

# ***ERIE DENIED: HOW FEDERAL COURTS DECIDE INSURANCE COVERAGE CASES DIFFERENTLY AND WHAT TO DO ABOUT IT***

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*Application of the Erie doctrine requires that federal courts exercising diversity jurisdiction apply substantive state law consistent with the state's highest court as a matter of federalism and to discourage forum shopping. This Article analyzes the reality, however, that federal courts decide important unsettled questions of state law differently than state courts, which undermines these two fundamental underpinnings of the Erie doctrine. Further, this Article demonstrates, through various examples, how these incorrect "Erie guesses" can have profound practical implications in the insurance context due to the standard use of form contracts for drafting insurance policies. As a result, litigants battle fiercely over the judicial forum, as federal courts are perceived, particularly by insurers, to decide procedural and substantive issues of state law differently than state courts.*

*Considering that the abolishment of diversity jurisdiction is highly improbable, this Article argues that federal courts should adopt clear, uniform standards that favor the liberal use of certification of unsettled questions of state law to the state's highest court. A constitutionally consistent approach to certification would promote the principles of federalism that underlie the Erie doctrine, and would render moot the less productive question of why federal courts decide the issues differently.*

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## I. INTRODUCTION

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Federal courts exercising diversity jurisdiction decide cases differently than state courts despite their obligation under the *Erie* doctrine<sup>2</sup> to apply substantive law in the same manner as the state courts. Federal courts periodically make incorrect “*Erie* guesses” of unsettled questions of state law as later determined by the state’s highest court.<sup>3</sup> In many instances, however, the state’s highest court will not have the opportunity to correct the error because the issue never reaches it.

Insurance coverage litigation provides a particularly important subject for studying this phenomenon for several reasons. First, federal courts are routinely called on to decide coverage questions, so there is a large body of case law to examine. Second, supreme courts from different states often reach diametrically different conclusions in deciding important coverage issues based on identical insurance policy language.<sup>4</sup> The

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<sup>2</sup> See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (mandating that a federal court sitting in diversity jurisdiction must apply state substantive law).

<sup>3</sup> The term “*Erie* guess” (referring to a federal court’s deciding of unsettled questions of state law) appears to have originated with the United States Court of Appeals for the Fifth Circuit, which stated in *Grey v. Hayes-Sammons Chemical Co.*, 310 F.2d 291, 295 (5th Cir. 1962), that *Erie* required it to “make an *Erie*, educated guess” as to Mississippi law. “*Erie* guess” is now used widely in the literature.

<sup>4</sup> For example, state courts are about equally divided on whether a construction defect resulting from negligent construction constitutes an “occurrence” under a commercial general liability insurance policy. Compare *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) (defective construction may constitute an “occurrence”), with *Essex Ins. Co. v. Holder*, 261 S.W.3d 456, 460 (Ark. 2008) (defective construction not an “occurrence”). State courts are also divided about equally on whether the “sudden and accidental” pollution exclusion applies to bar coverage for the unintended release of pollutants over a long period of time. Compare *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 688–89 (Ga. 1989) (finding “sudden” does not necessarily mean “abrupt” and is reasonably interpreted to mean “unexpected” and hence holding coverage not excluded for discharge over extended period of time), with *Dutton-Lainson Co. v. Cont’l Ins. Co.*, 716 N.W.2d 87, 97–100 (Neb. 2006) (deciding an event occurring over a period of time is not “sudden” and rejecting *Claussen*). The cases on this contentious issue are collected in *Dutton-Lainson*. Similarly, the courts are sharply split on whether the “absolute pollution exclusion” precludes claims not involving environmental pollutants. Compare *Reed v. Auto-*

potential for such divergence increases the possibility of an erroneous guess when a federal court decides an unsettled coverage question because of the likelihood of conflicting persuasive precedents from other jurisdictions. Third, the consequences of an incorrect *Erie* guess in coverage cases can have profound practical implications beyond the immediate case because insurance policies are typically written on common forms. A mistaken determination in one case may thus be repeated many times over in being applied as persuasive precedent to other claims. This is an important consideration.

This Article will demonstrate that federal courts have often guessed incorrectly in deciding important coverage issues. Moreover, the anecdotal view that insurers favor federal courts over state courts for both procedural and substantive reasons is supported by available survey and statistical evidence. The result is that federal courts often dispense—and are perceived to dispense—a different brand of justice than state courts.

The Article next examines how the practice of deciding unsettled coverage issues undermines the *Erie* doctrine. *Erie* has two fundamental underpinnings: First, the case firmly established that a state's highest court has the right to determine state law.<sup>5</sup> Second, *Erie* was meant to discourage

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Owners Ins. Co., 667 S.E.2d 90, 92 (Ga. 2008) (showing a claim arising from accidental release of carbon monoxide at rental house precluded by absolute pollution exclusion even though it did not involve environmental pollution), *with* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 82 (Ill. 1997) (holding a claim arising from accidental release of carbon monoxide not precluded by absolute pollution exclusion, which must be read in the context of its purpose of limiting coverage for environmental contamination).

<sup>5</sup> See *Erie*, 304 U.S. at 822 (“Except 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 state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”). *Erie* was decided on constitutional grounds, and this aspect of the decision, and others, have provoked a plethora of articles and debate. See, e.g., 17A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 124App.03 (Daniel R. Coquillette et al. eds., 3d ed. 2007) (citing numerous articles). With that said, *Erie*’s reliance on constitutional grounds is explicit and as prominent scholars have noted: “In the end . . . *Erie* must be accepted as a constitutional decision.” 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4505 (2d ed. Supp. 2013). The main volume of Wright, Miller, and Cooper notes *Erie*’s explicit reliance on the Constitution and contains an extensive collection of authorities. See generally Ernest A. Young, *A General Defense of*

forum shopping between the federal and state courts.<sup>6</sup> When federal courts decide unsettled questions of state law, they intrude on the first principle. And when they decide—or even when they are perceived to decide—those questions differently than the state courts, they undermine the second.

Finally, the Article examines possible solutions. Almost all states now have statutes allowing federal appellate courts (and sometimes district courts) to certify unsettled questions of state law to a state’s highest court for decision. Although the United States Supreme Court has enthusiastically endorsed certification on a number of occasions, the use of the certification procedure by the lower federal courts is haphazard. The Supreme Court has never established standards for certification, and, left to their own devices, the federal appellate courts have espoused a crazy quilt of certification standards, ranging from liberally granting certification to using it sparingly. The solution is straight-forward: The federal courts should adopt uniform standards favoring the liberal use of certification of unsettled questions of state law to a state’s highest court.

## II. FEDERAL COURTS MAKE INCORRECT *ERIE* GUESSES

Federal courts have made many incorrect *Erie* guesses, particularly in insurance coverage cases. This is not meant to be a blanket criticism of the federal judiciary, nor is it meant to suggest that federal courts routinely

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*Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17 (2013) (containing a lengthy examination of *Erie*, its defenders and detractors). This Article will not wade into these controversies. The fundamental principle of *Erie*, that a state’s highest court has the final say on issues of state law, is so well-established that it cannot be seriously questioned. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 226 (1991) (“*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary.”).

<sup>6</sup> See *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964) (quoting *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) (“The nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away, should not lead to a substantially different result.”); see also *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“[T]he twin aims of the *Erie* rule: [are the] discouragement of forum-shopping and avoidance of inequitable administration of the laws.”); *Salve Regina*, 499 U.S. at 234 (citing *Hanna*, 380 U.S. at 468) (explaining that the twin aims of *Erie* are avoiding the inequitable administration of justice and forum shopping).

make incorrect determinations of state law. Nevertheless, as some federal judges have candidly acknowledged, mistakes have been made. In the insurance context, the incorrect guess is particularly likely to be amplified due to the use of form contracts, making it more likely for the mistake to be repeated as precedent.

A. GENERALLY

A number of distinguished jurists have recognized that incorrect *Erie* guesses have plagued the federal judiciary for years in many different substantive areas of the law. In 1964, Judge Brown of the United States Court of Appeals for the Fifth Circuit observed that his court's record in predicting state law was terrible, particularly regarding Florida law:

Within the very recent past, both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering. In similar, but subsequent, cases, the Florida Courts have expressly repudiated our holdings in a number of cases. And now that we have this remarkable facility of certification, we have not yet "guessed right" on a single case.<sup>7</sup>

Writing twenty-eight years later, Judge Sloviter of the United States Court of Appeals for the Third Circuit observed that the predictions had not improved:

[T]he state courts have found fault with a not insignificant number of past "*Erie* guesses" made by the Third Circuit and our district courts. Despite our best efforts to predict the future thinking of the state supreme courts within our jurisdiction on the basis of all of the available data, we have guessed wrong on questions of the breadth of arbitration clauses in automobile insurance policies (we predicted they would not extend to disputes over the

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<sup>7</sup> *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486 (5th Cir. 1964) (Brown, J., concurring) (citations omitted); *see also* *Lehman Bros. v. Schein*, 416 U.S. 386, 390 n.6 (1974) (noting former Fifth Circuit's tendency to grant certification to state courts because of errors in predicting state law).

entitlement to coverage, but they do), the availability of loss of consortium damages for unmarried cohabitants (we predicted they would be available, but they are not), the “unreasonably dangerous” standard in products liability cases (we predicted the Restatement would not apply, but it does), and the applicability of the “discovery rule” to wrongful death and survival actions (we predicted it would toll the statute of limitations, but it does not). And this list is by no means exhaustive.

It is not that Third Circuit judges are particularly poor prognosticators. All of the circuits have similar problems in predicting state law accurately.<sup>8</sup>

As shown herein, there is no indication that the federal courts have gotten better in making predictions since Judge Sloviter’s article.

#### B. INSURANCE COVERAGE CASES

The federal courts have made incorrect *Erie* guesses in many insurance coverage cases. Even worse, these mistakes have often been on important recurring issues regarding the interpretation of common insurance policy provisions.

##### 1. Environmental Response Costs as “Damages”

One of the more contentious insurance coverage issues of the 1980s and 1990s was whether environmental response costs such as cleanup costs and monitoring costs imposed under the federal Comprehensive Environmental Response Compensation Liability Act (CERCLA) were covered as “damages” under commercial general liability policies (“CGL”). In *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co.* (“NEPACCO”), the United States Court of Appeals for the Eighth Circuit made an *Erie* guess under Missouri law

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<sup>8</sup> Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679–80 (1992) (footnotes omitted).

and held that response costs were not “damages.”<sup>9</sup> The NEPACCO court reasoned that “damages” should be defined “in the insurance context” rather than “outside the insurance context,” and that in the “insurance context” they were not considered “damages.”<sup>10</sup> Nine years later, in *Farmland Industries, Inc. v. Republic Insurance Co.*, the Supreme Court of Missouri held that response costs were “damages” under commercial general liability and other policies issued by the insurers and thus covered.<sup>11</sup> The *Farmland* court squarely rejected the Eighth Circuit’s guess:

The NEPACCO court misconstrues and circumvents Missouri law. The cases upon which the NEPACCO court relies for the proposition that “damages” distinguishes between claims at law and claims at equity are not persuasive. The cases do not determine the ordinary meaning of “damages” as required by Missouri law. Furthermore, no authority allows this Court to define words “in the insurance context.” To give words in an insurance contract a technical meaning simply by reading them “in the insurance context,” would render meaningless our law’s requirement that words be given their ordinary meaning unless a technical meaning is plainly intended.<sup>12</sup>

Similarly, the Maryland Court of Appeals held that environmental response costs were recoverable “as damages” under a CGL policy in *Bausch & Lomb Inc. v. Utica Mutual Insurance Co.*<sup>13</sup> In *Bausch & Lomb*, the court specifically disavowed an earlier “*Erie* guess” to the contrary by the United States Court of Appeals for the Fourth Circuit in *Maryland Casualty Co. v. Armco, Inc.*<sup>14</sup> The *Bausch & Lomb* court stated:

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<sup>9</sup> See *Cont’l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977, 987 (8th Cir. 1991) (en banc).

<sup>10</sup> *Id.* at 985.

<sup>11</sup> *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 512 (Mo. 1997).

<sup>12</sup> *Id.* at 510.

<sup>13</sup> *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1037 (Md. 1993).

<sup>14</sup> See generally *Md. Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987).

To the extent it suggests that the term “damages” imports a distinctively legal meaning in insurance matters, Armco misperceives the law of Maryland. As discussed earlier, we accord to words their usual and accepted signification. “Damages” in common usage means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity. Absent an express provision in the document itself, insurance policyholders surely do not anticipate that coverage will depend on the mode of relief, i.e. a cash payment rather than an injunction, sought by an injured party. Policyholders will, instead, reasonably infer that the insurer’s pledge to pay damages will apply generally to compensatory outlays of various kinds, including expenditures made to comply with administrative orders or formal injunctions.<sup>15</sup>

In its analysis, the court criticized the Fourth Circuit for overlooking case law establishing that insurance policies must be interpreted in accordance with the expectations of a reasonably prudent layperson.<sup>16</sup>

The *Bausch & Lomb* opinion noted the approach of many federal courts differed from the views of state courts on the recovery of environmental response costs as “damages” under CGL policies:

In confronting the legal issues present in the instant case, the majority of state appellate courts have concluded that the standard insuring language covers environmental response costs. They have construed the term “damages” to reach both monetary compensation to government agencies or aggrieved third parties and the expense of complying with environmental injunctions. The federal courts divide more or less evenly on the question.<sup>17</sup>

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<sup>15</sup> *Bausch & Lomb, Inc.*, 625 A.2d at 1032–33.

<sup>16</sup> *Id.* at 1032 n.6. But despite this aspect of the court’s decision, it ultimately found in favor of the insurer, and found that the absence of third party property damage meant there was no coverage under the facts of the case. *Id.* at 1036.

<sup>17</sup> *Id.* at 1030 (citations omitted).



This observation suggests there have been additional incorrect *Erie* guesses on this recurring issue.

## 2. Negligent Construction as an “Occurrence”

One of the most hotly contested issues in insurance coverage litigation in the past several years is whether negligently performed construction can constitute an “occurrence” under a CGL policy. Federal courts have made incorrect *Erie* guesses on this important issue. In Georgia, the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit issued a series of decisions holding that negligently performed construction could not constitute an occurrence. The first decision was *Owners Insurance Co. v. James*, which held that negligent installation of synthetic stucco could not be an occurrence because “the insurance policies at issue in this case provide coverage for injury resulting from accidental acts, but not for an injury accidentally caused by intentional acts.”<sup>18</sup> This distinction—difficult even to comprehend—was embraced in other federal decisions.<sup>19</sup> One federal judge expressed dismay regarding this approach, although he followed it, noting that the precedent “may create an awkward environment” for parties seeking to insure risks because “almost every conceivable accident involves some intentional action at some point in the chain of causation.”<sup>20</sup>

When the issue reached the Supreme Court of Georgia, the court not only held that negligent construction could be an occurrence, but it also expressly rejected the reasoning of the federal cases: “[W]e reject out of

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<sup>18</sup> See *Owners Ins. Co. v. James*, 295 F. Supp. 2d 1354, 1364 (N.D. Ga. 2003).

<sup>19</sup> *Owners Ins. Co. v. Chadd’s Lake Homeowners Ass’n, Inc.*, No. 1:03-cv-2050-WSD (N.D. Ga. Dec. 28, 2004) (“*Chadd’s Lake I*”); *Owners Ins. Co. v. Chadd’s Lake Homeowners Ass’n, Inc.*, No. 1:005-cv-00475-JOF, 2006 WL 1553888, at \*4 (N.D. Ga. May 30, 2006) (“*Chadd’s Lake II*”); *Travelers Indem. Co. of Conn. v. Douglasville Dev., LLC*, No. 1:07-cv-0410-JOW, 2008 WL 4372004, at \*8–9 (N.D. Ga. Sept. 19, 2008); *Hathaway Dev. Co., Inc. v. Ill. Union Ins. Co.*, No. 07-00118-CV-MHS-1, 2008 WL 1773307, at \*8–9 (11th Cir. Apr. 18, 2008).

<sup>20</sup> *Douglasville Dev., LLC*, 2008 WL 4372004, at \*9 (Forrester, J.). It is somewhat ironic that the court stated that “every conceivable accident involves some intentional action” given that the basic express definition of “occurrence” in a CGL policy is an “accident.”

hand the assertion that the acts . . . could not be deemed an occurrence or accident under the CGL policy because they were performed intentionally. “[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result . . . .”<sup>21</sup>

Similarly, in *Architex Association, Inc. v. Scottsdale Insurance Co.* the Supreme Court of Mississippi also held that negligent construction performed by a subcontractor can constitute an “occurrence” under a CGL policy.<sup>22</sup> The court held that a contrary *Erie* guess by the Fifth Circuit in *ACS Construction Co., Inc. v. CGU*<sup>23</sup> was “inconsistent with Mississippi law.”<sup>24</sup>

### 3. Application of the “Sudden and Accidental” Exception to the Pollution Exclusion in CGL policies

One of the most frequently and persistently litigated insurance coverage issues from the 1980s to today is the interpretation of the pollution exclusion in CGL policies with an exception for releases that are “sudden and accidental.” This version of the pollution exclusion, which was first utilized in 1973, excludes coverage for bodily injury or property damage “arising out of the discharge, dispersal, release or escape of smoke,

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<sup>21</sup> See *Am. Empire Surplus Lines v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) (quoting *Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.2d 1, 16 (Tex. 2007)). See J. Watkins, *American Empire Surplus Lines v. Hathaway Dev. Co.: An Important Occurrence in Georgia Insurance Law*, 17 GA. BAR J. 10 (2011), for a more thorough discussion of this issue.

<sup>22</sup> *Architex Ass’n, Inc. v. Scottsdale Ins. Co.*, 27 So.3d 1148, 1162 (Miss. 2010).

<sup>23</sup> *ACS Constr. Co., Inc. of Miss. V. CGU*, 332 F.3d 885, 888-892 (5th Cir. 2003).

<sup>24</sup> *Architex Ass’n, Inc.*, 27 So.2d at 1162. Similarly, in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, the Supreme Court of Texas decided that negligent construction could constitute an occurrence. *Lamar Homes* was decided on certified question from the United States Court of Appeals for the Fifth Circuit after the federal district court had made an incorrect *Erie* guess. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 335 F. Supp. 2d 754, 758–60 (W.D. Tex. 2004), *vacated*, 501 F.3d 435 (5th Cir. 2007). There was, however, Fifth Circuit authority consistent with the Texas Supreme Court’s holding in *Lamar Homes*. See *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 725 (5th Cir. 1999).

vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water.” However, the policy also contains an exception to the exclusion that potentially restores coverage. Specifically, the exclusion “does not apply if such discharge, dispersal, release or escape is sudden and accidental.”<sup>25</sup>

Considerable litigation has focused on the meaning of the “sudden and accidental” exception that restores coverage. Some courts have held that “sudden and accidental” means that the discharge must have been abrupt, and that “sudden” necessarily implies a temporal requirement. Hence, under this analysis, a discharge or release over a long period of time would be excluded. Other courts, in roughly equal numbers, have held that “sudden” is ambiguous and can reasonably be interpreted to mean “unexpected.” Under this interpretation, liabilities from unexpected long-term discharges or releases are not excluded. Which approach a court takes is significant, because it essentially means the difference between coverage and no coverage for expensive environmental liabilities.

Not surprisingly, federal courts have made incorrect *Erie* guesses on this issue. In *Mesa Oil, Inc. v. Insurance Co. of North America*, the United States Court of Appeals for the Tenth Circuit concluded that a “New Mexico court would likely honor the plain meaning of the word ‘sudden’ and conclude that the term encompasses a temporal component, and thus that pollution must occur quickly or abruptly before the exemption will apply.”<sup>26</sup> In *United Nuclear Corp. v. Allstate Insurance Co.*, the Supreme Court of New Mexico rejected the reasoning of *Mesa Oil*, specifically disagreeing with the Tenth Circuit’s observation that the “trend” was to find a temporal requirement in addition to its analysis of the policy language.<sup>27</sup> Thus, “*Mesa Oil*’s holding that ‘sudden’ clearly means ‘abrupt’ was premised on two assumptions we view to be erroneous . . . .”<sup>28</sup>

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<sup>25</sup> DANIEL P. HALE, CAMBRIDGE PROPERTY AND CASUALTY SPECIAL REPORT: HOW ABSOLUTE IS THE ABSOLUTE POLLUTION EXCLUSION? 2 (2008), available at <http://cambridgeunderwriters.com/wp-content/uploads/2013/05/How-Absolute-is-the-Absolute-Pollution-Exclusion.pdf>. This Article contains a good discussion of the history of the pollution exclusion, including form language prepared by the Insurance Services Office (“ISO”). The provision is also quoted in the cases discussed in this subsection.

<sup>26</sup> *Mesa Oil, Inc. v. Ins. Co. of N. Am.*, 123 F.3d 1333, 1340 (10th Cir. 1997).

<sup>27</sup> *United Nuclear Corp. v. Allstate Ins. Co.*, 285 P.3d 644 (N.M. 2012).

<sup>28</sup> *Id.* at 653.

In *Claussen v. Aetna Casualty & Surety Co.*, the United States District Court for the Southern District of Georgia emphatically rejected the argument that “sudden” was ambiguous: “Only in the minds of hypercreative lawyers could the word ‘sudden’ be stripped of its essential temporal attributes.”<sup>29</sup> While not all courts have agreed in this regard, recent decisions have recognized with increasing frequency that the pollution exclusion does mean just what it says.<sup>30</sup> When the case reached the Supreme Court of Georgia on certified question, however, the result was different, as was the analysis: “But, on reflection one realizes that, even in its popular usage, ‘sudden’ does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations . . . .”<sup>31</sup> Accordingly, the court concluded that environmental liabilities resulting from long term exposures were not excluded.

#### 4. Application of the “Absolute” Pollution Exclusion to Non-Environmental Claims

Because many courts, particularly state courts, rejected the insurance industry’s interpretation of the “sudden and accidental” pollution exclusion, the industry adopted the “absolute” pollution exclusion in 1985. This pollution exclusion, in a typical form, excludes claims for bodily injury or property damage “arising out of actual or alleged or threatened discharge, dispersal, release or escape of pollutants” and defines “pollutants” to be “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, alkalis, chemicals and waste.”<sup>32</sup>

Particularly because the definition of “pollutants” is so broadly stated, insurers have, with some success, argued for the application of the exclusion to bar coverage for risks unrelated to traditional environmental

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<sup>29</sup> *Claussen v. Aetna Cas. & Sur. Co.*, 676 F. Supp. 1571, 1580 (S.D. Ga. 1987), *rev’d*, 888 F.2d 747 (11th Cir. 1989) (per curiam).

<sup>30</sup> *Id.*

<sup>31</sup> *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 688 (Ga. 1989). *Claussen* illustrates the proper use of the certification procedure discussed at length later in this article.

<sup>32</sup> HALE, *supra* note 25, at 10.

pollution, such as, for example, injuries or deaths in homes or other buildings resulting from the release of carbon monoxide from improperly maintained furnaces. Some courts, however, have read the exclusion narrowly and confined its application to claims involving environmental liabilities. Again, some federal courts have made incorrect *Erie* guesses on this important and contentious issue.

In *Essex Insurance Co. v. Tri-Town Corp.*, the United States District Court for the District of Massachusetts predicted that Massachusetts would find the absolute pollution exclusion unambiguous, and held that the exclusion barred coverage for underlying claims for personal injury resulting from the discharge of carbon monoxide from a malfunctioning Zamboni machine at a hockey game.<sup>33</sup> Three years later, in *Western Alliance Insurance Co. v. Gill*, the Supreme Judicial Court of Massachusetts reached the opposite conclusion and held that the absolute pollution exclusion in a policy did not bar coverage for claims for bodily injury sustained due to exposure to carbon monoxide while dining at a restaurant because a reasonable insured would not anticipate exclusion barred claims for non-environmental pollution.<sup>34</sup>

This pattern repeated itself in Ohio. In *Longaberger Co. v. U.S. Fidelity & Guarantee Co.*, the United States District Court for the Southern District of Ohio, in the absence of Ohio Supreme Court authority, held that the absolute pollution exclusion would bar coverage for claims for bodily injury resulting from the discharge of carbon monoxide.<sup>35</sup> Three years later, in *Andersen v. Highland House Co.*, the Ohio Supreme Court reached the opposite conclusion, and held that the exclusion did not bar coverage for death and bodily injury claims caused by the release of carbon monoxide.<sup>36</sup>

## 5. Other Recent Examples

There are other examples of federal courts making *Erie* guesses regarding insurance issues, many of broad potential importance, that were later disavowed by the state's highest court. For example, the Mississippi Supreme Court rejected the Fifth Circuit's interpretation and application of

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<sup>33</sup> *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38, 40–41 (D. Mass. 1994).

<sup>34</sup> *W. Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 1000–01 (Mass. 1997).

<sup>35</sup> *Longaberger Co. v. U.S. Fid. & Guar. Co.*, 31 F. Supp. 2d 595, 604 (S.D. Ohio 1998), *aff'd*, 201 F.3d 441 (6th Cir. 1999).

<sup>36</sup> *Anderson v. Highland House Co.*, 757 N.E.2d 329, 331 (Ohio 2001).

an “anticoncurrent condition clause” that, as applied by the Fifth Circuit, precluded coverage for wind damage as well as water damage in Hurricane Katrina cases.<sup>37</sup>

In other recent cases, state supreme courts have rejected federal district court determinations in coverage cases upon certified question from the federal Court of Appeals. Thus, the Court of Appeals of New York held, contrary to the federal district court, that a contractual limitation period in a fire insurance policy requiring an insured to bring suit within two years from the date of “direct physical loss or damage” to recover replacement cost was unreasonable and unenforceable where the damaged property could not reasonably be replaced in that period.<sup>38</sup> The Supreme Court of Florida held, contrary to the federal district court, that a policy’s advertising injury coverage applied to violations of Telephone Consumer Protection Act.<sup>39</sup> There are other examples of this trend.<sup>40</sup> Although the incorrect guesses were thus corrected through the certification process—as this Article argues should be standard practice—the cases nevertheless illustrate that federal courts continue to make incorrect determinations of state law in coverage litigation.

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<sup>37</sup> *Corban v. United Servs. Auto. Ass’n*, 20 So.2d 601, 616–18 (Miss. 2009).

<sup>38</sup> *Exec. Plaza, LLC v. Peerless Ins. Co.*, 5 N.E.3d 989, 992 (N.Y. 2014).

<sup>39</sup> *Penzer v. Transp. Ins. Co.*, 29 So.3d 1000, 1008 (Fla. 2010); *see* 47 U.S.C. § 227 (2000).

<sup>40</sup> *E.g.*, *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 38 (Tex. 2014) (holding, contrary to federal district court and initial panel determination of the Fifth Circuit, that general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not “assume liability” for damages so as to trigger the contractual liability exclusion in CGL policy); *Fin. Indus. Corp. v. XL Specialty Ins. Co.*, 285 S.W.3d 877, 879 (Tex. 2009) (holding, contrary to federal district court, that insurer must show prejudice to deny payment on a claims made policy based on late notice given within the policy period); *Cornhusker Cas. Ins. Co. v. Kachman*, 198 P.3d 505, 509–10 (Wash. 2008) (en banc) (holding, contrary to federal district court, that notice of cancellation sent by certified mail that was never received did not satisfy state statutory requirements for cancellation).

### III. PERCEIVED AND REAL BENEFITS OF FEDERAL COURTS TO INSURERS

The cases in the preceding section suggest that in many instances a federal venue favored the insurer. The substantive results support my own experience that insurers strongly, as a general rule, favor federal court.<sup>41</sup> This section will demonstrate that the available survey and statistical evidence also supports this view.

When an insurance company is sued in state court, it has a strong tendency to invoke removal jurisdiction to move the case to federal court, if possible. The use of the removal process is significant. Approximately eleven to twelve percent of private litigant cases arrive in federal court by removal.<sup>42</sup> Between 2007 and 2011, over 30,000 cases were removed annually from state court to federal court, with 34,190 cases removed in 2011.<sup>43</sup> But, the raw numbers may not tell the full story. Because of the \$75,000 jurisdictional threshold for removal,<sup>44</sup> it is likely that the most significant cases—at least from a monetary point of view—end up in federal court.

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<sup>41</sup> Some quarters of academia reject such experiential evidence. That said, the views of experienced practitioners should not be dismissed. In the words of baseball great Yogi Berra (“Berra”): “In theory, there is no difference between theory and practice. In practice, there is.” *Yogi Berra Quotes*, BRAINYQUOTE <http://www.brainyquote.com/quotes/quotes/y/yogiberra141506.html> (last visited Feb. 3, 2015). Berra also said: “You can observe a lot by just watching.” *Yogi Berra Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/y/yogiberra125285.html> (last visited Feb. 11, 2015).

<sup>42</sup> Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 388 (1992).

<sup>43</sup> DIR. OF THE ADMIN. OFF. OF U.S. COURTS, 2013 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table C-8 (2013) [hereinafter “Director’s Report”], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C08Sep13.pdf> (reporting the number of cases removed for 2012 and 2013 decreased slightly but remained above 32,000).

<sup>44</sup> See 28 U.S.C. § 1441 (2012) (providing that actions which could have been brought in the original jurisdiction of federal courts are generally removable); see also 28 U.S.C. § 1332(a) (2012) (matters between citizens of different states “where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs” are within the original jurisdiction of the federal district courts).

## A. PROCEDURAL PREFERENCE FOR FEDERAL COURT

A detailed attorney survey by Neal Miller regarding the use of removal jurisdiction revealed that defense counsel, including a large proportion representing insurance companies, “almost uniformly favored federal court judges (85.6%).”<sup>45</sup> Miller’s findings regarding defense counsel generally apply to insurers. An insurer may file a declaratory judgment action and thus act as the plaintiff. However, the surveys in the Miller study revealed that only 1.6% of plaintiff attorneys represented insurance companies, while 30.7% of defense attorney’s represented insurance companies.<sup>46</sup> Accordingly, the survey results attributed to defense counsel would overwhelmingly include the views of those representing insurers. Forty-seven-and-nine-tenths percent (47.9%) of defense attorneys reported that the availability of summary judgment rulings was an important factor in choosing a federal forum.<sup>47</sup> Further, when adjusted by experience in federal court, the percentage became extremely significant: “Among those defense attorneys who reported that over 50% of their practice occurred in federal court, two-thirds (66.6%) said that federal court summary judgment rules were a factor in forum selection, and 32.8% cited it as a ‘very strong’ reason for removal.”<sup>48</sup>

Although the Miller study was published in 1992, there is reason to believe that defense counsel’s—and hence insurer counsel’s—preference for federal court has increased in the intervening twenty-three years. In 1993, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which imposed new requirements limiting the introduction of expert testimony in federal court.<sup>49</sup> Further, the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*<sup>50</sup> and *Ashcroft v. Iqbal*<sup>51</sup> established more stringent pleading requirements, thus permitting

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<sup>45</sup> Miller, *supra* note 42, at 414.

<sup>46</sup> *Id.* at 400 ex. 2.

<sup>47</sup> *Id.* at 418.

<sup>48</sup> *Id.* at 419.

<sup>49</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *see also* *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 158 (1999).

<sup>50</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

<sup>51</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).



the dismissal of cases filed in federal court before the discovery process.<sup>52</sup> These developments all favor the defense and provide additional procedural tools that did not exist at the time of the Miller survey.

Federal court statistics from the Administrative Office of the United States Courts back up the perceptions that defense counsel favor federal court. Statistics further suggest that the use of summary adjudication in federal court is substantial and increasing. Statistics from 1997 through 2012 regarding civil insurance cases in federal court consistently indicate that approximately 73% to 79% of cases terminated by court action were terminated before pretrial.<sup>53</sup> Further, the percentage of cases actually decided by trial was both minuscule and declining. In 1997, 3.7% of insurance cases were decided by trial (jury and non-jury). The percentage resolved by trial stayed above 3% until 2002, when it dropped to 2.5%. The percentage stayed above 2% but below 3% until 2007, when it dropped to 1.6%.<sup>54</sup> Since 2007, the percentage of insurance cases decided by trial has stayed below 2%, ranging from 1.2% to 1.8%.<sup>55</sup>

These percentage differences may seem insignificant, but they represent a substantial decline in the number of insurance cases proceeding to trial in the federal courts. The raw numbers for several years between 1997 and 2013 tell the story.

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<sup>52</sup> The complaint must include sufficient factual allegations “to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

<sup>53</sup> Director’s Report, *supra* note 43, at Table C–4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

**Insurance Cases Resolved by Jury Trial in Federal Court**<sup>56</sup>

| <b><u>Year</u></b> | <b><u>Non-Jury Trials</u></b> | <b><u>Jury Trials</u></b> | <b><u>Total Trials</u></b> |
|--------------------|-------------------------------|---------------------------|----------------------------|
| 1997               | 83                            | 161                       | 244                        |
| 2003               | 72                            | 104                       | 176                        |
| 2007               | 47                            | 97                        | 144                        |
| 2011               | 37                            | 94                        | 131                        |
| 2012               | 34                            | 95                        | 129                        |
| 2013               | 42                            | 90                        | 132                        |

Therefore, there is simply no doubt that the federal courts are very likely to dispose of insurance cases before trial, and the chances of a case going to trial is exceedingly low. From 2011 to 2013, approximately 130 insurance cases per year went to trial in the entire federal court system, a very low number.

B. SUBSTANTIVE PREFERENCE FOR FEDERAL COURT

Insurance companies prefer federal court for substantive reasons as well. Fifty-three-and-one-half percent (53.5%) of defense counsel responding to the Miller survey “cited the likelihood of a more favorable federal court legal ruling.”<sup>57</sup> Although the substantive differences were more difficult to specify than the procedural advantages of federal court, defense counsel were clear in their perception: “The research findings indicate that some areas of state law are not consistently followed by

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<sup>56</sup> Director’s Report, *supra*, note 43, at Table C–4; DIR. OF THE ADMIN. OFF. OF U.S. COURTS, 2012 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table C–4 (2012); DIR. OF THE ADMIN. OFF. OF U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table C–4 (2011); DIR. OF THE ADMIN. OFF. OF U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS C–4 (2007); DIR. OF THE ADMIN. OFF. OF U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table C–4 (2003); DIR. OF THE ADMIN. OFF. OF U.S. COURTS, 1997 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table C–4 (1997).

<sup>57</sup> Miller, *supra* note 42, at 417.

federal court rulings.”<sup>58</sup> Survey responses indicated that federal courts may make their own predictions of state law and ignore precedent from intermediate state appellate courts.<sup>59</sup> The survey concluded that although no conclusions about the pervasiveness of the problem could be reached, “the large proportion of attorneys in the study who anticipated different rulings of law in state court points to the need for more definitive study.”<sup>60</sup>

Thus, the reason why plaintiffs and defendants battle so fiercely over a state or federal forum is simple: despite *Erie*, federal courts are perceived, particularly by defense counsel, to decide procedural and substantive issues of state law differently than state courts. Statistics validate the perception that federal judges are very likely to dispose of cases without a trial. The risk of proceeding to trial for an insurer in federal court, which has been small for years, is now almost non-existent.

#### IV. CONSEQUENCES

The substantive misapplication of state law has serious consequences that directly undermine the fundamental principle of federalism underlying *Erie*, namely, the state courts’ ability to decide and shape state law. Moreover, perceived differences between the way federal and state courts decide state law encourage insurers and other parties to seek a federal forum, further undermining *Erie*’s policy against forum shopping.

##### A. DEPRIVATION OF SUBSTANTIVE RIGHTS

An incorrect *Erie* guess deprives a litigant of substantive rights. In the insurance context, the consequences are particularly obvious. An insured denied coverage based on an incorrect interpretation of state law loses, in a first party property case, the right to recover for a loss. In a liability case, the consequences may be even more severe, because the insured loses both the benefit of an insurer-provided defense as well as indemnity for any settlement or judgment. Further, insurance may provide the only means of recovery for the plaintiff.

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<sup>58</sup> *Id.* at 437.

<sup>59</sup> *Id.* at 440.

<sup>60</sup> *Id.*

Further, the loss is generally without any possible recourse. As observed by Judge Calabresi of the United States Court of Appeals for the Second Circuit: “In such a situation, the party who lost in federal court has been unjustly denied her state-law rights, and often has been left with no means of effective redress.”<sup>61</sup> In discussing a case in which a litigant was deprived of ownership of a valuable painting because of an incorrect *Erie* guess, Judge Calabresi noted that the plaintiff was deprived of her property “not because of any decision by the highest court of New York, but rather because of the will of the federal courts.”<sup>62</sup>

The ramifications of an incorrect *Erie* guess, particularly in insurance coverage cases, often extend far beyond the lack of redress in a single case. Because the ruling becomes persuasive precedent, it is likely to be applied multiple times until the state’s highest court issues a contrary ruling. Accordingly, a single mistake may be repeated again and again. Because insurance policies are typically written on common policy forms, the potential for repeated errors in coverage litigation is acute.<sup>63</sup>

#### B. ENCOURAGING FORUM SHOPPING

When a federal court decides an unsettled question of state law, it potentially undermines principles of federalism. This includes circumventing the right of a state’s highest court to determine questions of state law. In the context of discussing a hypothetical product liability case, Judge Calabresi observed:

If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court; similarly any departure in the manufacturer’s favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop

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<sup>61</sup> *McCarthy v. Olin Corp.*, 119 F.3d 148, 159 (2d Cir. 1997) (Calabresi, J., dissenting). Judge Calabresi’s dissent provides rare analysis and commentary from a member of the federal judiciary on this important subject.

<sup>62</sup> *Id.* (Calabresi, J., dissenting).

<sup>63</sup> As noted previously, this is exactly what happened in the United States District Court for the Northern District of Georgia and the Eleventh Circuit regarding coverage for construction defects. *See supra* notes 19–21 and accompanying text.

or restate the principles that it believes should govern the category of cases.<sup>64</sup>

This is no small matter, particularly in light of the discussion above showing that federal courts routinely decide unsettled questions of state law, and often decide them incorrectly.

Further, contrary to *Erie's* intent, federal court decisions on unsettled questions of state law encourage forum shopping. As noted in the quotation from Judge Calabresi above, it really does not matter which party the decision favors, as one side or the other will be encouraged to forum shop in federal court.

For insurance coverage cases, experience and statistics show, as discussed above, that the insured will usually wish to proceed in state court and the insurer will normally wish to proceed in federal court. Further, as a general proposition and as demonstrated above, federal judges have always been likely, and are becoming even more likely, to rule on motions to dismiss or for summary judgment, resulting in a minuscule chance for an insurance coverage case to proceed to trial.

Accordingly, when there is an insurance coverage dispute, and there is diversity jurisdiction, the insurer may well race to file first in federal court. If the insured files first in state court, the insurer will often still have the option to remove the case to federal court. To be sure, there may be jurisdictions in which the opposite situation prevails, and the insured would prefer to proceed in federal court and the insurer in state court. In such instances, the insured can use the same procedural techniques to maneuver the case to federal court.<sup>65</sup> But recognizing this possibility merely highlights the fundamental point: In all cases in which diversity exists and there is an unsettled question of state law, one party is likely to try to maneuver the case to federal court to achieve a different substantive result.

## V. POSSIBLE REMEDIES

### A. ELIMINATING DIVERSITY JURISDICTION

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<sup>64</sup> *McCarthy*, 119 F.3d at 158.

<sup>65</sup> 28 U.S.C. § 1441 (2012).

One obvious solution would simply be to eliminate diversity jurisdiction. Diversity jurisdiction is controversial, and there have long been calls to eliminate it. In the past several decades, serious legislative efforts were made to abolish diversity jurisdiction.<sup>66</sup> Most notably, in 1990, a specially appointed federal study committee recommended repealing diversity jurisdiction in all but a limited number of situations on the basis that no type of jurisdiction had a “weaker claim” on federal judicial resources, and because eliminating diversity jurisdiction would reduce the caseload of the federal courts.<sup>67</sup> Predictably, the committee’s recommendation met with substantial resistance, including among the bar.<sup>68</sup>

Efforts to limit or curtail diversity jurisdiction have failed, and, as Professor Underwood put it, “Congress chose a different path.”<sup>69</sup> Most recently, Congress expanded the scope of federal jurisdiction through the adoption of the Class Action Fairness Act of 2005 (“CAFA”),<sup>70</sup> which expands federal court jurisdiction to cover certain class action lawsuits in the absence of complete diversity.<sup>71</sup>

Regardless of the recent change in political fortunes, the elimination of diversity jurisdiction would seem, under almost any circumstance, to be highly improbable. Any such effort would be strongly opposed by insurers, big business, and the defense bar. In short, little basis

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<sup>66</sup> The House of Representatives voted twice to abolish diversity jurisdiction in the late 1970s, even though it never reached the Senate. James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 199 (2007) [hereinafter “Underwood”]. Underwood’s article provides a comprehensive and entertaining recitation of the ebb and flow of support or diversity jurisdiction. See also L. Lynn Hogue, *Law in a Parallel Universe: Erie’s Betrayal, Diversity Jurisdiction, Georgia Conflicts of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform*, 11 GA. ST. U. L. REV. 531, 533–35 (1995).

<sup>67</sup> H.R. REP. NO. 5381, at 63 (1990).

<sup>68</sup> See *Report of the N.Y. Cnty. Lawyers’ Ass’n Comm. on the Fed. Courts on the Recommendation of the Fed. Courts Study Comm. to Abolish Diversity Jurisdiction Adopted by the Bd. of Dirs. of the N.Y. Cnty. Lawyers’ Ass’n*, 158 F.R.D. 185 (1995) [hereinafter “New York Committee Report”]. The New York Committee Report contains a measured but very detailed criticism of the Committee Report, including a survey of federal judges that casts doubt upon the Committee Report’s underlying assumptions.

<sup>69</sup> Underwood, *supra* note 66, at 201.

<sup>70</sup> 28 U.S.C. §§ 1332(d), 1711–1714 (2012).

<sup>71</sup> 28 U.S.C. § 1332(d).

exists for challenging Professor Baker's observation that "no one should expect it to be abolished in an existing lifetime plus twenty-one years."<sup>72</sup>

Further, the expansion of federal court jurisdiction suggests that the federal courts will necessarily be facing an even greater number of state law questions. Thus, the question remains how to achieve the goals and requirements of *Erie*. Fortunately, a ready solution exists, although not in the way it is currently utilized.

#### B. USE OF AVAILABLE CERTIFICATION PROCEDURES

When a federal court in a diversity case faces an uncertain question of state law, it currently has three possible choices. First, the court can predict how the state's highest court would rule, often leading to unsatisfactory results as discussed above. Second, the court can abstain from deciding the question under the *Pullman* abstention doctrine, which is seldom applicable.<sup>73</sup> Third, if available, the court can certify the question to the state's highest court under statutory certification procedures. Almost all states now have certification statutes, so the opportunity to certify exists in most cases.<sup>74</sup>

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<sup>72</sup> THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 190 (1994).

<sup>73</sup> See generally *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). The *Pullman* abstention doctrine generally provides that, "if [there are] unsettled questions of state law in a case that may make it unnecessary to decide a federal constitutional question, the federal court should abstain until the state court has resolved the state questions." 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 295 (3d ed. 2007).

<sup>74</sup> Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to Federal Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 n.13 (2003) (compiling statutes); see also JONA GOLDSCHMIDT, *CERTIFICATION OF QUESTIONS OF STATE LAW* 1, 15–17 (American Judicature Society ed., 1995) (listing 43 states as of 1995). Cochran lists Arkansas, North Carolina, and New Jersey as not having certification procedures. However, New Jersey adopted a statute permitting certification effective in 2000, N.J. STAT. ANN. § 2:12A-1 (West 1999), and Arkansas adopted certification in 2002, see Ark. Sup. Ct. R. 6-8; *Longview Prod. Co. v. Dubberly*, 352 Ark. 207, 208 (2003) ("Rule 6–8 was adopted in 2002 pursuant to Section 2(D)(3) of Amendment 80 to the Arkansas Constitution: 'The Supreme Court shall have original jurisdiction to answer questions of state law certified by a court of the United States which may be exercised pursuant to Supreme Court rule'"). It appears that North Carolina is the only state that has not adopted a certification

Florida was the first state to adopt a certification statute in 1945. Over fifty years ago in *Clay v. Sun Insurance Office Ltd.*, Justice Frankfurter lauded the “rare foresight” of the Florida legislature by providing a mechanism for “authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.”<sup>75</sup>

Since *Clay*, the Supreme Court has enthusiastically embraced the use of the certification procedure in a number of cases.<sup>76</sup> The Court has stressed: “Through certification of novel or unsettled questions of state law for authoritative answers by a state’s highest court, a federal court may save ‘time, energy, and resources and hel[p] build a cooperative judicial federalism.’”<sup>77</sup> The Court has observed that a “question of state law usually can be resolved definitively . . . if a certification procedure is available and is successfully utilized.”<sup>78</sup>

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provision. Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 71 (2008) (“North Carolina remains the only state never to have enacted such a procedure, putting it behind the District of Columbia, Puerto Rico, the Northern Mariana Islands, and Guam.”) (footnotes omitted); see Shakira Robinson, *Right, But for the Wrong Reasons: How A Certified Question to the Supreme Court of North Carolina Could Have Alleviated Conflicting Views and Brought Clarity to North Carolina State Law*, 34 N.C. CENT. L. REV. 230, 230 (2012) (“Unconstitutional or dogmatic, North Carolina is the only state that has never enacted a procedure by which a federal court could certify a question of state law to its state Supreme Court”). As noted by Eisenberg, although Missouri has adopted a statute permitting certification, the Missouri Supreme Court has refused to accept certified questions on the ground they are not within its jurisdiction under the Missouri Constitution. See *Grantham v. Missouri Dep’t of Corr.*, No. 72576, 1990 WL 602159, at \*1 (Mo. July 13, 1990).

<sup>75</sup> *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960).

<sup>76</sup> *E.g.*, *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 398 (1988) (certifying questions to Supreme Court of Virginia); *Lehman Bros. v. Schein*, 416 U.S. 386, 395 (1974) (remanding for consideration of certification to Supreme Court of Florida).

<sup>77</sup> *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros.*, 416 U.S. at 391).

<sup>78</sup> *Salve Regina Coll. v. Russell*, 499 U.S. 225, 237 n.4 (1991).



C. THE PROBLEM: LACK OF UNIFORM APPLICATION OF CERTIFICATION

Although the Supreme Court has endorsed the use of certification procedures when available, it has never established definitive standards for certification. Rather, the Court has stated that the decision to certify is one of discretion, and “not obligatory.”<sup>79</sup> However, the Court has not provided guidance to the federal courts on the factors to be considered in exercising their discretion. As one District Court judge observed: “The Supreme Court has never indicated the necessary conditions before a court can resort to certification.”<sup>80</sup>

In the absence of definitive guidance from the Supreme Court, there remains considerable conflict among the Circuits in the approach to be taken in certifying questions for review. Some courts take a hospitable view, noting the Supreme Court’s enthusiastic support for certification.<sup>81</sup> For example among this group, the courts certify simply when “[t]here is no controlling precedent to be found in the decisions.”<sup>82</sup> The Eighth Circuit certified “because of the unsettled nature of Nebraska law on this issue and because a determination of this issue could be dispositive of this case.”<sup>83</sup>

Conversely, other courts take a very restrictive view. The Second Circuit resorts to certification “sparingly” on the theory that its job is to predict how the Court of Appeals of New York would rule.<sup>84</sup> Another court adopted a restrictive six-part test.<sup>85</sup> Some courts seem irritated with the very suggestion of certification, particularly after they have decided an

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<sup>79</sup> *Lehman Bros.*, 416 U.S. at 390–391 (certification “not obligatory” and matter of discretion, but helps build a “cooperative judicial federalism”).

<sup>80</sup> *Fiat Motors of N. Am. Inc. v. Mayor of Wilmington*, 619 F. Supp. 29, 33 (D.C. Del. 1985).

<sup>81</sup> *E.g.*, *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 903 F.2d 1014 (5th Cir. 1990).

<sup>82</sup> *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285, 1287 (D.C. Cir. 1997).

<sup>83</sup> *Hatfield v. Bishop Clarkson Mem’l Hosp.*, 701 F.2d 1266, 1267 (8th Cir. 1983).

<sup>84</sup> *E.g.*, *Runner v. N.Y. Stock Exch., Inc.*, 568 F.3d 383, 388 (2d Cir. 2009).

<sup>85</sup> *Zimmer v. Travelers Ins. Co.*, 454 F. Supp. 2d 839, 861 (S.D. Iowa 2006).

unsettled question of state law.<sup>86</sup> Other courts appear to have charted a middle ground: “While we apply judgment and restraint before certifying, however, we will nonetheless employ the device in circumstances where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance.”<sup>87</sup>

Notably, some courts have been inconsistent in considering certification in their own rulings. For example, the Eleventh Circuit has stated both that (1) a question should be certified if there is “any doubt” as to state law on an issue<sup>88</sup> and (2) that it will “exercise discretion and restraint in deciding to certify questions to state courts.”<sup>89</sup> The Eleventh Circuit recently recited the “any doubt” test, but also inconsistently stated that certification decisions must be made with “restraint.”<sup>90</sup> Even more recently, the Eleventh Circuit appeared to abandon the “any doubt” test, noting that certification should be used with “restraint,” but declared that

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<sup>86</sup> One court has remarked:

Certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law. Late requests for certification are rarely granted by this court and are generally disapproved, particularly when the district court has already ruled. Filing a motion to certify after an adverse ruling, as was done in this case, is not favored.

*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). The approach advocated by *Potter* may be questioned, as it essentially asks advocates to assume the federal court will make a mistake and to request certification before ruling. An advocate may, with some understanding, be reluctant to make such a suggestion for strategic reasons. In any event, a refusal to grant a legitimate request for certification based solely on timing seems to undermine the basic reason for the process: a correct determination of state law by the court authorized to have the final and definitive word.

<sup>87</sup> *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007).

<sup>88</sup> *Colonial Props., Inc. v. Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th Cir. 1996).

<sup>89</sup> *Escareno v. Noltina Crucible & Refractory Corp.*, 139 F.3d 1456, 1461 (11th Cir. 1998).

<sup>90</sup> *Royal Capital Dev., LLC v. Md. Cas. Co.*, 659 F.3d 1050, 1054–1055 (11th Cir. 2011).

“truly debatable” issues of state law should be certified.<sup>91</sup> It is thus impossible to ascertain any clear standard for certification in this court.

#### D. THE NEED FOR CLEAR STANDARDS FOR CERTIFICATION

Use of the certification process clearly fosters the policies underlying *Erie*, and promotes, as the Supreme Court has said, a “cooperative judicial federalism.”<sup>92</sup> As currently practiced, however, certification procedures often serve only to add a further level of uncertainty in deciding unsettled questions of state law. Although some use of certification is better than none, the reality is that the availability of certification is dependent upon the court in which the case is pending, and, in many cases, seems to turn on nothing more than how the judicial winds are blowing on a particular day.

The result is that, while some litigants receive the constitutional benefits of certification, others do not. Equally important, a state’s highest court is often deprived of its constitutional prerogative to determine the law of the state. Fortunately, the status quo need not continue. The best solution would be a definitive ruling from the Supreme Court, establishing liberal and consistent standards for certification. Even in the absence of Supreme Court guidance, however, lower federal courts can and should adopt consistent principles designed to foster the use of available certification procedures consistent with the constitutional mandate of *Erie*.

#### E. TOWARD A CONSTITUTIONALLY CONSISTENT APPROACH TO CERTIFICATION

A constitutionally consistent approach toward certification should be far more uniform than is currently practiced, but will not be completely uniform. The guiding principle of federalism is that certification must be consistent with the requirements of the state certification statute. Obviously, if a state has mandated certain requirements, they must be followed, and state certification procedures, although generally consistent in their broad outline, vary somewhat. Some procedures permit only the United States Supreme Court and the United States Courts of Appeal to

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<sup>91</sup> Ruderman *ex rel.* Schwartz v. Wash. Nat. Ins. Corp., 671 F.3d 1208, 1212 (11th Cir. 2012).

<sup>92</sup> *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239-240 (1991).

certify. Others permit United States District Courts to certify as well. Some statutes establish additional requirements.<sup>93</sup> Whatever state statutory requirements exist, the first principle is that they should be satisfied before a question is certified. That said, states that do not currently permit District Courts to certify should strongly consider amending their statutes. Certification by a District Court permits the parties to obtain a definitive determination of unsettled law early in the litigation, thus promoting efficiency.

Second, subject to state requirements, there should be a liberal presumption in favor of certifying unsettled questions of state law. This approach is consistent with the Supreme Court's oft-stated enthusiasm for certification, not to mention *Erie*'s core principle of federalism. It is also hardly radical. As noted above, some federal courts have followed this approach. Further, this approach is also consistent with the states' own endorsement of the certification mechanism as demonstrated by the nearly unanimous adoption of the process. In the insurance context, certification has been used—although haphazardly and pursuant to different standards—to resolve many unsettled state insurance questions.<sup>94</sup>

Third, the certifying court should consider whether a particular area of law, or a particular question, has led other courts to reach differing conclusions. As discussed above, the insurance coverage cases provide a particular example of such an area. If so, this factor will further support certification.

Fourth, the certifying court should make a clear determination that the controlling legal question has not been decided by the state's highest court, and it should clearly articulate the controlling question of state law. In most instances, this can and will be done without difficulty. In other cases, however, the case may turn not on a disputed or undecided substantive legal principle but upon the admissibility of evidence or other non-substantive issues. In such instances, certification might not be appropriate.

Fifth, the certifying court may wish to consider whether the legal principle has potential significance beyond the current case. In most instances, it is likely that there will be future ramifications. This is particularly true in the area of insurance coverage, because policies are written on standardized forms, virtually assuring that the same question

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<sup>93</sup> GOLDSCHMIDT, *supra* note 74, at 15–17.

<sup>94</sup> *See supra* notes 41–43 and accompanying text.

will arise in multiple cases. Nevertheless, there may be cases that are so unique that certification would lend little to the development of state law, and, in such circumstances, certification may be declined. Even then, however, consideration of the substantive rights of the litigants may favor certification.<sup>95</sup>

This approach will foster the principles of federalism that underlie *Erie*. It should decrease incentives for forum shopping between state and federal courts in the same jurisdiction. It will help prevent litigants from being deprived of substantive rights under state law through incorrect *Erie* guesses. Perhaps most importantly, it will ensure that the court entitled to make the final determination of state law gets a fair chance to make it.

It may be questioned whether these principles should apply only to insurance coverage litigation or generally. My view is that they should apply generally, because the policies underlying *Erie* apply generally. That said, the principles are particularly applicable to insurance coverage litigation, and if consistently applied, almost all unsettled insurance coverage issues would qualify for certification.

#### VI. A POSTSCRIPT: “WHY” REALLY DOES NOT MATTER

An early draft of this Article attempted to explain why federal courts often seem to decide insurance coverage cases differently than state courts; specifically, whether there is some identifiable difference in procedural approach or substantive doctrine that explained the divergence. At the end of the day, it was simply not possible to determine any definitive reasons why federal courts often decide insurance coverage cases differently from state courts, even though the evidence strongly suggests that they do.

One thing, however, is clear: different states often reach diametrically differing conclusions regarding the meaning and application of insurance policy forms.<sup>96</sup> Accordingly, when a federal court faces an unsettled question of state insurance law, there may well be conflicting precedent from other jurisdictions based on fundamentally different

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<sup>95</sup> Of course, there may be other unique factors militating in favor of or against certification, and the law should always allow for considerations applicable to the case under consideration. With that said, the consideration of unique factors should not undermine the general presumption in favor of certification.

<sup>96</sup> See *supra* note 4 and accompanying text.

approaches. Thus, when a federal court chooses one line of precedent in the face of substantial precedent to the contrary, it increases the probability of an incorrect *Erie* guess, because the state's highest court might well choose the reasoning in the other cases.

The fact that a federal court may choose to follow one line of conflicting precedent over another on an unsettled question is not, in the abstract, "wrong," *if* the federal court were left to its own devices. The problem, however, is that *Erie* does not leave federal courts to their own devices, but rather directs them to follow state law, even if they believe another approach would be preferable. The state's highest court has the last word, or at any rate, is supposed to have it.

Accordingly, rather than focusing on how they would decide the question, the federal courts should instead focus on using certification procedures to allow the state's highest court to exercise its constitutional prerogative to make the decision. Such an approach fosters the "cooperative judicial federalism"<sup>97</sup> on which *Erie* is based, and renders moot the question of why federal courts would decide the issue differently.

## VII. CONCLUSION

Although *Erie* has been the law of the land for over seventy years, its constitutional underpinnings are often forgotten. The fundamental principle underlying *Erie* is that the highest court of a state must have the final say in interpreting and determining state law. In spite of this principle, federal courts routinely make guesses on state law insurance questions, and frequently come up with the wrong answers. Incorrect *Erie* guesses not only affect the substantive rights of litigants, they undermine the constitutionally mandated prerogative of state courts to determine state law.

Certification statutes provide a readily available remedy in virtually every state. Although certification has been widely praised by the United States Supreme Court, its use in practice varies greatly, with some courts liberally granting certification, and others only in exceptional circumstances. As a result, the best available mechanism for implementing *Erie*'s principles has been unevenly applied. The approach advocated in this Article will bring greater uniformity and greater availability to certification procedures, and will also help eliminate forum shopping, with

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<sup>97</sup> *Lehman Bros. v. Schein*, 416 U.S. 386, 390–391 (1974).

the ultimate result being that the principles of federalism underlying *Erie* are properly applied.