, see *infra* Appendix Tables 3–6. I selected the cases based on citations to both *Erie* and its progeny that discussed how federal courts should proceed if the state court has not decided the issue. *See, e.g.*, Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967) (noting that in the absence of a highest state court decision, a federal court should "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the [s]tate" (citation omitted)).

within the Eighth Circuit that predicted issues of state law. Section A provides a summary of the study's methodology, limitations, and interesting insights. The following subsections provide concrete details and examples from the study and explain several state supreme court holdings that highlight each states' general reaction towards *Erie* Guesses. Section B discusses three states that validated at least 25% of the *Erie* Guesses involving their state law. Section C examines three states that over 75% of corresponding *Erie* Guesses were never referenced in a subsequent state court opinion. Section D reviews the one state—Missouri—that rejected over 15% of corresponding *Erie* Guesses.

A. METHODOLOGY, OVERALL INSIGHTS, AND LIMITATIONS

Ironically, a reader could describe the study itself as a prediction of how state courts will handle federal courts' predictions within the Eighth Circuit. The study's goal was to (1) identify *Erie* Guesses made by the Eighth Circuit and its corresponding ten district courts[172] and (2) determine how the corresponding states have judicially responded,[173] if at all. As noted in the Introduction, the study was confined to the federal courts within the Eighth Circuit to obtain a dataset with a manageable size.[174] Because the Eighth Circuit has the second-largest number of states[175] and second-largest number of district courts,[176] the study included a wide range of *Erie* Guesses from different courts and state reactions to applicable *Erie* Guesses.

Ultimately, the vast majority of *Erie* Guesses are left untouched by the corresponding state court.[177] Indeed, seventy-two cases involved *Erie* Guesses that the state's highest court has

172. Finding caselaw that cited *Erie* or even Eighth Circuit cases that had previously applied *Erie* Guesses was easy through electronic databases. Determining that such cases were actually applying *Erie* Guesses themselves proved, unsurprisingly, more difficult.

173. Such responses were largely determined from traditional law school lodestars (i.e., LexisNexis's Shepard's Citing Decisions and Westlaw's KeyCite).

174. *See supra* note 24.

175. The Eighth Circuit has seven states. The remaining circuits have the number listed in parentheses: First (4), Second (3), Third (3), Fourth (5), Fifth (3), Sixth (4), Seventh (3), Ninth (9), Tenth (6), and Eleventh (3). *See generally* 28 U.S.C. § 43 (2012) (establishing the circuits and their jurisdictions).

176. The Eighth Circuit includes ten district courts. First (5), Second (6), Third (6), Fourth (9), Fifth (9), Sixth (9), Seventh (7), Ninth (15), Tenth (8), and Eleventh (9). *See generally id.*

177. *See infra* Appendix Tables 3–6.

never cited.[178] The next most frequent occurrence, however, was an affirmative response to *Erie* Guesses from state courts. Twenty-three cases fell into this category.[179] The third and final occurrence, a state court rejecting an *Erie* Guess, happened only five times in the time period covered by the study.[180]

The study also looked at possible trends among the states interacting with the *Erie* Guesses. For example, Appendix Tables 2 and 3 reveal that three states within the Eighth Circuit validated 25% or more of applicable *Erie* Guesses,[181] three states did not respond to over 75% of *Erie* Guesses;[182] and one state disagreed with at least 15% of *Erie* Guesses made about its law.[183] The study also revealed tendencies of federal court's *Erie* Guesses. Of the ten district courts within the Eighth Circuit, two made *Erie* Guesses that were validated at least 25% of the time.[184] The Eighth Circuit is the only court that made *Erie* Guesses that were rejected.[185] Noteworthy, however, is that state courts affirmed over 30% of the Eighth Circuit's *Erie* Guesses.[186]

Admittedly, the study could give a false sense of confidence regarding the study's actual representativeness of other circuits and thus, *Erie* Guesses in general. Indeed, the study comprises fewer than 15% of states and fewer than 10% of federal courts.[187] Moreover, there is no indication that more states or district courts equates to more *Erie* Guesses.[188] Consequently, there is

178. *See infra* Appendix Tables 3–6.

179. *See infra* Appendix Table 4. This category also included *Erie* Guesses validated by lower state courts (e.g., district and appellate state courts).

180. *See infra* Appendix Table 5. This category also included one instance of a state legislature rejecting an *Erie* Guess.

181. *See infra* Appendix Table 1, left column.

182. *See infra* Appendix Table 1, middle column.

183. *See infra* Appendix Table 1, right column.

184. *See infra* Appendix Table 3 (D. Minn and S.D. Iowa).

185. *See infra* Appendix Table 5.

186. *See infra* Appendix Table 3.

187. *Infra* Appendix Tables 1–2.

188. Of course, there is the possibility that circuits with *fewer* states and *fewer* district courts could have more *Erie* Guesses because of the familiarity that each federal court may have with the corresponding state's law. Unfortunately, there is currently insufficient data that is generally required to prove such correlations. *But see* Furlough v. Cage (*In re Technicool Sys.*), 896 F.3d 382, 386 n.9 (5th Cir. 2018) (articulating that the "the more money we come

no reason to consider this "snapshot" of the Eighth Circuit as representative of the nation at large.

Perhaps more problematic, a reader may view the largest category—the "untouched" *Erie* Guesses—as merely representative of states that have not yet had the chance to consider the federal interpretations. Although there was no direct evidence that the state courts in this category are willfully ignoring the federal cases,[189] over thirty-nine of the untouched *Erie* Guesses were decided at least fifteen years ago.[190] Further, the *Erie* Guesses tended to interpret areas of unsettled law that state courts have discussed generally in later cases.[191] Undeniably, the study does not purport to explain the reasoning behind such "untouched" *Erie* Guesses. But even considering such limitations, several conclusions come to the fore within the Eighth Circuit's courts that reveal *Erie* Guesses often reflect how the state court would rule had it considered the issue.

B. VALIDATING STATES: MINNESOTA, NEBRASKA, AND ARKANSAS

Sometimes, *Erie* Guesses work well. That is, federal courts predict what the state's highest court would rule and the state courts respond affirmatively. Within the Eighth Circuit, Minnesota, Nebraska, and Arkansas validated at least 25% of the *Erie* Guesses that predicted their state law.[192] Notably, Minnesota was most likely to affirm *Erie* Guesses with 50% validated out of

across, the more problems we see" without referencing a single statistic (quoting NOTORIOUS B.I.G., *Mo Money Mo Problems*, *on* LIFE AFTER DEATH (Bad Boy/Arista 1997))).

189. Perhaps the best evidence to support this assertion would be that these states' supreme courts have certiorari-like discretionary review procedures and are denying review in cases involving the issues decided by the federal courts. Unfortunately, denials of review rarely discuss the reasoning behind the court, let alone what issues caused the court to decline certiorari. Darr v. Burford, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) ("The denial means that this Court has refused to take the case. It means nothing else."). *See generally* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979) (discussing the history of denials of certiorari and dissents from certiorari denials).

190. *Infra* Appendix Tables 3–6.

191. *See, e.g.*, McGuire v. Davidson Mfg. Corp., 398 F.3d 1005, 1008–09 (8th Cir. 2005) (applying an *Erie* Guess to predict how the Iowa Supreme Court would define res ipsa loquitur).

192. *See infra* Appendix Table 1, left column.

fourteen *Erie* Guesses.[193] Though Nebraska and Arkansas were not as likely to affirm as Minnesota, the limited opportunities (eight *Erie* Guesses involving Nebraska state law and sixteen involving Arkansas state law) made those affirmations impactful.[194]

Of the twenty-three cases that were affirmed, sixteen came from the Eighth Circuit Court of Appeals; two from the District Court of Minnesota; two from the Northern District of Iowa; one from the Southern District of Iowa; and one from the District Court of Nebraska.[195] The distinction between the federal court that states tend to affirm is important when discussing the usefulness of certification procedures from particular courts.[196]

1. Minnesota

One such affirmation occurred when the Minnesota Supreme Court upheld the federal district court's prediction regarding the elements of tortious interference/publication of private fact.[197] In 1998, the Minnesota Supreme Court first recognized this claim as a viable cause of action in *Lake v. Wal-Mart Stores, Inc.*[198] Then, in 1999, the federal district court of Minnesota, in *C.L.D. v. Wal-Mart Stores, Inc.*,[199] parsed out the elements of tortious interference of private fact because the Minnesota Supreme Court did not do so completely in *Lake*.[200] Specifically, the federal court explained that "publicity means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded

193. *See infra* Appendix Table 1, left column.

194. *See infra* Appendix Table 1, left column.

195. *See infra* Appendix Table 3.

196. *See infra* Part III.

197. Bodah v. Lakeville Motor Express Inc., 663 N.W.2d 550, 553 (Minn. 2003).

198. 582 N.W.2d 231, 236 (Minn. 1998).

199. 79 F. Supp. 2d 1080, 1087–88 (D. Minn. 1999).

200. *See Bodah*, 663 N.W.2d at 553 (explaining that "[t]he *Lake* court did not define 'publicity'"); *see also C.L.D.*, 79 F. Supp. 2d at 1083 ("[R]elevant Minnesota cases offer no guidance regarding what facts an invasion of privacy tort claimant must allege in order to satisfy the burden of showing that 'publicity' or 'publication' of private information has occurred . . . . *Lake* thus conferred upon other courts the task of defining the contours of these newly recognized causes of action.").

as substantially certain to become one of public knowledge."[201] Under this definition, "it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."[202]

In 2003, the Minnesota Supreme Court responded to the federal courts' interpretation of "publicity."[203] After considering alternative definitions that the federal court did not predict, the Minnesota Supreme Court "adopt[ed] the Restatement definition of 'publicity.'"[204] The Court therefore effectively accepted the federal court's predictive definition, and even relied on *C.L.D.* in applying the definition.[205] In sum, the Minnesota Supreme Court agreed with the federal court's *Erie* Guess.[206] Thus, the available certification procedure[207] would not have changed the cases' outcome.[208]

2. Arkansas

Similarly, in *Chavers v. General Motors Corp.*,[209] the Arkansas Supreme Court confirmed a standard of proximate causation in tort actions, which the Eighth Circuit predicted in *Jackson v. Anchor Packing Co.*[210] In *Jackson*, "[t]en former employees of the Mohawk Tire and Rubber Company plant in West Helena, Arkansas . . . filed suit against numerous manufacturers of asbestos-containing products."[211] The district court adopted the "frequency, regularity, and proximity" test, and granted the defendants' motion for summary judgment because the plaintiffs had failed to "produce sufficient evidence that exposure to the

201. *C.L.D.*, 79 F. Supp. 2d at 1083 (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (AM. LAW INST. 1979)).

202. *Id.*

203. *Bodah*, 663 N.W.2d at 556–58.

204. *Id.* at 557.

205. *Id.* at 557–58 (concluding "that respondents' claim that LME disseminated 204 employees' social security numbers to 16 terminal managers in six states does not constitute publication to the public or to so large a number of persons that the matter must be regarded as substantially certain to become public" (citing *C.L.D.*, 79 F. Supp. 2d at 1084)).

206. *Id*.

207. MINN. STAT. § 480.065, subd. 3 (2012).

208. *Bodah*, 663 N.W.2d at 555.

209. 79 S.W.3d 361, 369 (Ark. 2002).

210. 994 F.2d 1295, 1303 (8th Cir. 1993).

211. *Id.* at 1298.

defendants' products had proximately caused the plaintiffs' injuries."[212]

On appeal, the Eighth Circuit grappled with the district court's proximate causation standard that the plaintiffs argued was "more stringent than Arkansas law require[d]."[213] Importantly, the Arkansas Supreme Court had not yet addressed the proper standard for proximate causation in tort cases.[214] Consequently, the Eighth Circuit had "to predict how the Arkansas Supreme Court would resolve the issue if confronted with it."[215] In making its prediction, the Eighth Circuit noted how the majority of courts confronted with this same issue adopted the "frequency, regularity, and proximity" test.[216] Next, the Eighth Circuit relied on analogous Arkansas caselaw to reject the plaintiffs' argument that Arkansas had adopted alternative liability and, thereby, abrogated "the traditional requirement of proximate cause in all tort cases."[217] Hence, the Eighth Circuit's Erie Guess was that the Arkansas Supreme Court would still require proximate cause and weigh this element via the "frequency, regularity, and proximity" test.[218]

Nine years after *Jackson*, the Arkansas Supreme Court validated the Eighth Circuit's *Erie* Guess. In *Chavers v. General Motors Corp.*, the Arkansas Supreme Court faced the same issue as the Eighth Circuit in *Jackson*.[219] That is, whether Arkansas tort law requires proximate causation for a plaintiff to prevail.[220] The Court upheld the requirement and adopted the "frequency, regularity, and proximity" test.[221] In its discussion, the Court noted how the Eighth Circuit adopted this test in *Jackson* and acknowledged the accuracy of the Eighth Circuit's prediction.[222]

212. *Id.* at 1299.

213. *Id.*

214. *Id.* at 1301.

215. *Id.*

216. *Id.*

217. *Id.* at 1302–03 (citing Woodward v. Blythe, 439 S.W.2d 919, 920 (Ark. 1969)).

218. *Id.* at 1303–04.

219. 79 S.W.3d 361, 369 (Ark. 2002).

220. *Id.* at 367.

221. *Id.* at 368 ("We conclude that the 'frequency, regularity, and proximity' test is the correct test to apply in this case, and we adopt it." (citation omitted)).

222. *Id.* at 368 ("[T]he Eighth Circuit . . . , in reviewing a grant of summary judgment, affirmed the district court and held that if the issue was presented

Additionally, the Court used *Jackson* to analogize the facts on hand[223] and articulate why the plaintiff failed to satisfy the standard.[224]

Even more explicitly, the Arkansas Supreme Court, in *Burkett v. PPG Industries, Inc.*,[225] commended the Eighth Circuit in its prediction of a novel principle of law in *Kifer v. Liberty Mutual Insurance Co.*[226] In *Kifer*, "an injured employee sued the carrier of his employer's workers' compensation insurance claiming that it had independent liability to him for a workplace injury caused by its failure to inspect the premises and warn him of danger."[227] The Eighth Circuit hypothesized that the Arkansas Supreme Court would hold that Arkansas' workers' compensation act precludes such liability.[228] Two years later, in *Burkett*, the Arkansas Supreme Court firmly validated this prediction by stating: "the Eighth Circuit has considered the matter and has predicted, with great accuracy as it turns out, our holding."[229]

3. Nebraska

The Nebraska Supreme Court has also validated *Erie* Guesses from the Eighth Circuit[230] and the District Court of Nebraska. Regarding the latter, in *Bryan Memorial Hospital v. Allied Property & Casualty Insurance Co.*,[231] the district court predicted that the Nebraska Supreme Court would recognize an independent cause of action for a hospital against an insurance company that separately paid a party who was injured by a tortfeasor.[232] In other words, the court assumed that the Nebraska Supreme Court would allow hospitals that treated those injured by tortfeasors, the ability to collect money given to the injured

to us, the Arkansas Supreme Court would adopt the 'frequency, regularity, and proximity' test in determining whether proximate cause had been proven in toxic-tort cases." (citation omitted)).

223. *Id.* at 370.

224. *Id.*

225. 740 S.W.2d 621, 624 (Ark. 1987).

226. 777 F.2d 1325, 1329 (8th Cir. 1985).

227. *Burkett*, 740 S.W.2d at 624–25 (citing *Kifer*, 777 F.2d at 1326).

228. *Kifer*, 777 F.2d at 1332 (citing ARK. CODE. ANN. § 81–1340 (Repl. 1976)).

229. *Burkett*, 740 S.W.2d at 624.

230. Ames v. Hehner, 435 N.W.2d 869, 874 (Neb. 1989) (citing Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351 (8th Cir. 1983)).

231. 163 F. Supp. 2d 1059, 1066 (D. Neb. 2001).

232. *Id.* at 1065–66.

party.[233] Specifically, the district court noted that the hospital needs to prove only that "it had a perfected hospital lien under Neb. Rev. Stat. § 52-401, the amount of that lien, and that . . .[the insurer] impaired that lien."[234]

Two years after *Bryan Memorial Hospital*, the Nebraska Supreme Court affirmed the district court's *Erie* Guess in *Alegent Health v. American Family Insurance*.[235] In *Alegent Health*, the plaintiff hospital's patient was injured in an automobile accident by a tortfeasor.[236] However, when the tortfeasor's insurer, the defendant, settled with the patient, they failed to put the hospital's name on the settlement check.[237] The Nebraska Supreme Court relied on the federal district court's holding in *Bryan Memorial Hospital*, and adopted the standard predicted.[238] Therefore, *Alegent Health* represents a highest state court's affirmation of a federal district court, as opposed to an affirmation of the Eighth Circuit itself.

C. ACQUIESCENT STATES: NORTH DAKOTA, SOUTH DAKOTA, AND IOWA

Much more common than affirming or dissenting patterns in the study, states generally tended to neither agree nor disagree with a federal court's interpretation of a novel state claim.[239] Within the Eighth Circuit, Iowa, North Dakota, and South Dakota all revealed strong tendencies to leave *Erie* Guesses "untouched."[240] Of the seventy-two cases left "untouched," twelve came from South Dakota's fifteen applicable *Erie* Guesses, nine from North Dakota's ten, and fourteen from Iowa's eighteen.[241] As previously noted, all three of these states left untouched over 75% of applicable *Erie* Guesses.[242]

233. *Id.* at 1066–67.

234. *Id.* at 1066.

235. 656 N.W.2d 906, 911 (Neb. 2003).

236. *Id.* at 907–08.

237. *Id.* at 907.

238. *Id.* at 911 ("[I]n such a case, the hospital needs to prove only that 'it had a perfected hospital lien under Neb. Rev. Stat. § 52-401, the amount of that lien, and that [the insurer] impaired that lien.'" (quoting *Bryan Mem'l Hosp.*, 163 F. Supp. 2d at 1066)).

239. *See infra* Appendix Figure 1.

240. *See infra* Appendix Table 2.

241. *See infra* Appendix Table 2.

242. *See supra* note 182 and accompanying text.

1. South Dakota

For example, in the 1995 case *Novak v. Navistar International Transportation Corp.*,[243] the Eighth Circuit predicted how the South Dakota Supreme Court[244] would rule regarding the proper jury instruction for the assumption of risk in a strict products-liability trial.[245] In *Novak*, the plaintiff brought a products liability action against the defendant company that manufactured a tractor that rolled onto the plaintiff while in neutral.[246] The lower court ruled in the defendant's favor, and the plaintiff appealed, arguing that the court gave an incorrect jury instruction regarding assumption of risk.[247] Ultimately, the Eighth Circuit relied on a provision within the Restatement (Second) of Torts after it noted how the Supreme Court had relied on the same provision in previous cases.[248] Despite *Novak* involving a farming accident in a mainly agricultural state,[249] the South Dakota Supreme Court has not yet addressed the federal court's prediction.[250]

Likewise, in the 2002 case of *Orion Financial Corp. v. American Foods Group, Inc.*,[251] the Eighth Circuit made an *Erie* Guess[252] when it predicted how the South Dakota Supreme

243. 46 F.3d 844 (8th Cir. 1995).

244. *See id.* at 847 ("If state law is unsettled, it is our duty to apply the rule we believe the South Dakota Supreme Court would follow." (citations omitted)).

245. *Id.* at 849 ("[W]e conclude that the South Dakota Supreme Court would accept [the plaintiff's argument]").

246. *Id.* at 846–47.

247. *Id.* at 848–49.

248. *Id.* at 849 (citing Berg v. Sukup Mfg. Co., 355 N.W.2d 833 (S.D. 1984); Smith v. Smith, 278 N.W.2d 155, 161 (S.D. 1979); RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST 1965).

249. *See generally* CENSUS OF AGRIC., STATE PROFILE: SOUTH DAKOTA (2012), https://www.nass.usda.gov/Publications/AgCensus/2012/Online_Resources/County_Profiles/South_Dakota/cp99046.pdf [https://perma.cc/87S2-6TB8] (noting that over ten billion dollars of market value in agricultural products sold in South Dakota in 2012).

250. *But see* Wangsness v. Builders Cashway, Inc., 779 N.W.2d 136, 144 (N.D. 2010) (distinguishing *Novak*, 46 F.3d 844).

251. 281 F.3d 733 (8th Cir. 2002).

252. *Id.* at 737 ("As a federal court, our role in diversity cases is to interpret state law, not to fashion it. Thus, if the state law is unsettled, it is our duty to apply the rule it believes the South Dakota Supreme Court would follow." (citing *Novak*, 46 F.3d at 847)).

Court would rule regarding the definition of "prejudgment interest" in an agreement between two parties.[253] After nearly seventeen years, the South Dakota Supreme Court has yet to cite the Eighth Circuit's interpretation and thus *Orion* remains good law. Consequently, the South Dakota state courts' reluctance to disagree with the Eighth Circuit illustrates the idea that when states do not disagree, they essentially agree by acquiescence.

2. North Dakota

Another state that showed a strong tendency to leave *Erie* Guesses untouched is North Dakota.[254] In nine out of ten *Erie* Guesses involving North Dakota law, no North Dakota state court has responded.[255] For example, in *Ehlis v. Shire Richwood, Inc.*, the Eighth Circuit affirmed a district court prediction that the North Dakota Supreme Court would adopt the learned intermediary doctrine.[256] This doctrine applies to tort cases involving a manufacturer and a supplier who was informed of the risks involved with the goods being supplied.[257] Legally, the supplier has a duty to warn of said risks and the consumer is barred from bringing actions against the manufacturer.[258] For example, in *Ehlis*, the plaintiff college student began to hallucinate after taking the prescribed dosage of Adderall and killed his infant daughter.[259] The plaintiff sued both the psychiatrist and pharmaceutical manufacturer for failing to warn the student of the associated risks, which include psychosis.[260] As a defense, the manufacturer argued that the learned intermediary principle barred any claims other than those against the supplier psychiatrist himself.[261] The Eighth Circuit agreed and thus, dismissed

253. *Id.* at 744 (establishing that "the test of awarding interest is not whether liability was clear, but whether (assuming liability) the damages were reasonably ascertainable by reference to prevailing markets." (quoting City of Sioux Falls v. Kelley, 513 N.W.2d 97, 112 (S.D. 1994))).

254. *See infra* Appendix Table 3.

255. *See infra* Appendix Table 3.

256. 367 F.3d 1013, 1017 (8th Cir. 2004).

257. *Id.* at 1016–17.

258. *Id.* at 1016.

259. *Id.* at 1015.

260. *Id.*

261. *Id.* at 1017.

all claims against the manufacturer.[262] Although many jurisdictions have adopted the learned intermediary principle, [263] the North Dakota state courts have yet to respond to the Eighth Circuit's prediction.

3. Iowa

The third state that left untouched over 75% of applicable *Erie* Guesses was Iowa.[264] For example, in *McGuire v. Davidson Manufacturing Corp.*, the Eighth Circuit upheld the Northern District of Iowa's holding based on the Eighth Circuit's prediction of how the Iowa Supreme Court would rule on a question regarding *res ipsa loquitur*.[265] In *McGuire*, the plaintiff fell off a six-foot stepladder manufactured by the defendants and suffered severe injuries to his head.[266] Among other claims, the plaintiff relied on a theory of res ipsa loquitur.[267] At the district court, a jury awarded the plaintiff $311,838.57 in damages.[268] The defendants appealed, arguing that "a plaintiff must satisfy the 'voluntary action rule'[269] to prevail on a res ipsa loquitur, or general negligence, claim under Iowa law."[270] On appeal, the Eighth Circuit noted that "[t]he Iowa Supreme Court has not expressly addressed the issue of whether a plaintiff employing res ipsa loquitur must still prove he or she was not at fault under Iowa's comparative fault system."[271] Such absence, however, did not prevent the Eighth Circuit from deciding the unsettled law. Applying an *Erie* Guess, the Eighth Circuit predicted that the Iowa Supreme Court "like many other high courts, will find will find

262. *Id.* at 1019.

263. *Id.* at 1016–17. ("The learned intermediary doctrine has been adopted in most jurisdictions . . . ." (quoting Desmarais v. Dow Corning Corp., 712 F. Supp. 13, 17 (D. Conn. 1989))).

264. *See infra* Appendix Table 1.

265. 398 F.3d 1005, 1008–09 (8th Cir. 2005).

266. *Id.* at 1006.

267. *Id. See generally Res Ipsa Loquitor*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Latin for "the thing speaks for itself") ("The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence that establishes a prima facie case . . . .").

268. *McGuire*, 398 F.3d at 1007. Specifically, the jury found that both the defendant and plaintiff were 50% responsible for the accident. *Id.*

269. *Id.* at 1007 (explaining that this rule requires the plaintiff to prove "by a preponderance of the evidence that his actions did not cause the accident").

270. *Id.*

271. *Id.* at 1008.

that in a comparative negligence system, plaintiffs using res ipsa loquitur need not disprove their own fault to prevail."[272] This holding was in-line with "[t]he majority of states that have considered the question."[273]

Since *McGuire*, the Iowa Supreme Court has ruled on the res ipsa loquitur doctrine at least three different times.[274] In spite of such relevant rulings, neither the Iowa Supreme Court, nor any state intermediate appellate court has addressed *McGuire*'s reasoning. As noted, this avenue was the most frequent of state courts within the Eighth Circuit, as almost three quarters of the *Erie* Guesses studied were left untouched.[275]

D. DISSENTING STATE: MISSOURI

In the rare times that *Erie* Guesses are inaccurate, the state courts explicitly disagreed with the federal court's prediction. Within the Eighth Circuit, Missouri is the only state that explicitly rejected over 15% of its nineteen applicable *Erie* Guesses.[276] All of Missouri's rejections came from the Eighth Circuit and involved insurance law.[277]

First, in *Farmland Industries v. Republic Insurance Co.*,[278] the Missouri Supreme Court rejected the Eighth Circuit's Erie Guess in the 1988 case of *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.[279] In *NEPACCO*, the Eighth Circuit held that damages should be defined "in the insurance context."[280] Further, the *NEPACCO* court

272. *Id.* at 1009; *see also id.* at 1008 ("Iowa adopted a comparative fault system in 1984.").

273. *Id.* at 1008 (citing Cox v. May Dep't Store Co., 903 P.2d 1119, 1124 (Ariz. Ct. App. 1995); Montgomery Elevator Co. v. Gordon, 619 P.2d 66, 70 (Colo. 1980); Giles v. City of New Haven, 636 A.2d 1335, 1341–42 (Conn. 1994); Darrough v. Glendale Heights Comm. Hosp., 600 N.E.2d 1248, 1253 (Ill. App. Ct. 1992); Tipton v. Texaco, Inc., 712 P.2d 1351, 1359 (N.M. 1985); Turtenwald v. Aetna Cas. & Sur. Co., 201 N.W.2d 1, 4–5 (Wis. 1972)).

274. Banks v. Beckwith, 762 N.W.2d 149, 150 (Iowa 2009); Conner v. Menard, Inc., 705 N.W.2d 318, 320 (Iowa 2005); Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836, 847 (Iowa 2005).

275. *See infra* Appendix Figure 1.

276. *See infra* Appendix Table 1, right column.

277. *See infra* Appendix Table 3.

278. 941 S.W.2d 505, 510 (Mo. 1997).

279. 842 F.2d 977, 985 (8th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 821 (1988).

280. *Id.* at 985–86.

held that the "plain meaning of 'damages' . . . refers to legal damages and does not include equitable monetary relief."[281] Ultimately, the Missouri Supreme Court ruled that, in *NEPACCO*, the Eighth Circuit "misconstrue[d] and circumvent[ed] Missouri law."[282] Specifically, the Court explained that "[t]he cases upon which the [federal] court relie[d] for the proposition that 'damages' distinguishes between claims at law and claims at equity are not persuasive."[283]

Similarly, in *Rodriguez v. General Accident Insurance Co.*, the Missouri Supreme Court rejected the Eighth Circuit's *Erie* Guess from *Weber v. American Family Mutual Insurance Co.*,[284] as inconsistent with Missouri law.[285] In *Weber*, the Eighth Circuit held that "an insured . . . would never reach the limits of liability set forth in [an underinsured motorist coverage] unless the insured was dealing with an uninsured motorist . . . ."[286] However, similar to its reasoning in *Farmland Industries*, the Missouri Supreme Court rejected the Eighth Circuit's interpretation "as inconsistent with state law."[287] Critically, the Supreme Court noted that: "*Weber* is an example of a court creating an ambiguity in order to distort the language of an unambiguous policy. *Weber* is not binding on this Court. Indeed, having considered the issue, we reject the holding in *Weber* as inconsistent with Missouri law."[288] Thus, both *Farmland Industries* and *Rodriguez* reveal that state courts are not unwilling to contradict *Erie* Guesses when they believe the federal courts have inaccurately predicted state law. However, the study revealed that such rejections are relatively rare in that only five *Erie* Guesses involved contradicting state court opinions.[289] *Erie* Guesses, therefore, are generally accepted or ignored by state courts.

281. *Id.* at 985.
282. *Farmland Indus.*, 941 S.W.2d at 510.
283. *Id.*
284. 868 F.2d 286 (8th Cir. 1989).
285. 808 S.W.2d 379, 383 (Mo. 1991).
286. *Weber*, 868 F.2d at 288.
287. *Rodriguez*, 808 S.W.2d at 383.
288. *Id.*
289. *See infra* Appendix Figure 1.

III. *ERIE* GUESSES ACT AS NECESSARY LIGHTHOUSES THAT COULD SHINE BRIGHTER WHEN GUIDING FEDERAL COURTS IN UNCHARTED WATERS

This Part uses the interworking of caselaw, practicality concerns, and congressional legislation to support a more explicit approach that Eighth Circuit courts should take when asked to predict state law. Section A explains why the *Erie* Doctrine's caselaw and practicality concerns support the continued use of *Erie* Guesses within the Eighth Circuit. Section B then relies on the Judicial Improvements Act of 1990[290] as Congress's implicit affirmation of *Erie* Guesses. Section C describes the unintended consequences of alternatives such as abstention and certification, which are exemplified through Part II's study. Section D offers a purported quasi-middle ground through a more explicit approach that both litigants and judges may rely on when navigating unchartered waters of state law.

A. PRECEDENT AND PRACTICALITY CONCERNS SUPPORT CONTINUING ERIE GUESSES

As noted above, *Erie* Guesses are how federal courts have interpreted the *Erie* Doctrine to apply to unclear state law issues for eighty years.[291] These decisions address a main critique of *Erie* Guesses: federal predictions are unfounded in precedent and undermine the *Erie* Doctrine's purposes of avoiding the inequitable administration of justice associated with inconsistent holdings.[292] Indeed, the Supreme Court itself has confronted this argument by advising lower courts to provide *Erie* Guesses in situations where the state court is silent.[293] *Erie* Guesses therefore are not a novel legal concept and the Supreme Court has arguably upheld their use by federal courts.

Additionally, the Supreme Court has given specific directions to federal courts when state courts are silent on an issue. For example, in *Commissioner v. Estate of Bosch*, the Supreme

290. 28 U.S.C. § 1367(c) (2012).

291. *See supra* Part II.B. *But see* Clark, *supra* note 20, at 1517 (contending that Supreme Court opinions merely "contain dicta suggesting that federal courts should employ a predictive approach").

292. *See generally* Chang, *supra* note 13, at 266–67 (noting that the *Erie* Guess raises constitutional problems because of the inequitable administration of justice associated with inconsistent holdings by different courts and that *Erie* did not warrant such predictions).

293. *See supra* Part II.B.

Court explained that if the highest state court has not addressed the question of state law at issue, a federal court sitting in diversity jurisdiction should "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the [s]tate."[294] Moreover, the Supreme Court has directed federal courts to "ascertain from all the available data what the state law is."[295] Such "available data" includes the highest state court's recent decisions on similar issues and other jurisdictions' precedents.[296]

Such guidance not only helps federal courts when ascertaining the unsettled laws of states, but also supports the *Erie* Doctrine's "twin aims."[297] Concerns about practicality, as revealed through this Note's study, buttress this argument. First, the Supreme Court has noted that *Erie* was intended to deter the inequitable administration of justice.[298] The study reveals that such "inequitable administration of the laws" arguably only occurred in 5% of the cases applying *Erie* Guesses.[299] As noted in the study's limitations, the large "untouched" *Erie* Guesses may merely represent states that have not yet had the chance to reverse the federal interpretations.[300] Still, over thirty-nine of the untouched *Erie* Guesses were decided at least fifteen years ago[301] and the study's *Erie* Guesses tended to interpret areas of unsettled law that state courts have generally discussed in later cases.[302] Consequently, the "inequitable administration of the laws" resulting from identical litigants receiving different results dependent on the jurisdiction has not resulted in a vast majority of *Erie* Guesses that the study analyzed. Second, the Supreme Court has noted that *Erie* was intended to deter forum shopping.[303] The study revealed that 95% of *Erie* Guesses involve

294. 387 U.S. 456, 465 (1967).

295. West v. AT&T Co., 311 U.S. 223, 236–37 (1940).

296. *Id.*

297. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (emphasizing avoiding both forum shopping and the inequitable administration of justice).

298. *Id.*

299. *See infra* Appendix Figure 1.

300. *See supra* Part III.A.

301. *See infra* Appendix Tables 3–6.

302. McGuire v. Davidson Mfg. Corp., 398 F.3d 1005, 1008–09 (8th Cir. 2005) (applying an *Erie* Guess to predict how the Iowa Supreme Court would define res ipsa loquitur).

303. *Hanna*, 308 U.S. at 468.

issues that the state court has not explicitly contradicted.[304] Based on this finding, one is hard-pressed to claim litigants either picked federal courts for a more favorable outcome or would have fared better had state judges decided their case.

Also, the Supreme Court has noted that the *Erie* Doctrine's essence is that federal judges can equally interpret state law as state judges. Specifically, in *Salve Regina College v. Russell*, the Supreme Court noted that: "The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge."[305] The Court continued: "[a]lmost 35 years ago, Professor [Philip] Kurland stated: 'Certainly, if the law is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California.'"[306]

The Eighth Circuit has also followed this precedent and these practicality concerns, noting that if the issue is a matter of first impression for the state court, the federal court has the "responsibility to predict, as best [it] can, how that [state's highest] court would decide the issue."[307] Such guidance, coupled with the Supreme Court's rationale in *Russell*, *Bosch*, and *West* and the practicality concerns supported by the study, reveal that *Erie* Guesses and the more explicit approach proposed in Section D are well-founded in the *Erie* Doctrine's progeny and are effective methods of accomplishing the *Erie* Doctrine's goals.

B. CONGRESSIONAL INSIGHT: SUPPLEMENTAL JURISDICTION: 28 U.S.C. § 1367 AND DISCRETIONARY POWERS

In addition to federal courts interpreting the *Erie* Doctrine and applying *Erie* Guesses, Congress itself has arguably validated *Erie* Guesses through 28 U.S.C. § 1367(c), the Judicial Improvements Act of 1990. This Act defines the scope of federal supplemental jurisdiction and implies that federal courts have

304. See *infra* Appendix Figure 1.

305. 499 U.S. 225, 238 (1991).

306. *Id.* at 238–39 (citing Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the* Erie *doctrine in Diversity Cases*, 67 YALE L.J. 187, 217 (1957)).

307. Brandenburg v. Allstate Ins., 23 F.3d 1438, 1440 (8th Cir. 1994).

the power to provide *Erie* Guesses when the state courts are silent.[308] Because Congress has the constitutional power to determine what claims federal courts may hear,[309] 28 U.S.C. § 1367 arguably vests federal courts with the power to make *Erie* Guesses.

In the Judiciary Act of 1789 itself, there remains the key provision that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States" *except* "where the constitution, treaties or statutes of the United States shall otherwise require or provide."[310] Also, in *Erie*, the Supreme Court noted that "[s]upervision over either the legislative or the judicial action of the states is in no case permissible *except as to matters by the constitution specifically authorized or delegated* to the United States."[311] These exceptions provide Congress the opportunity to authorize federal courts to hear state claims that are otherwise binding.

In 1990, Congress exercised this power through the Judicial Improvements Act.[312] This Act was passed in response to *Finley v. United States*,[313] a Supreme Court case that limited federal courts' ability to exercise supplemental jurisdiction.[314] The Act states that: "[e]xcept as provided in [subsequent subsec-

308. *See* 28 U.S.C. § 1367(c) (2012) ("The district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . .").

309. *See supra* Part II.A.

310. The Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2012)).

311. Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938) (emphasis added) (quoting Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

312. Judicial Improvements Act of 1990, Pub. L. No. 101–650, § 310(a), 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367 (2012)).

313. 490 U.S. 545 (1989) (upholding the Ninth Circuit's denial of supplemental jurisdiction to ancillary state law tort claims). *See generally* Rachel Ellen Hinkle, *The Revision of 28 U.S.C. 1367(c) and the Debate over the District Court's Discretion to Decline Supplemental Jurisdiction*, 69 TENN. L. REV. 111, 118–19 (2001) (explaining *Finley* and its implications on federal courts' supplemental jurisdiction powers).

314. H.R. REP. No. 101-734, at 28 (1990) ("Indeed, the Supreme Court has virtually invited Congress to codify supplemental jurisdiction by commenting in *Finley*, '[w]hat ever we say regarding the scope of jurisdiction . . . can of course be changed by Congress.'").

tions] . . . the district courts shall have supplemental jurisdiction over all other claims that 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 . . . ."[315] More importantly, § 1367(c)(1) states that: "[t]he district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the claim raises a novel or complex issue of State law."[316] The inference[317] follows that if Congress carved out an exception for when federal courts may choose not to decide novel state or complex issues, clearly Congress concurred—or at the very least acquiesced—with what has become known as the *Erie* Guess.[318] Thus, the *Erie* Guess arguably became an exception to both the Judiciary Act of 1789 and the *Erie* Doctrine because Congress recognized the ability of federal courts to decide such claims when the state is silent. If Congress has given federal courts this right, the Eighth Circuit may adopt a more explicit approach that courts should take when asked to predict state law.

315. 28 U.S.C. § 1367(a).

316. 28 U.S.C. § 1367(c)(1). Interestingly, some scholars have advocated that Congress, under its Art. IV, § 1 powers, should "enact a federal statute imposing on state supreme courts an obligation to decide unclear issues of state law certified by federal courts, trial and appellate, for resolution." L. Lynn Hogue, *Law in a Parallel Universe:* Erie's *Betrayal, Diversity Jurisdiction, Georgia Conflict of Law Questions in Contract Cases in the Eleventh Circuit, and Certification Reform*, 11 GA. ST. U. L. REV. 531, 540–41 (1995). Such a proposal has not seemed to garner much traction. *See generally* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of Law*, 88 CORNELL L. REV. 1672, 1680 n.18 (2003) (proposing instead a state specialized tribunal to review *Erie* Guesses).

317. If I tell my daughter, Hazel, that she can choose *not* to eat cookies, then she arguably has the choice *to* eat cookies.

318. *See generally* Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 952 F. Supp. 1399, 1411 (D. Neb. 1997) (noting that § 1367(c)'s discretionary power "does not mean . . . that a federal trial court can simply refuse to hear a state law claim . . . unless the criteria set forth in § 1367(c) exist in the case before it"); Clark, *supra* note 20, at 1533–35 (explaining how Congress, via the Judicial Improvement Act, effectively permitted federal courts to make *Erie* Guesses).

C. ALTERNATIVE METHODS DO NOT EFFECTIVELY ADDRESS THE UNINTENDED CONSEQUENCES OF THEIR PROPOSALS

As discussed above, several alternatives have garnered attraction with opponents of *Erie* Guesses.[319] Certification procedures and abstention are appealing to judges and legal scholars seeking to limit the power of federal courts.[320] However, as discussed below, these methods fall short in addressing the *Erie* Doctrine's aims and are less effective than *Erie* Guesses.

1. Certification

Certification proponents emphasize the Supreme Court's use of this procedure,[321] and how it avoids the possibility of the inequitable administration of justice because federal courts must ask state courts how they would decide the unsettled issue.[322] Additionally, "forum shopping" is limited because federal litigants essentially fall back into state court via certification.[323]

Despite these benefits, advocates underestimate the unintended consequences such procedures entail. For example, certification can actually lead to forum shopping in certain situations.[324] Indeed, certification may incentivize a plaintiff to circumvent a state's trial and intermediary appellate courts by simply filing in federal court only to immediately ask for certification.[325] Likewise, "a defendant may receive or anticipate an unfavorable ruling in state court, foresee a long state appeals process, and seek removal to federal court. Once in federal court, the defendant moves to certify to the highest state court."[326] Consequently, certification results in outcomes antithetical to a foundational purpose of the *Erie* Doctrine.

319. *See supra* Part I.B.

320. These methods are explained in Schaffer & Herr, *supra* note 13, at 1630–32; *see also supra* Part I.B.2.

321. *See, e.g.*, Fiore v. White, 528 U.S. 23, 29 (1999) (certifying to the Pennsylvania Supreme Court); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395–97 (1988) (certifying to the Virginia Supreme Court); Zant v. Stephens, 456 U.S. 410, 416–17 (1982) (certifying to the Georgia Supreme Court); Bellotti v. Baird, 428 U.S. 132, 150–53 (1976) (certifying to the Supreme Judicial Court of Massachusetts).

322. Schaffer & Herr, *supra* note 13, at 1630.

323. Clark, *supra* note 20, at 1545.

324. Schaffer & Herr, *supra* note 13, at 1636–37.

325. Cochran, *supra* note 141, at 204.

326. *Id.*

Also, the delay and cost of certification procedures generally exceed that of *Erie* Guesses.[327] Some studies have found "that the certification process generally causes delays of longer than one year with an average being about fifteen months."[328] Therefore, if certification's result is generally identical to *Erie* Guesses', as the study revealed, certification's delay is unjustified and unnecessary. Another dilemma is that, at times, certification procedures turn state supreme court decisions into mere advisory opinions.[329] In short, an advisory opinion has no binding authority and merely informs litigants of how the court would rule should a case arise.[330] Since Article III's inception, the U.S. Supreme Court has held that advisory opinions are unconstitutional and violate the separation of powers.[331]

Further, even federal courts with the ability[332] to certify questions may choose to make an Erie Guess because of particular factors, including the time and resources certification entails.[333] Indeed, the Supreme Court has made clear that certification is "not obligatory."[334] Specifically, the Northern District of Iowa has explained the complexity that federal courts face when

327. Coby W. Logan, *Certifying Questions to the Arkansas Supreme Court: A Practical Means for Federal Courts in Clarifying Arkansas State Law*, 30 U. ARK. LITTLE ROCK L. REV. 85, 101 (2007).

328. *Id.*

329. Cochran, *supra* note 141, at 161 ("[I]n practice, certification . . . has resulted in advisory opinions.").

330. *Advisory Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose.").

331. *See, e.g.*, Hayburn's Case, 2 U.S. 408, 408–10 (1792) (requiring an actual dispute between litigants and a substantial likelihood that a judicial decision will bring about some change or have some effect); *Letter from John Jay to George Washington* (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 488–89 (Henry P. Johnston ed., 1891) (explaining that advisory opinions would violate the separation of powers because the President could ask the executive officers for such an opinion (citing U.S. CONST. art. II, § 2)).

332. Relevantly, Nebraska, Missouri, and South Dakota are on the only states within the Eighth Circuit that do not allow certified questions to the state supreme courts. *See supra* notes 150–57 and accompanying text.

333. *See, e.g.*, L. Cohen & Co. v. Dun & Bradstreet, Inc., 629 F. Supp. 1419, 1423 (D. Conn. 1986) (noting that routine certification "would impose an unreasonable and unnecessary burden on [the highest courts of the states]").

334. Lehman Bros. v. Schein, 416 U.S. 386, 390–91 (1974).

determining whether to certify a question of state law to the corresponding state court.[335] Thus, certification may prove futile for federal courts seeking answers to unsettled issues of state law.

Federal courts also struggle with the fact that state courts may rule certification procedures are unconstitutional. For example, in *Grantham v. Missouri Department of Corrections*, the Arkansas Supreme Court held Missouri's certification procedure[336] to be unconstitutional because it was held to be outside the Court's jurisdiction.[337] Specifically, the United States District Court for the Western District of Missouri certified a question to the Missouri Supreme Court pursuant to § 477.004.[338] However, "[f]inding no constitutional jurisdiction," the Court declined to answer.[339] Although proponents emphasize that certification "promotes judicial economy because certification short-circuits state appellate procedure and presents questions directly to the state's highest court, it saves time and conserves finite state resources," these dilemmas prove that certification can be counterproductive.[340]

Lastly, the practicality concerns of the *Erie* Guess, as the study revealed, undermine certification's purpose. Certification's primary argument against *Erie* Guesses is that certification could never lead to conflicting results between state and federal law.[341] However, such results were extremely rare in the

335. Rowson v. Kawasaki Heavy Indus., 866 F. Supp. 1221, 1225 (N.D. Iowa 1994) (noting a complexity of factors a court may consider when determining whether to certify a federal question); *see also supra* notes 160–65 and accompanying text.

336. MO. REV. STAT. § 477.004 (2012).

337. No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990).

338. *Id.*

339. *Id.*

340. Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or Bad Idea?*, 38 VAL. U. L. REV. 327, 339 (2004) (citing Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000)); *see also* Joshua D. Yount, *Taking the Guess Out of the* Erie *Guess: The Seventh Circuit's Approach to the Certification of Questions to a State's Highest Court*, CIRCUIT RIDER, 2012, at 34. *See generally* Shepard, *supra* note 340 (providing a detailed history of certification throughout the United States since *Erie* along with a well-cited argument advocating for certification to replace the *Erie* Guess).

341. Chang, *supra* note 13, at 267 ("Certification allows federal courts to avoid Erie problems regarding federalism, forum shopping, and inequitable administration of justice.").

study and were vastly overshadowed by outcomes revealing harmony between federal and state courts.[342] Although almost three-quarters of the studied cases reflected "untouched" opinions that potentially could result in inequitable decisions under the worst case scenario,[343] certification is unlikely to address this dilemma. As noted, no data exists regarding why the state supreme courts have not addressed these *Erie* Guesses.[344] If the states actually desired to reject the issues ascertained in these *Erie* Guesses, but were unable to because of denials of certiorari, certification would also likely be futile because the states could also reject such questions under the applicable certification procedures.[345] In other words, the state courts are unlikely to deny certiorari on cases with which they disagree or wish to change.[346] Therefore, if there really is an inequitable administration of justice occurring in such "untouched" *Erie* Guesses, then certification is only meaningful if denials of certiorari are the sole reasoning for the states' acquiescence and the corresponding state has adopted mandatory certification procedures from the court making such *Erie* Guesses.

Hence, notwithstanding the Supreme Court's apparent preference of certification over abstention,[347] *Erie* Guesses are still necessary for federal courts involving states that reject certification for expediency and cost factors.

342. *See infra* Appendix Figure 1.

343. *Id.*

344. *See supra* Part III.A.

345. *See, e.g.*, Longview Prod. Co. v. Dubberly, 99 S.W.3d 427, 428 (2003) ("Certification will only be necessary when our substantive law is unclear on an issue 'which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." (quoting ARK. SUP. CT. R. 6–8(a)(2))); Wolner v. Mahaska Indus., 325 N.W.2d 39, 41 n.1 (Minn. 1982) (explaining that certification is appropriate "when there is no controlling precedent in the decisions of the supreme court of this state" (quoting MINN. STAT. § 480.061, subd. 1 (1980))).

346. *See generally* Linzer, *supra* note 189 (describing the meaning of certiorari denials).

347. Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring))).

2. Abstention

For similar reasons why certification fails to effectively promote the *Erie* Doctrine's goals, the abstention doctrine also falls short. First, abstention inherently carries unnecessary costs and delays on the judicial process.[348] Under this doctrine: "the parties must leave federal court to initiate a full round of state litigation plus any attendant appeals, and then return to federal court for another full round of litigation and appeals."[349] Additionally, "the state supreme court may not definitively resolve the relevant issue, as that court can decline review—undercutting the reason to abstain in the first place."[350] Theoretically, abstention interrupts careful balancing of separation of powers because it essentially allows judges to decline their jurisdiction.[351]

Longstanding tradition holds that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[352] Abstention presents unnecessary delays, costs, and constitutional issues that *Erie* Guesses avoid altogether.

In sum, the *Erie* Guess has its roots in long-established precedent upheld by both the United States Supreme Court, lower federal courts, and arguably Congress for eighty years. Although alternatives to *Erie* Guesses exist—like abstention and certification—the unintended consequences outweigh their potential benefit. Therefore, *Erie* Guesses are still necessary for judicial efficiency and are strongly supported by precedent and practicality concerns.

348. Eisenberg, *supra* note 129, at 73–74.

349. *Id.* at 74.

350. *Id.*

351. *See generally* George D. Brown, *When Federalism and Separation of Powers Collide-Rethinking* Younger *Abstention*, 59 GEO. WASH. L. REV. 114, 114 (1990) ("[A] case can be made that the abstention doctrines present . . . a conflict between [the Supreme Court's] vision of federalism and its commitment to the separation of powers."); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) ("[N]either total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers.").

352. Cohens v. Virginia, 19 U.S. (1 Wheat.) 264, 403 (1821).

D. BRIGHTER GUIDELINES: IMPROVING ERIE GUESSES' ACCURACY, FINALITY, AND CERTAINTY

Ultimately, *Erie* Guesses allow for appropriate and effective federal definitions of state law in overlaps between state and federal courts. Thus, the Eighth Circuit should continue to use *Erie* Guesses when forced to interpret state law in the absence of state decisions. In other words, because the vast majority of states within the Eighth Circuit either explicitly validate or implicitly acquiesce to *Erie* Guesses,[353] federal courts should continue interpreting novel or complex state claims. Notwithstanding such success of the status quo, the study did reveal cases in which the *Erie* Guesses were wrong.[354] Hence, some change is desirable to avoid inaccurate predictions of state law and confusion regarding what factors federal courts will apply when making *Erie* Guesses.[355] Therefore, Eighth Circuit courts should adopt the modified four-step analysis articulated in *Soto v. Shealey*,[356] to effectively and accurately predict unresolved state law. In the context of whether to recognize a common law tort, for example, the approach asks:

> (1) whether the [cause of action] is inherent in, or the natural extension of, a well-established common law right, (2) whether the [cause of action] has been recognized in other common law states, (3) whether recognition of [the] cause of action will create tension with other applicable laws, and (4) whether such tension is out-weighed by the importance of the additional protections that recognition of the claim would provide to injured persons.[357]

This Note's suggested modified approach would ask the same four questions with an additional fifth prong that would weigh relevant lower state court decisions from the state that the federal court is analyzing.[358] This approach will not only allow federal courts to more accurately predict state law, but also provide foreseeability for state supreme courts and guidance for

353. *See infra* Appendix Figure 1, Tables 4–5.

354. See *infra* Appendix Figure 1, Table 5.

355. *See supra* notes 88–91 and accompanying text (discussing the differences, although minor, between federal courts within the Eighth Circuit when describing relevant factors for *Erie* Guesses).

356. 331 F. Supp. 3d 879, 885 (D. Minn. 2018).

357. *Id.* (quoting Larson v. Wasemiller, 738 N.W.2d 300, 304 (Minn. 2007)).

358. *See* Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967) (noting that in the absence of a highest state court decision, a federal court should "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the [s]tate").

federal litigants like the Sotos.[359] Additionally, as noted, *Erie* Guesses, established via this five-step approach, are supported by precedent,[360] Congress,[361] and practicality concerns.[362]

A main critique of *Erie* Guesses is that the Supreme Court has never decided, outside of dicta, what federal courts should consider when predicting state law.[363] This suggested approach, however, synthesizes influential precedent and effectively provides clarity to how federal courts should predict state law. The first element ensures that the federal court bases its prediction on "inherent" common law rights that are not novel to the state court. This element conforms with the Supreme Court's mandate in *West v. American Telephone & Telegraph Co.*,[364] that federal courts must consider the "the highest state court's recent decisions on similar issues."[365] Likewise, the second prong exemplifies the Supreme Court's holding in *West* that ordered the federal court to consider "other jurisdictions' precedents."[366] The third and fourth prong interact with the first prong and allow the federal court to base its decision not only on past state decisions, but also on contemporary and future concerns that the state court would not ignore if faced with the unsettled issue. Thus, these two prongs also emulate the Supreme Court's instruction to consider "the highest state court's recent decisions on similar issues."[367] The fifth and final prong—regarding relevant lower state court opinions from that state—gives teeth to the Supreme Court's declaration in *West* that a federal court ought not to disregard a "rule of law" announced by an intermediate appellate state court "unless [the federal court] is convinced by other per-

359. *See supra* Introduction.

360. *See supra* Part III.A.

361. *See supra* Part III.B.

362. *See supra* Part III.C.

363. *See, e.g.*, Clark, *supra* note 20, at 1517 ("Although the Supreme Court's opinions contain dicta suggesting that federal courts should employ a predictive approach, the Court has neither squarely endorsed that model nor suggested that such an approach is the exclusive means that federal courts must employ to resolve unsettled questions of state law.").

364. 311 U.S. 223, 236–37 (1940).

365. Soto v. Shealey, 331 F. Supp. 3d 879, 885 (D. Minn. 2018) (citing *West*, 311 U.S. at 236–37).

366. *Id.*

367. *Id.*

suasive data that the highest court of the state would decide otherwise."[368] This prong would force federal courts, just as state courts do, to seriously consider relevant decisions from persuasive authority within the state.

Together, these factors effectively and efficiently provide federal courts with instructions that mimic how a state court would approach the unsettled issue. By following identical steps as the corresponding state court, federal courts will be able to more accurately predict how the state court would resolve the issue. Accurate *Erie* Guesses effectuate the *Erie* Doctrine's goal of avoiding the "inequitable administration of the laws"[369] because federal outcomes will reflect state outcomes and vice versa. Accuracy, in turn, will lead to finality because state courts will not be as likely to contradict the federal courts' *Erie* Guesses. Finality will reduce uncertainty because state court litigants will have the ability to look towards federal courts for guidance. Perhaps most importantly, this concrete "checklist" will guide litigants entering federal courts and reduce the risk of forum shopping[370] because litigants will know that federal courts are likely to treat their claims just as state courts would. In all, these factors represent the best solution to *Erie* Guesses' current ambivalent state and will effectively carry out the *Erie* Doctrine's goals.

Although this suggested approach is tailored specifically for federal courts determining whether to recognize a new cause of action, it has the potential to guide courts in other contexts where *Erie* Guesses arise.[371] For example, *Erie* Guesses predicting how state courts will define elements of an existing cause of action[372] or rule on novel causes of defenses[373] would adopt a sim-

368. *West*, 311 U.S. at 237; *see also* New York Life Ins. Co. v. Stoner, 109 F.2d 874, 878 (8th Cir.) *rev'd*, 311 U.S. 464 (1940) (stating that "[w]e are not bound to follow the decisions and reasoning of the intermediate appellate courts of Missouri").

369. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

370. *Id.* (noting that reducing forum shopping is one of *Erie*'s two goals).

371. *See supra* note 20 and accompanying text (noting that *Erie* Guesses include federal predictions of how state courts will rule on novel causes of action, novel defenses, and even whether state precedent will be overruled).

372. *See supra* notes 199–205 and accompanying text (explaining how *Erie* Guesses have been used to establish elements of existing causes of action).

373. *See supra* notes 98–110 and accompanying text (explaining how *Erie* Guesses have been used to predict whether a state court would recognize novel

ilar test with minor changes. The fifth prong would remain identical for both contexts and the other prongs would simply change "cause of action" to "elements" for the former and "cause of defense" for the latter. Another context involving *Erie* Guesses—predicting whether a state court would overrule its precedent[374]—is more difficult to analyze under this suggested approach. The other prongs' focuses remain valuable, but the federal court would have to change the "cause of action" language to something along the broad lines of the "federal court's decision." For example, the second prong would change from whether the cause of action has been recognized in other common law states to whether the *federal court's decision* has been recognized in other common law states. These slight modifications would allow the suggested approach not only to improve *Erie* Guesses within limited contexts, but also enhance all *Erie* Guesses no matter what specific issue they predict.

CONCLUSION

This Note describes and analyzes the *Erie* Doctrine with an emphasis on the *Erie* Guess. It advocates for a focus on the *Erie* Doctrine's history, which resoundingly supports the *Erie* Guess when the highest state court has not ruled on the state law issue and there are no persuasive, analogous state cases. To provide clarity for both courts and litigants, this Note advocates for a five-step approach that is supported by both precedent and practicality concerns. The approach will strengthen the relationship between federal and state courts and will provide notice to those, like the Sotos,[375] of how a federal court will treat their claim. In all, the five-step approach walks the thin line between avoiding establishing federal general common law and providing reasonable and contemporary interpretations of unsettled state law.

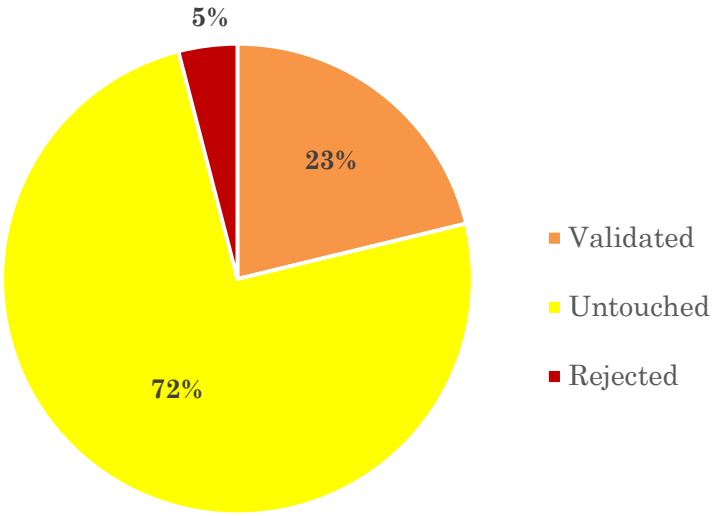
causes of defenses).

374. *See supra* notes 114–25 and accompanying text (discussing how *Erie* Guesses have been used to predict whether a state court would overrule is precedent).

375. *See supra* Introduction.

APPENDIX

Figure 1. State Reactions to *Erie* Guesses Within the Eighth Circuit



Percentages are based on a random 100 cases that involved *Erie* Guesses.

Table 1. State Tendencies (Percentages)

Validating (25% or Greater)	**Untouching (Greater than 75%)**	**Rejecting (Greater than 15%)**
Minnesota (50%)	Iowa (77.78%)	Missouri (15.79%)
Nebraska (37.5%)	North Dakota (90%)	
Arkansas (25%)	South Dakota (80%)	

Percentages are based on a random 100 cases that involved *Erie* Guesses.

Table 2. State Tendencies (Raw Numbers)

State	Ark.	Iowa	Minn.	Mo.	Neb.	N.D.	S.D.	Total
Validated	4	4	7	2	3	0	3	23
Untouched	11	14	7	14	5	9	12	72
Rejected	1	0	0	3	0	1	0	5
Total	16	18	14	19	8	10	15	100

Table 3. Federal Court Tendencies Regarding How State Courts "Respond" (Raw Numbers and Case List for District Courts)

Court	Validated[376]	Untouched
8th Cir.[377]	16	27[378]
E.D. Ark.	0	1[379]
W.D. Ark.	0	3[380]
N.D. Iowa	2	7[381]
S.D. Iowa	1	3[382]
D. Minn.	2	2[383]
E.D. Mo.	0	7[384]
W.D. Mo.	0	2[385]
D. Neb.	1	4[386]
D.N.D.	0	8[387]
D.S.D.	1	8[388]
Total	**23**	**72**

376. *See infra* Table 4.

377. The Eighth Circuit itself was the only court that state courts rejected. *See infra* Table 5.

378. *See infra* Table 6.

379. Meredith v. Buchman, 101 F. Supp. 2d 764, 767 (E.D. Ark. 2000).

380. 3A Composites USA, Inc. v. United Indus., No. 5:14-CV-5147, 2015 U.S. Dist. LEXIS 154115, at *4 (W.D. Ark. Nov. 4, 2015); Crussell v. Electrolux Home Prods., 499 F. Supp. 2d 1137, 1138–39 (W.D. Ark. 2007); Int'l Paper Co. v. McI Worldcom Network Servs., 202 F. Supp. 2d 895, 903 (W.D. Ark. 2002).

381. United States v. Burnside, No. CR17-2094-LTS, 2018 U.S. Dist. LEXIS 66545, at *9 (N.D. Iowa Apr. 20, 2018); Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc., No. 09-CV-175-LRR, 2010 U.S. Dist. LEXIS 42273, at *1 (N.D. Iowa Apr. 29, 2010); Bituminous Cas. Corp. v. Sand Livestock Sys., No. C04-4028-PAZ, 2005 U.S. Dist. LEXIS 12276, at *18 (N.D. Iowa June 22, 2005); MidAmerican Energy Co. v. Great Am. Ins., 171 F. Supp. 2d 835, 848 (N.D. Iowa

2001); Prudential Ins. of Am. v. Rand & Reed Powers P'ship, 972 F. Supp. 1194, 1201 (N.D. Iowa 1997); Olympus Aluminum Prods. v. Kehm Enters., 930 F. Supp. 1295, 1311 (N.D. Iowa 1996); Rowson v. Kawasaki Heavy Indus., 866 F. Supp. 1221, 1232 (N.D. Iowa 1994).

382. Mahony v. Universal Pediatric Servs., 753 F. Supp. 2d 839, 852 n.8 (S.D. Iowa 2010); Weitz Co. LLC v. Lloyd's of London, No. 4:04-CV-90353-TJS, 2010 U.S. Dist. LEXIS 148063, at *15–17 (S.D. Iowa Dec. 20, 2010); Jackson v. Drake Univ., 778 F. Supp. 1490, 1494 (S.D. Iowa 1991).

383. St. Paul v. FMC Corp., No. 3-89-0466, 1990 U.S. Dist. LEXIS 18142, *22–24 (D. Minn. Feb. 26, 1990); Meyer v. Tenvoorde Motor Co., 714 F. Supp. 991, 995–96 (D. Minn. 1989).

384. Jo Ann Howard & Assocs., P.C. v. Cassity, No. 4:09CV01252 ERW, 2012 U.S. Dist. LEXIS 128754, at *23–24 (E.D. Mo. Sep. 11, 2012); Auto Owners Ins. v. Biegel Refrigeration & Elec. Co., 659 F. Supp. 2d 1050, 1054 (E.D. Mo. 2009); Auto-Owners Ins. v. Mid-America Piping, No. 4:07-CV-00394, 2008 U.S. Dist. LEXIS 26038, at *5 (E.D. Mo. Mar. 17, 2008); Zoltek Corp. v. Structural Polymer Grp., No. 4:08-CV-460 (CEJ), 2008 U.S. Dist. LEXIS 92714, at *10 (E.D. Mo. Nov. 13, 2008); Harris v. Parkway Sch. Dist., No. 4:07-CV-579 (JCH), 2007 U.S. Dist. LEXIS 96702, at *4–6 (E.D. Mo. June 22, 2007); Self v. Equilon Enters., No. 4:00CV1903 TIA, 2005 U.S. Dist. LEXIS 17288, at *29–31 (E.D. Mo. Mar. 30, 2005); Kraus v. Celotex Corp., 925 F. Supp. 646, 651–53 (E.D. Mo. 1996).

385. Trilogy Dev. Co. v. BB Syndication Servs. (*In re* Trilogy Dev. Co.), 437 B.R. 683, 686–87 (Bankr. W.D. Mo. 2010); Harber v. Altec Indus., 812 F. Supp. 954, 957 (W.D. Mo. 1993).

386. Uribe v. Sofamor, S.N.C., 8:95CV464, 1999 U.S. Dist. LEXIS 18854, at *53–54 (D. Neb. Aug. 16, 1999); Lincoln Benefit Life Co. v. Edwards, 45 F. Supp. 2d 722, 756 (D. Neb. 1999); Cudahy Co. v. Am. Labs., Inc., 313 F. Supp. 1339, 1342 (D. Neb. 1970); Platte v. New Amsterdam Cas. Co., 6 F.R.D. 475, 485 (D. Neb. 1946).

387. S & W Mobile Home & Rv Park, LLC v. B&D Excavating & Underground, LLC, No. 1-17-cv-9, 2017 U.S. Dist. LEXIS 113924, at *27 n.8 (D.N.D. July 21, 2017); Hoff v. Elkhorn Bar, 613 F. Supp. 2d 1146, 1156–57 (D.N.D. 2009); Albers v. Deere & Co., 599 F. Supp. 2d 1142, 1152 (D.N.D. 2008); Dakota W. Credit Union v. Cumis Ins. Soc'y, 532 F. Supp. 2d 1110, 1114 (D.N.D. 2008); Acuity v. N. Cent. Video, LLLP, No. 1:05-cv-010, 2007 U.S. Dist. LEXIS 33540, at *51 (D.N.D. May 7, 2007); Hueske v. State Farm Fire & Cas. Co., 627 F. Supp. 2d 1060, 1064 (D.N.D. 2007); Atkinson v. McLaughlin, 462 F. Supp. 2d 1038, 1048–50 (D.N.D. 2006); Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co., 675 F. Supp. 1534, 1536 (D.N.D. 1987).

388. Larson Mfg. Co. of S.D. v. W. Showcase Homes, Inc., No. 4:16-CV-04118-VLD, 2018 U.S. Dist. LEXIS 208389, at *60 (D.S.D. Dec. 11, 2018); Klynsma v. Hydradyne, 2015 U.S. Dist. LEXIS 133275, at *14–15 (D.S.D. Sep. 30, 2015); O'Daniel v. Hartford Life Ins., 2013 U.S. Dist. LEXIS 188540, at *90 (D.S.D. Sept. 20, 2013); Am. Gen. Life Ins. v. Jenson, 2012 U.S. Dist. LEXIS 33409, at *39 (D.S.D. Mar. 12, 2012); Nw. Pub. Serv. v. Union Carbide Corp., 115 F. Supp. 2d 1164, 1166 (D.S.D. 2000); Warner *ex rel.* Brown v. Youth Servs. Int'l of S.D., Inc., 89 F. Supp. 2d 1095, 1100 (D.S.D. 2000); Tokley v. State Farm Ins. Cos., 782 F. Supp. 1375, 1377 (D.S.D. 1992); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 161 (D.S.D. 1967).

Table 4. Validated *Erie* Guesses (Case List)

***Erie* Guess**	**Validated by**
Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351 (8th Cir. 1983)	Ames v. Hehner, 435 N.W.2d 869, 874 (Neb. 1989)
Lindsay Mfg. Co. v. Hartford Accident & Indem. Co., 118 F.3d 1263, 1268 (8th Cir. 1997)	Herman Bros. v. Great W. Cas. Co., 582 N.W.2d 328, 334 (Neb. 1998)
Hegg v. United States, 817 F.2d 1328, 1330 (8th Cir. 1987)	Bird v. Econ. Brick Homes, Inc., 498 N.W.2d 408, 409 (Iowa 1993)
First Colony Life Ins. v. Berube, 130 F.3d 827, 829 (8th Cir. 1997)	*In re* Smid, 756 N.W.2d 1, 14 (S.D. 2008)
Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 508 (8th Cir. 1983)	Clark Cty. v. Sioux Equip. Corp., 753 N.W.2d 406, 411 (S.D. 2008)
Jackson v. Anchor Packing Co., 994 F.2d 1295, 1301 (8th Cir. 1993)	Chavers v. GMC, 349 Ark. 550, 562 (Ark. 2002)
Kifer v. Liberty Mut. Ins., 777 F.2d 1325, 1329 (8th Cir. 1985)	Burkett v. PPG Indus., 740 S.W.2d 621, 624 (Ark. 1987)
Bass v. GMC, 150 F.3d 842, 848 (8th Cir. 1998)	Uxa v. Marconi, 128 S.W.3d 121, 129 (Mo. Ct. App. 2003)
Toney v. WCCO TV, 85 F.3d 383, 389–90 (8th Cir. 1996)	Schlieman v. Gannett Minn. Broad., Inc., 637 N.W.2d 297, 302 (Minn. Ct. App. 2001)
Taylor v. Ark. La. Gas Co., 793 F.2d 189 (8th Cir. 1986)	Ark. La. Gas Co. v. Taylor, 858 S.W.2d 88, 89 (Ark. 1993)
Luster v. Retail Credit Co., 575 F.2d 609, 613 (8th Cir. 1978)	Roeben v. BG Excelsior Ltd. P'ship, 344 S.W.3d 93, 98 (Ark. Ct. App. 2009)
Ventura v. Titan Sports, 65 F.3d 725, 729 (8th Cir. 1995)	Afremov v. Amplatz, No. A09-1157, 2010 Minn. App. Unpub. LEXIS 470, at *21 (Minn. Ct. App. 2010)
Leonard v. Dorsey & Whitney, 553 F.3d 609 (8th Cir. 2009)	In re Syngenta Litig., 2016 Minn. Dist. LEXIS 6, at *33–34 (Minn. Dist. Ct. 2016)

Marvin Lumber & Cedar Co. v. Ppg Indus., 223 F.3d 873, 876 (8th Cir. 2000)	N. States Power Co. v. GE, No. A16-1687, 2017 Minn. App. Unpub. LEXIS 603, at *14–15 (Minn. Ct. App. 2017)
Soo L.R. Co. v. Fruehauf Corp., 547 F.2d 1365, 1373 (8th Cir. 1977)	Durfee v. Rod Baxter Imps., Inc., 262 N.W.2d 349, 356 n.11 (Minn. 1977)
Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978)	Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851, 853 (Mo. 1993)
McCabe v. Macaulay, 551 F. Supp. 2d 771, 785 (N.D. Iowa 2007)	Godfrey v. State, 898 N.W.2d 844, 847, 856 (Iowa 2017)
Wendt v. Lillo, 182 F. Supp. 56, 60 (N.D. Iowa 1960)	Audubon-Exira Ready Mix, Inc. v. Ill. C. G. R. Co., 335 N.W.2d 148, 151 (Iowa 1983)
Weaver v. Nash Int'l, Inc., 562 F. Supp. 860, 863–64 (S.D. Iowa 1983)	C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc., 412 N.W.2d 593, 597 (Iowa 1987)
C.L.D. v. Wal-Mart Stores, Inc., 79 F. Supp. 2d 1080, 1083 (D. Minn. 1999)	Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 557 (Minn. 2003)
Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 987 (D. Minn. 1998)	Geist-Miller v. Mitchell, No. A07-1859, 2008 Minn. App. Unpub. LEXIS 1032, *10–11 (Minn. Ct. App. Aug. 26, 2008)
Bryan Mem'l Hosp. v. Allied Prop. & Cas. Ins. Co., 163 F. Supp. 2d 1059, 1066 (D. Neb. 2001)	Alegent Health v. Am. Family Ins., 656 N.W.2d 906, 911 (Neb. 2003)
O'Daniel v. Stroud NA, 604 F. Supp. 2d 1260, 1262–63 (D.S.D. 2008)	Steineke v. Delzer, 807 N.W.2d 629, 632 (S.D. 2011)

Table 5. Rejected *Erie* Guesses (Case List)

***Erie* Guess**	**Rejected by**
Cont'l Ins. Co. v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 842 F.2d 977, 985 (8th Cir. 1988) (en banc)	Farmland Indus. v. Republic Ins. Co., 941 S.W.2d 505, 510 (Mo. 1997)
Weber v. Am. Family Mut. Ins. Co., 868 F.2d 286, 288 (8th Cir. 1989)	Rodriguez v. Gen. Accident Ins. Co., 808 S.W.2d 379, 383 (Mo. 1991)
Gearhart v. Uniden Corp. of Am., 781 F.2d 147, 149–50 (8th Cir. 1986)	MO. REV. STAT. § 537.765 (1987)
Edens v. Shelter Mut. Ins. Co., 923 F.2d 79, 81 (8th Cir. 1991)	Shelter Mut. Ins. Co. v. Irvin, 831 S.W.2d 135, 137 (Ark. 1992)
Kovarik v. Am. Family Ins. Grp., 108 F.3d 962, 965 (8th Cir. 1997)	Warner & Co. v. Solberg, 634 N.W.2d 65, 71 (N.D. 2001)

Table 6. Eighth Circuit Untouched *Erie* Guesses (Case List)

***Erie* Guess**
Blankenship v. USA Truck, Inc., 601 F.3d 852, 856–57 (8th Cir. 2010)
Babinski v. Am. Family Ins. Grp., 569 F.3d 349 (8th Cir. 2009)
Northland Cas. Co. v. Meeks, 540 F.3d 869, 874–75 (8th Cir. 2008)
Bogan v. GMC, 500 F.3d 828, 830–31 (8th Cir. 2007)
County of Harding v. Frithiof, 483 F.3d 541, 546 n.5 (8th Cir. 2007)
Minn. Supply Co. v. Raymond Corp., 472 F.3d 524, 534 (8th Cir. 2006)
Cont'l Cas. Co. v. Advance Terrazzo & Tile Co., 462 F.3d 1002, 1007–08 (8th Cir. 2006)
McGuire v. Davidson Mfg. Corp., 398 F.3d 1005, 1008–09 (8th Cir. 2005)
Ehlis v. Shire Richwood, Inc., 367 F.3d 1013, 1019 (8th Cir. 2004)

Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 387 F.3d 705, 715 (8th Cir. 2004)
Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 738–39 (8th Cir. 2004)
Sloan v. Motorists Mut. Ins. Co., 368 F.3d 853, 856 (8th Cir. 2004)
Orion Fin. Corp. v. Am. Foods Grp., Inc., 281 F.3d 733, 737, 744 (8th Cir. 2002)
Smith v. Chem. Leaman Tank Lines, Inc., 285 F.3d 750, 754–55 (8th Cir. 2002)
Reliance Nat'l Indem. Co. v. Jennings, 189 F.3d 689, 694 (8th Cir. 1999)
Berg v. Norand Corp., 169 F.3d 1140, 1147 (8th Cir. 1999)
St. Paul Fire & Marine Ins. Co. v. Schrum, 149 F.3d 878, 880 (8th Cir. 1998)
Farr v. Farm Bureau Ins. Co., 61 F.3d 677, 679 (8th Cir. 1995)
Novak v. Navistar Int'l Transp. Corp., 46 F.3d 844, 847 (8th Cir. 1995)
B.B. v. Cont'l Ins. Co., 8 F.3d 1288, 1295 (8th Cir. 1993)
Gilliam v. Roche Biomedical Labs. Inc., 989 F.2d 278, 280 n.3 (8th Cir. 1993)
Wallace v. Dorsey Trailers Se., Inc., 849 F.2d 341, 343–44 (8th Cir. 1988)
Abernathy v. United States, 773 F.2d 184, 187 (8th Cir. 1985)
Hazen v. Pasley, 768 F.2d 226, 228 (8th Cir. 1985)
Tucker v. Paxson Mach. Co., 645 F.2d 620, 624 (8th Cir. 1981)
Garoogian v. Medlock, 592 F.2d 997, 1000 (8th Cir. 1979)
Heeney v. Miner, 421 F.2d 434, 439 (8th Cir. 1970)