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The Erosion of *Erie* in the Federal Courts: Is State Law Losing Ground?

David A. Thomas*

Probably no civil case has been cited more frequently¹ in this country than *Erie Railroad v. Tompkins*.² This 1938 opinion, reversing almost a century of the prior jurisprudence in federal diversity jurisdiction cases, has directly and pervasively influenced the tens of thousands of diversity cases that have come into the federal court system since 1938. In its broadest aspect, the *Erie* decision required the application of state law to decide diversity cases in most instances where those decisions had previously turned on federal law. It added immense new vitality to state law development and to the significance of decisions produced by state judicial systems. The opinion itself contained mysterious and controversial assertions. It has been reinterpreted by decisions which have, themselves, become leading and frequently cited cases.³ Nevertheless, the broad impact of *Erie* remains the same: application of state law is required in the great majority of federal diversity cases.

Not all agree that the impact of *Erie* is required by the Federal Constitution.⁴ Most will concede, however, that the influence has been a healthy one and has been useful in maintaining a workable federalistic relationship between the federal and state governments.⁵ If the *Erie* decision were no longer the law of the

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1. Estimates based on the entries in *Shepard's United States Citations* indicate that *Erie* has been cited in over 4,000 subsequent cases (as of January 1, 1977).

2. 304 U.S. 64 (1938).

3. The landmark cases among *Erie's* progeny include, to name a few, *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

4. See, e.g., C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 56, at 258-62 (3d ed. 1976).

5. This may be illustrated by the observation that all of the cases announcing major redefinitions of *Erie*, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965), *Byrd v. Blue Ridge Rural*

land or were to have its authority seriously diluted, the effect on our nation's federalistic structure—at least in the area of judiciary—would probably be far-reaching.

The purpose of this article is to examine the extent to which federal courts continue faithfully to adhere to the basic tenets of *Erie*, as redefined in subsequent cases, which require application of state law. The study is simplistic in its conception, involving mainly the reading and analysis of hundreds of diversity cases decided since 1938 and testing them against that portion of the “*Erie* doctrine” that can be identified as remaining intact after nearly four decades of judicial glossing.

The conclusion of this study is explicit and disquieting: the *Erie* decision is being frequently ignored or avoided. The portent of this conclusion is a growing concentration of judicial power in the federal courts. The tendency to decide federal diversity cases without resorting to state law appears to be a growing one and may now be reaching significant proportions. While it must be left for future efforts to assess the impact of this development, the fact of its occurrence is revealed in this article.

I. DEVELOPMENT OF THE MODERN *Erie* DOCTRINE

Development of the *Erie* doctrine has been paradoxical. In authoring the opinion, Justice Brandeis claimed the Constitution compelled a reinterpretation of section 34 of the Judiciary Act of 1789,⁶ but announced a rule broader in its terms than either the Constitution or the Act.⁷ Such breadth notwithstanding, the actual application of *Erie* has been narrower than the scope of the

Elec. Coop., 356 U.S. 525 (1958), *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and the numerous lesser cases have generally accepted the principle “that rights created by state law should be adjudicated in accordance with State law.” C. WRIGHT, *supra* note 4, § 55, at 258.

6. Ch. 20, § 34, 1 Stat. 73 (1789).

7. Even though the *Erie* holding required only that the Judiciary Act of 1789 be reinterpreted to render state decisional as well as statutory law the rules of decision in federal courts—absent applicable United States treaties, statutes, or constitutional provisions—the Court suggested in dictum that at least one constitutional limitation on the federal power to enact applicable statutes is a prohibition against declaring common law rules for a state. This, of course, ensures that the state laws invoked as rules of decision are rules truly emanating from the states. Nothing in *Erie* prohibits or qualifies the enactment of statutes such as the Federal Rules Enabling Act, 28 U.S.C. § 2072 (1970), and, as Professor John Hart Ely correctly observes, such a statute and not *Erie* constitutes the primary standard for protecting state prerogatives. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974). *Contra*, Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974).

opinion's language or the governing constitutional and statutory provisions.⁸

The first step in analyzing the extent to which the federal judiciary is adhering to the *Erie* doctrine is to determine the modern bounds of *Erie's* application. This section briefly reviews the history behind and subsequent development of the principles of that decision. The conclusion is reached that, although Supreme Court reformulations of the *Erie* doctrine have significantly affected its application when important federal interests are at stake, the basic *Erie* requirement of deference to state substantive law is, in the great majority of diversity cases, still binding upon the federal courts.

The diversity jurisdiction of American federal courts—the power to hear and decide controversies between litigants of different states—was created by article III, section 2, of the Constitution: “The Judicial power shall extend . . . to controversies . . . between a State and citizens of another State [and] between citizens of different States”⁹ There is no universally accepted view of the justification or wisdom then perceived in the inclusion of these controversies within federal original jurisdiction.¹⁰ Hamilton believed this to be a function “essential to the peace of the Union” and “to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled.”¹¹ Others held different views, and since

8. The *Erie* Court did not identify any constitutional provisions allegedly violated by the pre-*Erie* practice, but presumably Justice Brandeis believed the courts had exceeded the judicial power described in article III of the Constitution and had “invaded rights which . . . are reserved by the Constitution to the several States [U.S. CONST. amend. X].” 304 U.S. at 80. Judicial attempts to recast *Erie*, such as in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1965), have been premised on the notion that the federal judicial power extends beyond the restraints imposed by traditional applications of *Erie*. The statutory provision involved is § 34 of the Judiciary Act of 1789, invoking laws of the states as rules in *all* federal cases except those governed by the United States Constitution, treaties, or statutes. Exclusion of *Erie* doctrine applications from nondiversity or from cases characterized by a countervailing federal interest or policy typifies the *Erie* applications that are more restrictive than the governing statute.

9. U.S. CONST. art. III, § 2, cl. 1.

10. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487-93 (1928). The classical justification for diversity jurisdiction has been the need to guard against local prejudice. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring); Friendly, *supra* at 493.

11. THE FEDERALIST No. 80 (A. Hamilton) 494, 496-97 (H. Lodge ed. 1888). John Marshall, while recognizing that the state courts would probably “administer justice as impartially as those of the nation,” noted that the Constitution nonetheless embodies certain “apprehensions” concerning the subject. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

its inception diversity jurisdiction has been the subject of aggravated controversy.¹²

The first Congress under the new Constitution did not hesitate to create a system of federal courts and to implement the diversity jurisdiction, both actions forming part of the Judiciary Act of 1789.¹³ To guide the courts in the exercise of their jurisdiction—diversity and otherwise—section 34 of the first Judiciary

12. The Constitution's provisions for the federal judiciary, including the diversity jurisdiction, were the subject of attack as early as the ratification debates. See Friendly, *supra* note 10, at 487-500. The controversy has continued to modern times. At least two Supreme Court Justices have advocated the virtual abolition of diversity jurisdiction. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53-54 (1954) (Frankfurter, J., concurring); R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37-38 (1955). Others have also urged that the jurisdiction be eliminated or limited to a greater or lesser degree. See, e.g., ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-110 (1969); Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933); Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1 (1968); Field, *Diversity of Citizenship: A Response to Judge Wright*, 13 WAYNE L. REV. 489 (1967); Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841, 855-56 (1972); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 234-40 (1948). Still other writers have continued to praise the diversity jurisdiction and would maintain or even expand its operation. See, e.g., Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C.L. REV. 677 (1965); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

The proponents of diversity jurisdiction have advanced various arguments for its maintenance. Some writers claim that the federal courts are inherently better than state courts. See, e.g., Moore & Weckstein, *supra* at 22-23; Wright, *supra* at 327. Others have seen economic factors as necessitating the continuation of the jurisdiction. See, e.g., Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 47 A.B.A. REP. 250, 258-59 (1922). At the same time, the old question about the danger of prejudice in state courts to out-of-state litigants has not gone undisputed. Compare Friendly, *supra* at 492-97 with Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 & n.13 (1931).

As to the difficulties of any extensive reform, see Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 576-77 (1967).

13. Ch. 20, 1 Stat. 73 (1789). This extremely significant legislation was drafted and debated by many who participated in framing the Constitution. See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 57-130 (1923). The statute created a system of inferior federal courts, including at least one district court for each state and three circuit courts, the latter possessing the original jurisdiction of some diversity cases, "concurrent with the courts of the several States." Ch. 20, § 11, 1 Stat. 73 (1789); C. WRIGHT, *supra* note 4, § 1, at 3. Legislation in 1875 broadened the scope of diversity-type cases within the circuit courts' original cognizance. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (1875). In 1801 further procedural modifications were made. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891). The 1891 act created courts of appeals for each circuit, which became the only circuit courts when the 1911 Judicial Code abolished the original circuit courts and transferred their diversity and other jurisdictions to the district courts. Judicial Code Act of 1911, ch. 231, 36 Stat. 1087 (1911).

Act provided "[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."¹⁴

No judicial definition of the meaning of "laws of the several states" achieved wide acceptance until more than half a century after section 34 was enacted. Some early decisions held that the phrase referred only to the statutory law of the states,¹⁵ while others invoked the opinions of the state courts or other state acts for rules of decision.¹⁶ The landmark 1842 decision in *Swift v. Tyson*¹⁷ resolved the dispute by announcing that court decisions do not constitute laws, but "are, at most, only evidence of what the laws are."¹⁸

14. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (1789). The provision in effect today is virtually identical, except for the substitution of "in civil actions" in place of the former "in trials of common law." See 28 U.S.C. § 1652 (1970).

15. See, e.g., *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222-23 (1818). See generally 2 W. CROSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 818-64 (1953).

16. E.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834); *Polk's Lessee v. Wendal*, 13 U.S. (9 Cranch) 87, 98 (1815); *Sims Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799); *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797). See generally 2 W. CROSKEY, *supra* note 15, at 818-64.

17. 41 U.S. (16 Pet.) 1 (1842). In *Swift*, the plaintiff became the endorsee of a bill of exchange in consideration of a preexisting debt. *Id.* at 2. The issue in the case was whether or not the preexisting debt constituted "a valuable consideration in the sense of the general rule applicable to negotiable instruments." *Id.* at 16. Although Justice Story assumed that the applicable state court decisions would indicate a finding of no consideration in the circumstances of the case, he determined that ascertainment of the state court decisions was not dispositive; rather, the state "laws" that govern federal courts in nonfederal matters were legislative enactments only, not the decisions of state courts, and that in the absence of state legislative enactments, federal courts were free to fashion their own judgments. *Id.* at 18-19. He then held that a federal court should find good consideration in the instant circumstances. *Id.* at 22.

18. *Id.* at 18. Justice Story continued by saying that "[t]he laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof." *Id.* Furthermore, while "the decisions of the local tribunals . . . are entitled to, and will receive, the most deliberate attention and respect of this Court [and presumably other federal courts]; . . . they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." *Id.* at 19. In its precise holding, *Swift* established this rule only with respect to negotiable instruments (or general commercial law, depending on the view one takes of the case), but Justice Story did suggest that there were other areas of the law of a "more general nature," *id.*, discoverable in federal courts and uninhibited by state court decisions. Justice Story also held that federal courts, in deciding suits involving "contracts and other instruments of a commercial nature," were, in the absence of state legislation, to refer to the "general principles and doctrines of commercial jurisprudence." *Id.* at 19. At the same time, however, he spoke of a universal "law respecting negotiable instruments." State court decisions, on the other hand, were binding on matters of "local law." *Id.*

Swift dominated diversity litigation without serious challenge for half a century. The second half of *Swift's* nearly 100 years of preeminence, however, was marked by discontent with both the rationale and the results of the decision.¹⁹ Diversity jurisdiction was being manipulated by plaintiffs to their occasional, apparent advantage.²⁰ New findings on the history of section 34 cast doubt on Justice Story's restrictive interpretation of "the laws of the several states."²¹ Suggestions of unconstitutional assumption of state court prerogatives by the federal courts began to appear.²² Following the heavily criticized decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,²³ a tendency to greater deference toward state law could be discerned.²⁴

The culmination of this process of retreat from *Swift* occurred in the 1938 case of *Erie Railroad v. Tompkins*,²⁵ one of the most important and frequently cited civil cases in American legal history.²⁶ Like *Swift*, *Erie* was a diversity case that tackled the problem of interpreting section 34's "laws of the several states." Faced with a state law arguably at variance with federal courts' notions on a question of tort liability, the United States Supreme Court took the occasion finally and fully to disapprove of the *Swift* doctrine and to render this pronouncement on the meaning and weight of the "laws of the several states":

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law

19. C. WRIGHT, *supra* note 4, § 54, at 251-52. See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting); *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 390-405 (1893) (Field, J., dissenting).

20. C. WRIGHT, *supra* note 4, § 54, at 252-53. See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

21. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923).

22. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting). "If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Id.* at 533.

23. 276 U.S. 518 (1928).

24. C. WRIGHT, *supra* note 4, § 54, at 252-53. See, e.g., *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335, 339-40 (1934); *Burns Mortgage Co. v. Fried*, 292 U.S. 487, 493-95 (1934). See also 48 HARV. L. REV. 979 (1935).

25. 304 U.S. 64 (1938).

26. See, e.g., Black, *Address*, 13 Mo. B.J. 173, 174 (1942); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946).

There are over 4,000 Shepard's citations for *Erie* (as of January 1, 1977).

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. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.²⁷

The decision has been intensely reviewed in legal literature.²⁸ Present purposes are served by merely noting that *Erie*, a diversity case, undertook to reinterpret section 34 of the Judiciary Act—which is not expressly limited to diversity cases—and delivered a holding that on its face was likewise not limited to diversity cases. Indeed, "[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 State."²⁹ Under the Judiciary Act, and according to the *Erie* pronouncement, state law would apply even in a federal question case as to issues not governed by federal law.³⁰

Nevertheless, *Erie's* strong identification with diversity litigants led to an early consensus and some explicit rulings that the rule governed only diversity cases.³¹ As a result, the *Erie* rule has been applied almost exclusively to diversity cases involving more

27. 304 U.S. 64, 78 (1938).

28. E.g., Ahrens, *Erie v. Tompkins—The Not so Common Law*, 1 WASHBURN L.J. 343 (1961); Boner, *Erie v. Tompkins: A Study in Judicial Precedent* (pts. 1-2), 40 TEX. L. REV. 509, 619 (1962); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Edwards, *The Erie Doctrine in Foreign Affairs Cases*, 42 N.Y.U.L. REV. 674 (1967); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Keeffe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957); Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938); Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L.Q. 377 (1967); Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248 (1963); Weintraub, *The Erie Doctrine and State Conflict of Law Rules*, 39 IND. L.J. 228 (1964).

29. 304 U.S. 64, 78 (1938).

30. *Id.* See also *Sun Oil Co. v. Burford*, 130 F.2d 10, 13-14 (5th Cir. 1942), *rev'd on other grounds*, 319 U.S. 315 (1943).

31. See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 180 (1940); *Deupree v. Levinson*, 186 F.2d 297, 301 (6th Cir. 1950), *cert. denied*, 341 U.S. 915 (1951); *Franzen v. E.I. DuPont de Nemours & Co.*, 146 F.2d 837, 839 (3d Cir. 1944); *Rehm v. Interstate Motor Freight Sys.*, 133 F.2d 154, 157 (6th Cir. 1943); *Stanford v. Atlantic Life Ins. Co.*, 109 F.2d 428, 429 (5th Cir. 1940).

than the jurisdictional amount³² and not involving domestic relations,³³ probate matters,³⁴ or several other minor categories.³⁵

Far more troublesome than the limitation of *Erie* to diversity cases have been the attempts to modify application of the *Erie* rule to specific classes of issues within the context of diversity litigation. In writing for the *Erie* court, Justice Brandeis did not assert that state law was applicable only to issues of substantive law. Indeed, he declared that the law to be applied in any case not governed by the United States Constitution or federal law is the law of the state.³⁶ Consistent therewith, state law was later held applicable in federal question litigation to issues not governed by federal statute or Constitution.³⁷ Nevertheless, the *Erie* majority's reference to congressional inability "to declare substantive rules of common law" for states,³⁸ and the reminder of Justice Reed's concurring opinion of federal power over procedure,³⁹ prompted the widely held view that, according to *Erie*, state law in diversity cases would be applied only to substantive, as opposed to procedural, issues.⁴⁰

The first major attempt to improve on the substance-procedure distinction was made in *Guaranty Trust Co. v. York*,⁴¹ a 1945 case requiring a federal court to apply a state statute of limitations in a diversity case. Although acknowledging the "procedural" character of limitations statutes for some purposes, the court treated them as "substantive" in order that in this case, "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."⁴² In the

32. 28 U.S.C. § 1332 (1970).

33. See *In re Burrus*, 136 U.S. 586, 593-94 (1890); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858); C. WRIGHT, *supra* note 4, § 25, at 96-99.

34. See *Byers v. McAuley*, 149 U.S. 608, 619 (1893); C. WRIGHT, *supra* note 4, § 25, at 98.

35. See C. WRIGHT, *supra* note 4, § 25, at 97-99.

36. 304 U.S. 64, 78 (1938).

37. Note 30 *supra*. But see *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). See also 74 HARV. L. REV. 1662 (1961).

38. 304 U.S. 64, 78 (1938).

39. *Id.* at 91-92 (Reed, J., concurring).

40. See, e.g., *Waldron v. Aetna Cas. & Sur. Co.*, 141 F.2d 230, 233 (3d Cir. 1944); *Stinson v. Edgemoor Iron Works*, 55 F. Supp. 861, 863 (D. Del. 1944); *Hardie v. Bryson*, 44 F. Supp. 67, 70 (E.D. Mo. 1942); *McCoid, Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271, 279-88 (1939).

41. 326 U.S. 99 (1945).

42. *Id.* at 109.

early years after *Guaranty Trust*, this new "outcome-determinative" test drove state law applications to extensions that invaded the procedural realm presumably reserved for federal law.⁴³ Besides obscuring a theoretically neat substance-procedure dichotomy, *Guaranty Trust* and its successors threatened the sanctity of the new Federal Rules of Civil Procedure.⁴⁴

Not until thirteen years after *Guaranty Trust* did the second major *Erie* redefinition occur in the case of *Byrd v. Blue Ridge Rural Electric Cooperative*.⁴⁵ *Byrd* did not overrule *Guaranty Trust*, but reinvigorated the hegemony of federal procedure by tempering the "outcome-determinative" test with a ruling that a federal interest, such as fostering sound administration of the federal courts, might be so strong as to call for the application of federal law.⁴⁶

Unguided discretion among federal judges as to the weight to be given such federal interests created uncertainties in administering the *Byrd* test, making it especially difficult to establish the uniformity deemed so important by the *Byrd* Court.⁴⁷ With respect to applying the Federal Rules of Civil Procedure, that difficulty was substantially overcome by the 1965 decision of *Hanna v. Plumer*.⁴⁸ According to *Hanna*, the existence of an applicable Federal Rule of Civil Procedure clearly signifies a strong federal interest which should prevail over contrary state rules.⁴⁹ The *Hanna* Court also reached out to the larger problem of the "typical, relatively unguided *Erie* choice"⁵⁰ not governed by one of the federal rules. The Court ignored both the original declara-

43. See C. WRIGHT, *supra* note 4, § 59, at 273-74; Gavit, *State's Rights and Federal Procedure*, 25 IND. L.J. 1 (1949). These extensions were perhaps made possible because, as one writer asserts,

[t]he *York* opinion reads into the *Erie* decision three points that were definitely excluded from it by the explicit constitutional grounds given in the opinion. *York* asserts that the *Erie* decision was based on policy, that the policy was for diversity cases, and that its aim was to reach the same result that a state court would reach.

Boner, *Erie v. Tompkins: A Study in Judicial Precedent* (pt. 2), 40 TEX. L. REV. 619, 628 (1962).

44. See C. WRIGHT, *supra* note 4, § 59, at 273-75; Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 716-25 (1950); Clark, Book Review, 36 CORNELL L.Q. 181, 183 (1950).

45. 356 U.S. 525 (1958).

46. *Id.* at 537-40.

47. See C. WRIGHT, *supra* note 4, § 59, at 275-76. See generally Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082 (1963).

48. 380 U.S. 460 (1965).

49. *Id.* at 469-74.

50. *Id.* at 471.

tion of Justice Brandeis—that state law is to be displaced only by express provisions in federal statutory or constitutional law—and the traditional substance-procedure view of *Erie*, taking aim instead on the *Guaranty Trust* “outcome-determinative” test and rejecting it. As a replacement standard, in cases not governed by federal rules, the Court advised that the decision whether to apply state law is to be made by considering “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”⁵¹ *Hanna* is clearly the most recent and authoritative pronouncement of the so-called *Erie* doctrine,⁵² and it, together with its parent case, must govern choice of law in diversity actions.⁵³

The broad phrasing of the *Hanna* rule for deciding whether to apply state law in the “typical, relatively unguided *Erie* choice,”⁵⁴ e.g., a diversity case in which an issue is not governed by a federal rule, does not provide the detailed guidelines needed to make uniform choice of law decisions in the federal courts.⁵⁵

51. *Id.* at 468.

52. The following Supreme Court cases since *Hanna* have touched on *Erie*, but none have attempted any restatement of the *Erie* doctrine: *Day & Zimmermann, Inc. v. Chal-loner*, 423 U.S. 3 (1975); *DeMarrias v. Poitra*, 421 U.S. 934 (1975) (White, J., dissenting); *Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R.*, 417 U.S. 703 (1974); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966).

53. Unfortunately, *Hanna* perpetuated the “strong federal interest” rationale of *Byrd* in reaching a result consistent with *Erie*, when the mere presence of a federal civil procedure rule promulgated under the Rules Enabling Act would have easily satisfied the *Erie* Court. *Guaranty Trust* carried the same flaw: a result consistent with *Erie* but supported by a novel rationale.

54. 380 U.S. 460, 471 (1965).

55. The *Hanna* opinion does, however, suggest an interesting throwback to the original, long-ignored statement in *Erie* excluding federal governance in the absence of explicit federal law. 304 U.S. 64, 78 (1938). That statement was tendered as the solution to the problems generated by the *Swift* practice, i.e., forum-shopping and inequitable administration of the laws, both of which are actually aspects of the same interjurisdictional conflict. As pointed out by Justice Brandeis in *Erie*, out-of-state plaintiffs in the *Swift* era had a choice of forum not open to in-state plaintiffs. *Id.* at 74-75. The choice was meaningful only if one forum supported a rule on a particular legal question different from that promulgated in the alternative forum. Resultant forum-shopping was an attempt to gain advantage from such “inequitable administration of the law.” The *Erie* answer was a single, simple solution to both problems: eliminate the choice of law in every instance where there is a choice of forum, except where Federal Constitution, treaty, or legislation directs otherwise. The instruction in *Hanna* to aim more directly at the evils which concerned the *Erie* Court could be construed as an invitation, whether or not intended, to take up once again *Erie*’s long-forgotten mandate: apply state law in *all* instances not preempted by explicit federal law. There is, of course, no discernible movement in the

How is it possible, in the absence of such guidelines, to gauge the success or failure of the *Erie* doctrine as a preserver of state power or to measure the diligence with which the *Erie* mandate is being implemented? One helpful observation is that virtually all the significant or controversial decisions in the post-*Erie* jurisprudence have turned on matters which, although peripheral to the initial dispute in the case, were on the fringes of important federal interests. *Guaranty Trust* involved a statute of limitations that was palpably "procedural" in nature but had no federal counterpart. Thus, the federal interest in governing procedure in the federal courts was the focus of the Court's attention. *Byrd* focused on the significant constitutional right to jury trial, but that right was not central to the original conflict in the litigation. *Hanna* dealt with a challenge to the Federal Rules of Civil Procedure, but the specific issue before the Court, whether service of process should be governed by state law or by Federal Rule 4(d)(1), was arguably not inextricably bound up with the rights and liabilities sought to be adjudicated. Thus, it may be safe to say that the four decades of conflict on the perimeters of federal-state judicial relations have left the greater interior areas of *Erie* largely intact. Who would contend, for example, that a straightforward contract or personal injury action between litigants of different states should somehow be governed by a federal rule of law? Despite the lack of an exhaustive listing of the broad subject matter areas that have not been affected by the continuing reinterpretations of *Erie*, they obviously include the bulk of the day-to-day federal diversity litigation.⁵⁶ The study described in the remainder of this article is restricted to those cases where, under *Erie* and its progeny, state law is clearly to be applied; the application of the *Erie* rule in those cases will be examined.

II. MODERN APPLICATION OF *Erie*: A STUDY

If there are important constitutional or federal policy reasons why state law must supplant federal law in most diversity cases, then the performance of federal courts in applying state law should be evaluated. A partial evaluation, involving the reading

federal judiciary to perceive such an invitation in *Hanna*, so the "typical *Erie* choice" remains "unguided."

56. This is not to deny the existence of many areas where border conflicts continue. The line between state property law and federal bankruptcy law, for example, continues in dispute. See, e.g., *Prudence Realization Corp. v. Geist*, 316 U.S. 89 (1942); Boner, *Erie v. Tompkins: A Study in Judicial Precedent* (pt. 1), 40 TEX. L. REV. 509, 515-17 (1962).

and analysis of hundreds of diversity cases decided since 1938, has now been completed and the conclusions are disconcerting. It appears that in a substantial proportion of diversity cases where state law should be applied—higher than one-third in one circuit⁵⁷—federal appellate courts may be failing or refusing to find and apply state law as rules of decision. Both the possible causes and the consequences of such a conclusion are alarming. The causes can be found only in the neglect or the refusal of the federal bench and bar properly to apply *Erie*. The consequences are the decline of state law as rules of decision—in essence, a possible return to the practice and problems of *Swift v. Tyson*⁵⁸—and the establishment of federal law superiority in an ever-increasing scope of legal activity, all at the expense of state law, state power, and possibly of functional federal balance.

How prevalent are these deviations from the *Erie* pattern? To answer this question, over 1,400 diversity cases decided in the federal circuit courts of appeals between 1938 and 1973 have been read and analyzed to determine federal judicial approaches toward diversity cases wherein *Erie* requires application of state law. The project results indicate that in recent years approximately twenty-two percent of such diversity cases in the federal courts of appeals (hereinafter “state law” diversity cases) may have been decided by applying law other than that of the forum state as the rule of decision, in apparent contravention of *Erie*. The conclusion that there is frequent avoidance of *Erie* principles in the federal appellate courts is inescapable. Specific facts and figures from the study will emphasize this conclusion.

The diversity cases studied were taken from the reported opinions of the circuit courts of appeals. The incomplete reporting of district court cases⁵⁹ and their modern reliance on the find-

57. Examination of diversity cases in the Tenth Circuit decided in 1971-73 revealed that state law apparently was not properly applied in 35% of the cases.

58. Notes 17-24 and accompanying text *supra*.

Although the focus of this article is the compliance of the federal appellate judiciary with the letter and spirit of *Erie*, it is possible that the findings reported here also support a conclusion that the rule of *Swift* itself—that state statutory law be deferred to—is also being undermined. The kinds of judicial errors discussed in this article appear to disregard state statutory as well as decisional law.

59. FED. R. CIV. P. 52(a). “More than 22 thousand cases were terminated in the Fifth Circuit with only 377 opinions reported by West Publishing Company [in 1968].” Vestal, *Publishing District Court Opinions in the 1970's*, 17 LOY. L. REV. 673, 676 (1971).

When the 2279 opinions from fiscal 1962 available in the West publications are viewed against the total work of the courts, some meaningful conclusions can be drawn. It would appear that there is a rough ratio of one opinion in a West publication for each forty cases terminated after some court action.

ings of fact and conclusions of law format⁶⁰ neither provide the information needed for analysis nor establish a dependably representative population for the sample. Federal circuit court opinions, on the other hand, appear to be more comprehensively published⁶¹ and are usually written in such a manner that the issue of state law as rules of decision is treated.

Even when restricted to a review of appellate opinions, the study could not undertake an analysis of all post-1938 opinions. It was decided to establish a reference point in the study by examining all diversity cases published in the *Federal Reporter, Second Series*, for one fairly recent calendar year. The year 1972 was selected because it was recent, but also far enough in the past to permit studies into subsequent years to examine any trends preliminarily indicated in the 1972 study. This review of 1972 cases indicated that 403 cases could be termed "state law" diversity cases. Of those 403 cases, ninety-four (23%) were identified as apparently failing⁶² in some respect to apply state law where *Erie* would require such application.⁶³ To confirm that the 1972 pattern was not an aberration, an examination was made of the diversity cases contained in the six volumes of the *Federal Reporter, Second Series*, immediately preceding the 1972 cases; the diversity cases from the six volumes immediately succeeding the 1972 cases were also examined. Of the 151 pre-1972 "state law" diversity cases, thirty-three (22%) were analyzed as apparently failing to apply state law in accordance with *Erie*.⁶⁴ Of the 107 post-1972 "state law" cases, the apparent number in error was twenty-one (20%).⁶⁵ Percentages for both 1971 and 1973 differ from the 1972 percentage, but not sufficiently to require a modification of the general conclusion.

Vestal, *A Survey of Federal District Court Opinions: West Publishing Company Reports*, 20 Sw. L.J. 63, 81 (1966).

60. FED. R. CIV. P. 52(a).

61. In the first eleven months of 1973, 4,563 federal courts of appeals opinions were published and another 1,477 were written but not published; 2,708 cases were decided without a written opinion. Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 797 (1975). See also *NLRB v. Clothing Workers of America Local 990*, 430 F.2d 966 (5th Cir. 1970), explaining the necessity of the Fifth Circuit's Rule 21, which limits the number of written opinions by allowing certain types of cases to be disposed of without opinion.

62. It is recognized that there may be explanations or justifications for some of the *Erie* problems identified in this study. See text accompanying notes 87-89 *infra*. For this reason, these and the following statistics represent the number of cases that appear to depart from the requirements of the *Erie* doctrine.

63. See Appendix A for citations to those 1972 cases.

64. See Appendix B for citations to those 1971 cases.

65. See Appendix C for citations to those 1973 cases.

The next question considered by the study was whether the trend of the 1970's represents any shift from earlier years. It was decided to examine all the diversity cases decided during one year from a decade earlier. The 416 "state law" diversity cases decided on appeal in 1962, as published in the *Federal Reporter, Second Series*, revealed nineteen cases with potential *Erie* violations.⁶⁶ This represents five percent of the total and is considerably lower than the statistics for a decade later. A clear picture of appellate court departures from *Erie* over the years must, of course, await further research.

The next inquiry of the study was to determine whether any of the post-*Erie* decisions generally considered to be landmark cases may have influenced the use of state law in diversity cases decided by the federal appellate judiciary. For this purpose, the 1945 case of *Guaranty Trust Co. v. York*⁶⁷ was chosen as a test decision. Fifty-six 1945 "state law" diversity cases decided prior to *Guaranty Trust* were examined and, of those, four (7%) were identified as apparently failing to apply state law.⁶⁸ Two hundred fifty-one "state law" diversity cases decided after *Guaranty Trust*, extending into 1947, were examined and, of those, thirty (12%) appeared to depart from the *Erie* requirement.⁶⁹ A tentative conclusion suggested by this smaller sample is that the greater credence given state law by the *Guaranty Trust* decision had no corresponding impact throughout the federal appellate judiciary. Again, further research is needed to substantiate this conclusion.⁷⁰

An interesting byproduct of this study has been an indication of which circuits appear to deviate most frequently from the *Erie* rule. In this category, the Tenth Circuit leads with 35% of its "state law" diversity cases revealing potential *Erie* problems (based only on cases examined from 1971-73). The other circuits and the percentages of their "state law" diversity cases that ap-

66. See Appendix D for citations to those 1962 cases.

67. 326 U.S. 99 (1945).

68. See Appendix E for citations to those 1945 cases.

69. See Appendix F for citations to those 1945 and 1946 cases.

70. No attempt is made by application of statistical techniques to project a "rate of deviation" for those years and those cases not specifically examined as a part of this study. The study is intended to show discrepancies only for specific reference periods. For those periods a population of 100% is used and no sampling techniques are employed. It should not necessarily be implied that the rate of deviation declined from 1945-46 to 1962 and then steadily rose to the 1971-73 level, inasmuch as no attempt has been made to determine whether the periods studied represent reliable samples for the entire population of post-1938 cases at any level of confidence.

peared to be incorrectly handled during the same period are the Fourth Circuit, 29%; Eighth Circuit, 26%; Seventh Circuit, 25%; Ninth Circuit, 23%; First Circuit, 23%; Second Circuit, 21%; Third Circuit, 20%; Fifth Circuit, 18%; and Sixth Circuit, 10%.

In addition to the foregoing statistics, this study has revealed an interesting collection of judicial techniques used to invoke federal law in cases where state law ought to be applied. These techniques may be summarized as follows:

1. The federal court cites no supporting case law or statutes from any jurisdiction, but states its own notions of common law principles in deciding key issues.

2. The federal court cites no state authority whatsoever, but relies exclusively on federal authority for its conclusions on issues in the case. A variation of this technique occurs when the court, while ignoring direct state authority, notes that some of the federal authority that it cites is itself based upon or interpretive of state law.⁷¹ (Cases where it could be definitely determined from the appellate opinion that these federal precedents were grounded in forum state law were considered in this study as conforming to *Erie*.)

3. The federal court cites state authority for some issues and invokes federal law and secondary authority to decide other issues in the case. Sometimes only the less important or conceded issues are decided on the basis of state law.

4. The federal court cites both federal and state authority for some issues, but fails to indicate which it considers mandatory.

Three observations should be made about these techniques as they occur in the cases analyzed in this study. First, perhaps the most common error made is citation to authority from both the forum state and other jurisdictions, state and federal. It is not suggested that the mere fact of reference to nonforum law is, in itself, in violation of *Erie*. State courts themselves frequently look to the law of other jurisdictions to support the reasoning and conclusions in their opinions, and federal diversity courts should likewise enjoy some leeway in looking to nonforum authority. But a crucial difference between state courts and federal diversity courts must not be overlooked. While a state court may refer to other jurisdictions for supporting case law, the court's holding

71. For a discussion of why this practice may be said to violate *Erie*, see text accompanying note 88 *infra*.

becomes, ipso facto, the law of the state, unless reversed on appeal. A federal diversity court, on the other hand, has no authority to declare the content of state law but is faced with the peculiar problems of deciding whether to apply state law at all and, if so, how to determine the content of that law. In light of these special problems, which represent the very essence of the *Erie* doctrine, it is important for a federal court to be explicit about its decision to apply state law and scrupulous in establishing that any nonforum authority cited is reflective of the proper state rule of decision. For the purposes of this study, diversity cases citing both forum and nonforum law have been counted in error when the court's opinion does not reasonably indicate that all the authority cited in support of a substantive issue in the case is intended to reflect the law of the forum state.

Second, it is not suggested here that a reliance on improper authority has necessarily affected the results of these cases. Of concern here is not the correctness of the results reached but the courts' recognition of the proper source of the rules of decision.

Finally, the alleged errors in the appellate court decisions analyzed here must often be inferred from the language of the opinions. Since judges who deviate from the *Erie* doctrine frequently seem to do so unconsciously, it is sometimes difficult to perceive why a particular choice of law decision was made—or even precisely what that decision was. The techniques listed above have thus been drawn by inference from some of the opinions counted here as in error. Intelligent inference, however, has been aided by the reading of large numbers of cases where *Erie* ought to govern. Certainly the deviant cases do not restrict themselves to a single technique or categorize themselves neatly according to the list suggested here. Yet the presence of these kinds of errors is often unmistakable,⁷² as the following illustrative cases show.

72. The attempt has been made to identify those cases departing from a clear *Erie* requirement that state law be applied. In this connection it should be noted that many of the diversity cases examined in this study were appealed in order to secure review of the trial court's rulings on the admissibility of evidence. In addition, the reviewing court was frequently asked to evaluate the sufficiency of the evidence. As to admissibility, where the relevant state rule would exclude evidence that the federal court would otherwise admit, a federal standard governs except as to state rules of privilege. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2405 (1971); FED. R. EVID. 501. With respect to the sufficiency of the evidence, two issues are raised. Where the question is whether evidence is sufficient to create an issue for the jury—in other words, should the verdict be directed or judgment notwithstanding the verdict entered—a great deal of authority supporting either the governance of state law or the supremacy of federal law compels the conclusion that the question is still open.

An example of an appellate opinion in a diversity case that was rendered with no supporting authority whatsoever is found in *Graham v. Texas Gulf Sulphur Co.*⁷³ The plaintiff in this class action sought determination of certain contract rights involving Texas Gulf Sulphur as defendant. The appellate court reversed a trial court judgment by substituting its third-party beneficiary theory for a trust theory adopted below. The appellate court reached its legal conclusions, however, in an eight-page opinion that neither acknowledged that these contract issues were governed by state law nor cited a single authority of any variety, legal or otherwise.

More common than the complete absence of cited legal authority is the approach of many courts that cite only federal authority for propositions that ought to be derived from state law.⁷⁴ In *Zelinsky v. Associated Aviation Underwriters*⁷⁵ the administrator of a decedent's estate brought action against an insurer to recover under a group travel policy. The court recited several principles governing the interpretation of the insurance policy,

At least part of the confusion may result from stating the problem as one of the "sufficiency of the evidence." That rubric may conceal the distinction between applying a "rule of decision" and observing a rule of procedure. For example, the question whether the plaintiff is required to prove elements A, B, C, and D, or only elements A, B, and C, presents the problem of ascertaining the rule of decision. Clearly, in a diversity case, such a question is to be governed by state law. If the issue is, however, whether a given question of fact is to be resolved by the judge or by the jury, it should be equally clear that it is a procedural problem that is controlled by federal law. . . . The difficult problems emerge when the issue cannot be easily classified as falling into the first or second categories. For example, does evidence of fact X satisfy the requirement to prove element A. If the issue here is whether the testimony as to X is credible, clearly the problem falls in the second category and is governed by federal law. If, on the other hand, the question is whether fact X by itself satisfies the state requirement that element A be proved, the issue should be governed by state authorities.

5A MOORE'S FEDERAL PRACTICE ¶ 50.06, at 2349-50 (2d ed. 1966).

The evaluation of sufficiency of the evidence cases in this study follows Moore's analysis. Thus, if the appellate court finds occasion to discuss a rule of decision, then state law should be applied; if, on the other hand, the question is only who is to weigh the evidence, then federal rules determining the allocation of judge-jury functions should control. "It is clear," declare Wright and Miller, "that state law must be resorted to in determining the elements necessary to create rights and duties in a diversity action." See 9 C. WRIGHT & A. MILLER, *supra* § 2525, at 551.

73. 457 F.2d 418 (5th Cir. 1972).

74. It should be noted that many of the federal citations given in the diversity cases discussed in this section refer to cases which are themselves based on state law, frequently that of the forum state. For a discussion of why this may be considered to be a departure from *Erie*, see text accompanying note 88 *infra*.

75. 478 F.2d 832 (7th Cir. 1973).

representing one to be well-settled in Illinois (the forum state) and in other jurisdictions, but cited only cases from the Seventh Circuit in support of its assertions. Similarly, the court in *Bank of the Southwest v. National Surety Co.*,⁷⁶ in interpreting provisions of a bank bond, cited only cases from the Fifth and other circuits, except for a final point, for which the court resorted to an Ohio appellate case. The court gave no indication that it had searched for and not found appropriate Texas citations to govern the case.

Many federal courts hearing diversity cases seem to be fully aware of the requirement to apply state law but nevertheless base some aspects of their decisions on federal authority. In *Trawick v. Manhattan Life Insurance Co.*,⁷⁷ an appeals court reversed a trial court's judgment notwithstanding the verdict against the beneficiary of a life insurance policy. The court first turned to federal authority for a general rule governing material misrepresentations by an insurance policy applicant⁷⁸ and then cited state cases to establish the "waiver of forfeiture" limitation on the insurance company's defense of material misrepresentations.⁷⁹ Although properly referring to the federal standard respecting directed verdicts and judgments notwithstanding the verdicts,⁸⁰ the court went on to buttress its conclusions against the merits of the defendant's position by citing two Fifth Circuit cases and a United States Supreme Court case.⁸¹ The mixture of federal and state authority in the *Trawick* opinion suggests a predominant and misplaced reliance on federal authority for key issues to the extent that state law may not have played a determinative role in helping the court reach its decision.

A variant of this pattern of mixed federal and state authorities in diversity decisions is found in *Sperry Rand Corp. v. A-T-O, Inc.*⁸² Plaintiff employer commenced an action against two former employees and their subsequent employer for misappropriation of trade secrets and bidding data. The Fourth Circuit applied authority from other federal courts, state courts other than the forum state, and secondary sources on most issues; resorted to the law of Virginia, the forum state, on a question of

76. 447 F.2d 73 (5th Cir. 1973).

77. 447 F.2d 1293 (5th Cir. 1971).

78. *Id.* at 1294.

79. *Id.*

80. *Id.* at 1295.

81. *Id.* at 1295-96.

82. 447 F.2d 1387 (4th Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

attorneys' fees; and set forth federal citations on a punitive damages issue, including, interestingly, a Fourth Circuit case that it noted as applying Virginia law.⁸³ This may constitute an example of the court applying state law but only as it is found in federal cases.

A case somewhat similar to the *Trawick* case discussed above is *Southern Pacific Transportation Co. v. Nielsen*,⁸⁴ a Tenth Circuit decision that should have applied Utah law. The court cited federal law for all the crucial issues of the case and set forth citations to state law for some of those same issues, but gave no indication as to which source of authority it relied upon where both federal and state authorities were noted. For example, the court began its discussion of the legal issues by noting a general rule adopted in the Tenth Circuit that certain indemnity provisions, although enforceable under some circumstances, are not favored in the law. The court noted that Utah has adopted the general rule and then discussed limitations and interpretations of the rule found in a United States Supreme Court case, a decision of the federal district court in Wyoming, and the Tenth Circuit case initially cited for a statement of the general rule.⁸⁵ There is no way of telling of what importance, if any, the Utah case had in helping the Tenth Circuit reach its decision. There is, to the contrary, a marked preference for federal authority in this case.

A curious mix of state and federal authority is found in *Bradshaw v. Thompson*,⁸⁶ a Sixth Circuit opinion on a breach of contract action. After properly relying on federal authority to affirm the trial court's submission of certain issues to the jury, the court asserted a point of agency law for which it also cited a federal case.⁸⁷ On the same page of the report, a point in contract law is grounded in the Uniform Commercial Code of Tennessee, the forum state. The court offered no explanation for its reliance on both federal and state authority on these substantive issues.

The cases described above constitute only a handful of examples derived from the 1971-73 diversity cases used in this study. On the surface, it would appear that many of these courts are failing to apply state law on issues where such application would appear mandated by the *Erie* rule. That conclusion, however,

83. *Id.* at 1395.

84. 448 F.2d 121 (10th Cir. 1971).

85. *Id.* at 123.

86. 454 F.2d 75 (6th Cir.), *cert. denied*, 409 U.S. 878 (1972).

87. *Id.* at 78.

may be ameliorated by the following possible explanations for what appears in these federal appellate opinions.

1. Many federal courts acknowledge the governing authority of state law in their diversity cases but appear to falter in their application of state law. While this may be giving only lip service to the authority of state law, it is at least an acknowledgement. Even acknowledgements are of some value in the federal judiciary, where the majority of appellate judges fail even to state that the jurisdictional basis of their proceeding is diversity of citizenship.

2. Many federal case law citations that appear in diversity cases are themselves based on state law, often that of the forum. Understandably, a circuit court may wish to cite an interpretation of state law that has been previously approved or adopted by the circuit in an earlier case. There are dangers in this practice, however. Although a cited case might appear to be interpretive of forum state law, that federal case might itself be guilty of relying on improper or outdated authority in violation of *Erie*.⁸⁸ Moreover, there is a qualitative difference between relying on the decisions of state courts, which can interpret and modify state law with binding effect, and resorting to prior federal diversity cases, which are a kind of secondary authority as to the content of state law. For these reasons, it would seem the better practice to rely on primary sources of state authority, citing relevant federal cases only to supplement or fill in the gaps of the primary sources.

3. Surely part of the blame for neglect of state authority in federal diversity cases must be attributed to counsel who appear before federal appellate tribunals. While federal judges remain wholly responsible for the content and quality of their judicial opinions, it is likely that many judges rely heavily upon briefs and arguments presented by the attorneys appearing before them. It seems likely that many appellate opinions devoid of citations to

88. An example of this problem can be found in *Trawick v. Manhattan Life Ins. Co.*, 447 F.2d 1293 (5th Cir. 1971), discussed in the text accompanying notes 77-81 *supra*. *Trawick* was to be decided under Mississippi law. As authority for a substantive rule central to the outcome of the case—the effect on the validity of an insurance policy of a material misrepresentation of fact by the applicant—the court cites *Apperson v. United States Fidelity & Guar. Co.*, 318 F.2d 438 (5th Cir. 1963), which is itself a diversity case governed by Mississippi law. To establish the point of law in question, the *Apperson* court relies on case law from West Virginia, Colorado, Illinois, and California, the Fifth, Eighth, and Ninth Circuits, and a treatise on insurance law and practice, in addition to a single Mississippi state court decision. 318 F.2d at 441 n.2.

state authority were preceded by attorneys' briefs similarly devoid.

4. It is possible that in reviewing conclusions reached by the trial court, an appellate court may simply not find it important to reiterate the authorities relied upon by the trial court. If this approach is adopted in a case where the trial court has placed proper reliance on state law, then the appellate court could not be accused of departing therefrom. It would seem the better practice, however, for the appellate court to be more explicit in explaining the bases for its opinions, especially when it reverses or otherwise modifies the judgment of the court below.

5. Some appellate courts may be simply unable to determine state law and resort to other sources without acknowledging their initial futile search. In similar circumstances, some federal courts may be unable to resolve a conflict between state rules and thus resort to other sources to find the "general rule" or some other acceptable position. Again, it would seem preferable for the courts at least to explain their attempts to invoke the authority of state law and the obstacles that they encountered in those attempts. Their failure to leave such an explanation behind creates the appearance that state law (along with *Erie*) was simply ignored.

Apart from these somewhat redeeming explanations, there are other possible reasons for the behavior of federal appellate judges in diversity cases. It is possible that some federal judges are unable to understand what *Erie* requires of them. While this explanation seems credible for cases involving the kind of problems encountered in *Byrd*⁸⁹ and *Hanna*,⁹⁰ i.e., issues peripheral to the substantive arguments in the case but touching important federal interests, it is more difficult to believe that federal judges at the circuit level are unable to apply *Erie* to the relatively straightforward substantive issues examined here.

Reading hundreds of diversity cases compels one to consider another almost equally uncomplimentary explanation: federal judges may simply be sloppy in acknowledging diversity of citizenship as the basis of their jurisdiction in such cases and in following that acknowledgement with the proper application of state law in accordance with *Erie*. Certainly the better judicial opinion-writing practice is to introduce the opinion with a state-

89. 356 U.S. 525 (1958).

90. 380 U.S. 460 (1965).

ment of the basis upon which the court's jurisdiction rests.⁹¹ Failure to follow this simple technique may result in the additional mistake of failing to make the appropriate incorporation of state law into judicial deliberations. If one adopts this view, one sees some federal judges as not consciously attempting to escape the requirements of *Erie* but failing to assess carefully the basis of the court's jurisdiction.⁹²

Another possible explanation takes a more complimentary view of the judges' opinion-writing abilities but views the judges themselves as less innocent in the evasion of *Erie* requirements. Several writers have expressed the somewhat ironic view that federal judges are, in general, more highly qualified than state judges to make applications of state law in diversity cases.⁹³ A corollary view assumes the desirability of bringing within the federal judge's discretion the decision of as many diversity case issues as possible.⁹⁴ If federal appellate judges are of this persuasion, especially if they accept the belief that substantive law in this country is becoming increasingly and inevitably nationalized,⁹⁵ then wherever a diversity issue arises that is only marginally substantive or that is even arguably outside the reach of state law governance, such judges will be disposed to invoke or create a federal rule for decision of the issue. Wherever litigants or their counsel are unaware of or apathetic toward the role of state law in their cases' diversity issues, judges professing this philosophy would seize the opportunity to invoke federal law and federal precedents in rendering their decisions.⁹⁶ Such a philosophy is

91. "The ordinary appellate opinion contains statements covering the following matters: (1) the nature of the action and how it reached the appellate court" APPELLATE JUDICIAL OPINIONS 172 (R. Leflar ed. 1974) (quoting from the American Bar Associations's 1961 booklets, *Internal Operating Procedures of Appellate Courts*). It must be conceded, however, that there is surprisingly little attention paid to the matter of jurisdictional statements in appellate opinions.

92. See text accompanying note 72 *supra*.

93. See, e.g., Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 22-23 (1964); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 326-27 (1967). See also Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203, 1212-13 (1965).

94. See, e.g., Note, *The Tolling of State Statutes of Limitations in Federal Courts*, 71 COLUM. L. REV. 865, 874-75 (1971); 13 VILL. L. REV. 225, 231-32 & nn.44 & 45 (1967).

95. See, e.g., Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 30 (1964); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 330-33 (1967).

96. See, e.g., 18 S.C.L. REV. 488 (1966). There may also be an element of nostalgia in this attitude, a yearning for the "carefree days before the advent of *Erie R. Co. v. Tompkins*." Zell v. American Seating Co., 138 F.2d 641, 643 n.1 (2d Cir. 1943); Boner, *Erie v. Tompkins: A Study in Judicial Precedent* (pt. 2), 40 TEX. L. REV. 619, 639-40

similar in tenor to the aggressive expansion of federal court jurisdiction in numerous other legal areas.⁹⁷ Many commentators have noted the growing number of skirmish points on the line manned by federal and state courts and the tendency of the federal courts to be the attackers and the ultimate victors in the jurisdiction battles.⁹⁸ It is possible to view the federal court treatment of state law and diversity cases as simply another example of these.

As an example of the diminished importance of state law in federal litigation, the trend noted in this study is of serious proportions. Particularly if one adopts the position advanced by Justice Brandeis in *Erie* that the rule of that case is required by the United States Constitution and that the pre-*Erie* practice was violative of the Constitution,⁹⁹ then one must conclude that many of our diversity cases are being decided in violation of constitutional principles of federalism. Even if one does not accept the theory of *Erie*'s constitutional necessity, the possible damage to the nation's federalistic structure in the judicial sector must be weighed against whatever benefits, if any, may accrue by this widespread favoring of federal over state law in diversity cases.¹⁰⁰

III. CONCLUSION

The history of diversity litigation has been consistently controversial. Uncertainty and acrimony have characterized the judicial struggles with choice of law in these cases.¹⁰¹ The first strong attempt at a definitive solution—*Swift v. Tyson* in 1842—finally disintegrated in the critical blasts following *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* in 1922. The experiment in federal law predominance was abandoned and a new program of state law hegemony was inaugurated with the *Erie Railroad v. Tompkins* decision

(1962). This aggressive philosophy may also be reflected in Wisdom, *The Frictionmaking, Exacerbating Political Role of the Federal Courts*, 21 Sw. L.J. 411 (1967).

97. See, e.g., Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 20 (1964). See generally Littlefield, *Progress in Federal-State Cooperation*, 19 BUS. LAW. 203 (1963); Younger, *State v. Uncle Sam*, 58 A.B.A.J. 155 (1972).

98. See, e.g., Carter, *Federal-State Court Conflict*, 20 FED. B.J. 409 (1960). See also Flynn, *The Crisis of Federalism: Who Is Responsible?* 51 A.B.A.J. 229 (1965); Mason, *The Supreme Court and Federalism*, 44 TEX. L. REV. 1187 (1966).

99. 304 U.S. 64, 77-80 (1938). See also Note, *State Statutes of Limitations in Federal Courts: By Whom Is the Statute Tolled?*, 1971 DUKE L.J. 785, 788 & n.32.

100. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 49 (1954).

101. See note 12 and accompanying text *supra*.

announced in 1938. In the fringe areas of its application, the decision has been widely debated and radically reinterpreted on several occasions. Nevertheless, the major impact of the *Erie* decision remains today as when it was announced in 1938: most issues in diversity cases not directly governed by federal statutes or constitutional provisions are to be decided by application of the law of the forum state. The conclusion of this study is that there is today in the federal judiciary frequent departure from this mandate, even where its application is obvious. The study supports the conclusion that many current federal diversity cases are resolved by resort to nonmandatory authorities from outside the forum state or to subjective notions of the federal judges themselves. It is suggested that the impetus for this development is found in poor opinion-writing practices, in the inability of some federal judges to understand what *Erie* requires of them, or in a conscious effort on the judges' part to supplant the authority of state law with that of federal law in diversity cases. These unpleasant conclusions may be joined by other possible explanations resulting from future investigations.

If *Erie* is truly an important seam in our nation's fabric of federalism,¹⁰² then it is imperative that members of the federal judiciary make a more conscientious attempt to understand and apply its teachings in a way that will strengthen that fabric. Their failure to do so may contribute heavily to the declining importance of state courts and state-created rights in this country.¹⁰³

102. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring); C. WRIGHT, *supra* note 4, § 52, at 225; Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695-96 (1974); Boner, *Erie v. Tompkins: A Study in Judicial Precedent* (pt. 2), 40 TEX. L. REV. 619, 635-36 (1962).

103. See Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 3, 5-6 & n.22, suggesting that greatly expanded federal diversity jurisdiction would deprive states of the ability to construe their own statutes and to make common law.

APPENDICES

The following cases from the federal circuit courts of appeal have been identified in the study as apparently failing in some respect to rely on state law as the appropriate rule of decision in diversity litigation. These judgments are based on the absence of state citations, the presence of nonstate citations, or on other declarations in the opinions.

APPENDIX A

These cases are taken from volumes 452-73 of the *Federal Reporter, 2d Series*, and will be listed first in alphabetical order and then repeated alphabetically by circuits.

A.W. Therrien Co. v. H.K. Ferguson Co., 470 F.2d 912 (1st Cir. 1972).

Allstate Ins. Co. v. Hiseley, 465 F.2d 1243 (10th Cir. 1972).

Alvernes v. Small Business Administration, 470 F.2d 954 (1st Cir. 1972).

Armour & Co. v. Nard, 463 F.2d 8 (8th Cir. 1972).

Ashland Oil & Ref. Co. v. Cities Serv. Gas Co., 462 F.2d 204 (10th Cir. 1972).

Atlantic & Gulf Stevedores, Inc. v. Kominers, 456 F.2d 1146 (2d Cir. 1972).

Barby v. Cabot Corp., 465 F.2d 11 (10th Cir. 1972).

Bednarz v. Continental Ins. Co., 453 F.2d 372 (5th Cir. 1972).

Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972).

Bitsos v. Red Owl Stores, Inc., 459 F.2d 656 (8th Cir. 1972).

Bonhiver v. Rotenberg, Schwartzman & Richards, 461 F.2d 925 (7th Cir. 1972).

Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972).

Brauer v. Republic Steel Corp., 460 F.2d 801 (10th Cir. 1972).

Brooks Towers Corp. v. Hunkin-Conkey Constr. Co., 454 F.2d 1203 (10th Cir. 1972).

Charles L. Bowman & Co. v. Erwin, 468 F.2d 1293 (5th Cir. 1972).

Citizens State Bank v. Penn Cent. Transp. Co., 463 F.2d 611 (7th Cir. 1972).

Clark v. Bunker, 453 F.2d 1006 (9th Cir. 1972).

Clyde v. Hodge, 460 F.2d 532 (3d Cir. 1972).

Cookson v. Western Oil Fields, Inc., 465 F.2d 460 (10th Cir. 1972).

Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co., 466 F.2d 722 (7th Cir. 1972).

- Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972).
 Elite, Inc. v. S.S. Mullen, Inc., 469 F.2d 1127 (9th Cir. 1972).
 Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972).
 Farmers & Bankers Life Ins. Co. v. Insurance Co. of N. America, 457 F.2d 21 (10th Cir. 1972).
 Fattore Co. v. Metropolitan Sewage Comm'n, 454 F.2d 537 (7th Cir. 1971).
 Fidelity & Deposit Co. v. Scott Bros. Constr. Co., 461 F.2d 640 (5th Cir. 1972).
 Fidelity Bank v. Lutheran Mut. Life Ins. Co., 465 F.2d 211 (10th Cir. 1972).
 Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179 (8th Cir. 1972).
 First Ins. Co. v. Continental Cas. Co., 466 F.2d 807 (9th Cir. 1972).
 Freight Terminals, Inc. v. Ryder System, Inc., 461 F.2d 1046 (5th Cir. 1972).
 Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972).
 Goldstein v. Stainless Processing Co., 465 F.2d 392 (7th Cir. 1972).
 Graham v. Texas Gulf Sulphur Co., 457 F.2d 418 (5th Cir. 1972).
 Hagans v. Glen Falls Ins. Co., 465 F.2d 1249 (10th Cir. 1972).
 Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).
 Howard Hill, Inc. v. George A. Fuller Co., 473 F.2d 217 (5th Cir. 1973).
 Insurance Co. of N. America v. McCleave, 462 F.2d 587 (3d Cir. 1972).
 J.G. Link & Co. v. Continental Cas. Co., 470 F.2d 1133 (9th Cir. 1972).
 James v. Atchison, T. & S.F. Ry., 464 F.2d 173 (10th Cir. 1972).
 Johnson Chem. Co. v. Condado Center, Inc., 453 F.2d 1044 (1st Cir. 1972).
 KLPR TV, Inc. v. Visual Elecs. Corp., 465 F.2d 1382 (8th Cir. 1972).
 Kaczmarek v. Mesta Mach. Co., 463 F.2d 675 (3d Cir. 1972).
 Kaufman v. Diversified Indus., Inc., 460 F.2d 1331 (2d Cir. 1972).
 Kelley v. Bank Bldg. & Equip. Corp. of America, 453 F.2d 774 (10th Cir. 1972).

Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1067 (10th Cir. 1972).

Kilpatrick Bros. v. I.B.M. Corp., 464 F.2d 1080 (10th Cir. 1972).

King v. Woodward, 464 F.2d 625 (10th Cir. 1972).

L & S Enterprises Co. v. Great Am. Ins. Co., 454 F.2d 457 (7th Cir. 1971).

Leighton v. New York, S. & W. R.R., 455 F.2d 389 (2d Cir. 1972).

Lloyd v. Grynberg, 464 F.2d 622 (10th Cir. 1972).

Louis M. McMaster, Inc. v. Pennsbury Village Co., 460 F.2d 520 (3d Cir. 1972).

Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972).

Mack v. Earle M. Jorgensen Co., 467 F.2d 1177 (7th Cir. 1972).

Major v. Bishop, 462 F.2d 1277 (10th Cir. 1972).

Major Oil Corp. v. Equitable Life Assurance Soc'y of the United States, 457 F.2d 596 (10th Cir. 1972).

Maxworthy v. Horn Elec. Serv., Inc., 452 F.2d 1141 (4th Cir. 1972).

McPhee v. Reichel, 461 F.2d 947 (3d Cir. 1972).

Meeks v. State Farm Mut. Auto. Ins. Co., 460 F.2d 776 (5th Cir. 1972).

Mendelson v. General Ins. Co. of America, 455 F.2d 270 (5th Cir. 1972).

Mickelsen v. Monsanto Co., 473 F.2d 221 (9th Cir. 1972).

Milwaukee Gear Co. v. Charles Benjamin, Inc., 466 F.2d 588 (3d Cir. 1972).

Mock v. Chicago, R.I. & P.R.R., 454 F.2d 131 (8th Cir. 1972).

Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

Natol Petroleum Corp. v. Aetna Ins. Co., 466 F.2d 38 (10th Cir. 1972).

New Mexico Sav. & Loan Ass'n v. United States Fidelity & Guar. Co., 454 F.2d 328 (10th Cir. 1972).

Noonan v. Midland Capital Corp., 453 F.2d 459 (2d Cir. 1972).

Noto v. Pico Peak Corp., 469 F.2d 358 (2d Cir. 1972).

Oklahoma Morris Plan Co. v. Security Mut. Cas. Co., 455 F.2d 1209 (8th Cir. 1972).

Orient Mid-East Lines v. Albert E. Bowen, Inc., 458 F.2d 572 (2d Cir. 1972).

Pogue v. Retail Credit Co., 453 F.2d 336 (4th Cir. 1972).

- Prudential Ins. Co. of America v. Clark, 456 F.2d 932 (5th Cir. 1972).
- Ranco Fertiliservice, Inc. v. Laursen, 456 F.2d 988 (8th Cir. 1972).
- Raybestos-Manhattan, Inc. v. Rowland, 460 F.2d 697 (4th Cir. 1972).
- Rawdon v. Stanley, 455 F.2d 482 (10th Cir. 1972).
- Rogers v. Mascari, 455 F.2d 963 (6th Cir. 1972).
- Sainsbury v. Hartford Accident & Indem. Co., 469 F.2d 392 (6th Cir. 1972).
- Schoenfeld v. Neher, 453 F.2d 896 (10th Cir. 1972).
- Schott v. City of Kingman, 461 F.2d 593 (9th Cir. 1972).
- Sid Richardson Carbon & Gasoline Co. v. Phillips Petroleum Co., 456 F.2d 203 (5th Cir. 1972).
- Singer v. Sterling Drug, Inc., 461 F.2d 288 (7th Cir. 1972).
- Slotkin v. Willmering, 464 F.2d 418 (8th Cir. 1972).
- Smith v. Babcock Poultry Farms, Inc., 469 F.2d 456 (10th Cir. 1972).
- Smith v. Coy, 460 F.2d 1226 (3d Cir. 1972).
- Stanspec Corp. v. Jelco, Inc., 464 F.2d 1184 (10th Cir. 1972).
- State Auto. Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 456 F.2d 238 (6th Cir. 1972).
- Stone v. Stone, 460 F.2d 64 (4th Cir. 1972).
- Tayar v. Roux Labs., Inc., 460 F.2d 494 (10th Cir. 1972).
- Trans-Car Purchasing, Inc. v. Summit Fidelity & Sur. Co., 454 F.2d 788 (7th Cir. 1971).
- Transpac Constr. Co. v. Clark & Groff, Eng'rs, Inc., 466 F.2d 823 (9th Cir. 1972).
- Unigard Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 466 F.2d 865 (10th Cir. 1972).
- Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir. 1972).
- Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972).
- Wise v. Westchester Fire Ins. Co., 463 F.2d 386 (10th Cir. 1972).
- Wood, Walker & Co. v. Evans, 461 F.2d 852 (10th Cir. 1972).

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First Circuit

- A.W. Therrien Co. v. H.K. Ferguson Co., 470 F.2d 912 (1st Cir. 1972).
- Alvernes v. Small Business Administration, 470 F.2d 954 (1st Cir. 1972).

Johnson Chem. Co. v. Condado Center, Inc., 453 F.2d 1044 (1st Cir. 1972).

Second Circuit

Atlantic & Gulf Stevedores, Inc., v. Kominers, 456 F.2d 1146 (2d Cir. 1972).

Kaufman v. Diversified Indus., Inc., 460 F.2d 1331 (2d Cir. 1972).

Leighton v. New York, S. & W.R.R., 455 F.2d 389 (2d Cir. 1972).

Noonan v. Midland Capital Corp., 453 F.2d 459 (2d Cir. 1972).

Noto v. Pico Peak Corp., 469 F.2d 358 (2d Cir. 1972).

Orient Mid-East Lines v. Albert E. Bowen, Inc., 458 F.2d 572 (2d Cir. 1972).

Third Circuit

Clyde v. Hodge, 460 F.2d 532 (3d Cir. 1972).

Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972).

Insurance Co. of N. America v. McCleave, 462 F.2d 587 (3d Cir. 1972).

Kaczmarek v. Mesta Mach. Co., 463 F.2d 675 (3d Cir. 1972).

Louis M. McMaster, Inc. v. Pennsbury Village Co., 460 F.2d 520 (3d Cir. 1972).

McPhee v. Reichel, 461 F.2d 947 (3d Cir. 1972).

Milwaukee Gear Co. v. Charles Benjamin, Inc., 466 F.2d 588 (3d Cir. 1972).

Smith v. Coy, 460 F.2d 1226 (3d Cir. 1972).

Fourth Circuit

Maxworthy v. Horn Elec. Serv., Inc., 452 F.2d 1141 (4th Cir. 1972).

Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

Pogue v. Retail Credit Co., 453 F.2d 336 (4th Cir. 1972).

Raybestos-Manhattan, Inc. v. Rowland, 460 F.2d 697 (4th Cir. 1972).

Stone v. Stone, 460 F.2d 64 (4th Cir. 1972).

Fifth Circuit

Bednarz v. Continental Ins. Co., 453 F.2d 372 (5th Cir. 1972).

Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972).

Charles L. Bowman & Co. v. Erwin, 468 F.2d 1293 (5th Cir. 1972).

- Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972).
 Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972).
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 Freight Terminals, Inc. v. Ryder System, Inc., 461 F.2d 1046 (5th Cir. 1972).
 Graham v. Texas Gulf Sulphur Co., 457 F.2d 418 (5th Cir. 1972).
 Howard Hill, Inc. v. George A. Fuller Co., 473 F.2d 217 (5th Cir. 1973).
 Meeks v. State Farm Mut. Auto. Ins. Co., 460 F.2d 776 (5th Cir. 1972).
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 Prudential Ins. Co. of America v. Clark, 456 F.2d 932 (5th Cir. 1972).
 Sid Richardson Carbon & Gasoline Co. v. Phillips Petroleum Co., 456 F.2d 203 (5th Cir. 1972).
 Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir. 1972).

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- Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972).
 Rogers v. Mascari, 455 F.2d 963 (6th Cir. 1972).
 Sainsbury v. Hartford Accident & Indem. Co., 469 F.2d 392 (6th Cir. 1972).
 State Auto. Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 456 F.2d 238 (6th Cir. 1972).

Seventh Circuit

- Bonhiver v. Rotenberg, Schwartzman & Richards, 461 F.2d 925 (7th Cir. 1972).
 Citizens State Bank v. Penn Cent. Transp. Co., 463 F.2d 611 (7th Cir. 1972).
 Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co., 466 F.2d 722 (7th Cir. 1972).
 Fattore Co. v. Metropolitan Sewage Comm'n, 454 F.2d 537 (7th Cir. 1972).
 Goldstein v. Stainless Processing Co., 465 F.2d 392 (7th Cir. 1972).
 L & S Enterprises Co. v. Great Am. Ins. Co., 454 F.2d 457 (7th Cir. 1972).

Mack v. Earle M. Jorgensen Co., 467 F.2d 1177 (7th Cir. 1972).

Singer v. Sterling Drug, Inc., 461 F.2d 288 (7th Cir. 1972).

Trans-Car Purchasing, Inc. v. Summit Fidelity & Sur. Co., 454 F.2d 788 (7th Cir. 1971).

Eighth Circuit

Armour & Co. v. Nard, 463 F.2d 8 (8th Cir. 1972).

Bitsos v. Red Owl Stores, Inc., 459 F.2d 656 (8th Cir. 1972).

Farmers & Bankers Life Ins. Co. v. Insurance Co. of N. America, 457 F.2d 21 (8th Cir. 1972).

Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179 (8th Cir. 1972).

KLPR TV, Inc. v. Visual Elecs. Corp., 465 F.2d 1382 (8th Cir. 1972).

Mock v. Chicago, R.I. & P.R.R., 454 F.2d 131 (8th Cir. 1972).

Oklahoma Morris Plan Co. v. Security Mut. Cas. Co., 455 F.2d 1209 (8th Cir. 1972).

Ranco Fertiliservice, Inc. v. Laursen, 456 F.2d 988 (8th Cir. 1972).

Slotkin v. Willmering, 464 F.2d 418 (8th Cir. 1972).

Ninth Circuit

Clark v. Bunker, 453 F.2d 1006 (9th Cir. 1972).

Elite, Inc. v. S.S. Mullen, Inc., 469 F.2d 1127 (9th Cir. 1972).

First Ins. Co. v. Continental Cas. Co., 466 F.2d 807 (9th Cir. 1972).

J.G. Link & Co. v. Continental Cas. Co., 470 F.2d 1133 (9th Cir. 1972).

Mickelsen v. Monsanto Co., 473 F.2d 221 (9th Cir. 1972).

Schott v. City of Kingman, 461 F.2d 593 (9th Cir. 1972).

Transpac Constr. Co. v. Clark & Groff, Eng'rs, Inc., 466 F.2d 823 (9th Cir. 1972).

Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972).

Tenth Circuit

Allstate Ins. Co. v. Hiseley, 465 F.2d 1243 (10th Cir. 1972).

Ashland Oil & Ref. Co. v. Cities Serv. Gas Co., 462 F.2d 204 (10th Cir. 1972).

Barby v. Cabot Corp., 465 F.2d 11 (10th Cir. 1972).

Brauer v. Republic Steel Corp., 460 F.2d 801 (10th Cir. 1972).

Brooks Towers Corp. v. Hunkin-Conkey Constr. Co., 454 F.2d 1203 (10th Cir. 1972).

Cookson v. Western Oil Fields, Inc., 465 F.2d 460 (10th Cir. 1972).

Fidelity Bank v. Lutheran Mut. Life Ins. Co., 465 F.2d 211 (10th Cir. 1972).

Hagans v. Glen Falls Ins. Co., 465 F.2d 1249 (10th Cir. 1972).

Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

James v. Atchison, T. & S.F. Ry., 464 F.2d 173 (10th Cir. 1972).

Kelley v. Bank Bldg. & Equip. Corp. of America, 453 F.2d 774 (10th Cir. 1972).

Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1067 (10th Cir. 1972).

Kilpatrick Bros. v. I.B.M. Corp., 464 F.2d 1080 (10th Cir. 1972).

King v. Woodward, 464 F.2d 625 (10th Cir. 1972).

Lloyd v. Grynberg, 464 F.2d 622 (10th Cir. 1972).

Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972).

Major v. Bishop, 462 F.2d 1277 (10th Cir. 1972).

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New Mexico Sav. & Loan Ass'n v. United States Fidelity & Guar. Co., 454 F.2d 328 (10th Cir. 1972).

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Schoenfeld v. Neher, 453 F.2d 896 (10th Cir. 1972).

Smith v. Babcock Poultry Farms, Inc., 469 F.2d 456 (10th Cir. 1972).

Stanspec Corp. v. Jelco, Inc., 464 F.2d 1184 (10th Cir. 1972).

Tayar v. Roux Labs., Inc., 460 F.2d 494 (10th Cir. 1972).

Unigard Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 466 F.2d 865 (10th Cir. 1972).

Wise v. Westchester Fire Ins. Co., 463 F.2d 386 (10th Cir. 1972).

Wood, Walker & Co. v. Evans, 461 F.2d 852 (10th Cir. 1972).

APPENDIX B

These cases are taken from volumes 446-53 of the *Federal Reporter, 2d Series*, and will be listed first in alphabetical order and then repeated alphabetically by circuits.

Alphonse v. W.M. Kinner Transp. Co., 452 F.2d 700 (5th Cir. 1971).

Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115 (10th Cir. 1971).

- American Marine Corp. v. Citizens Cas. Co., 447 F.2d 1328 (5th Cir. 1971).
- Bigjoe v. Pioneer Am. Ins. Co., 446 F.2d 28 (9th Cir. 1971).
- Bornmann v. Great Southwest Gen. Hosp., Inc., 453 F.2d 616 (5th Cir. 1971).
- Buono Sales, Inc. v. Chrysler Motors Corp., 449 F.2d 715 (3d Cir. 1971).
- Charm Promotions, Ltd. v. Travelers Indem. Co., 447 F.2d 607 (7th Cir. 1971).
- Citizens State Bank v. Transamerica Ins. Co., 452 F.2d 199 (7th Cir. 1971).
- Cordero v. Pasquith, 450 F.2d 300 (4th Cir. 1971).
- Dillon v. Berg, 453 F.2d 876 (3d Cir. 1971).
- Eastern Petroleum Co. v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971).
- Etling v. Sander, 447 F.2d 593 (7th Cir. 1971).
- 1507 Corp. v. Henderson, 447 F.2d 540 (7th Cir. 1971).
- Fifty Assocs. v. Prudential Ins. Co. of America, 450 F.2d 1007 (9th Cir. 1971).
- Fireman's Fund Ins. Co. v. Millers' Mut. Ins. Ass'n, 451 F.2d 1140 (10th Cir. 1971).
- Forest Labs., Inc. v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971).
- Friedman v. N.B.C. Motorcycle Imports, Inc., 452 F.2d 1215 (2d Cir. 1971).
- Gross v. Southern Ry., 446 F.2d 1057 (5th Cir. 1971).
- Gushee v. Kalen, 449 F.2d 1276 (10th Cir. 1971).
- Jenkins v. General Motors Corp., 446 F.2d 377 (5th Cir. 1971).
- Keeler v. Carpenter, 449 F.2d 437 (10th Cir. 1971).
- Pietrucha v. Grant Hosp., 447 F.2d 1029 (7th Cir. 1971).
- Potts v. Continental Cas. Co., 453 F.2d 276 (9th Cir. 1971).
- Roberts v. Fidelity & Cas. Co., 452 F.2d 981 (9th Cir. 1971).
- Safeway Moving & Storage Corp. v. Aetna Ins. Co., 452 F.2d 79 (4th Cir. 1971).
- Scherff v. Missouri-Kansas-Texas R.R., 449 F.2d 23 (5th Cir. 1971).
- Southern Pac. Transp. Co. v. Nielsen, 448 F.2d 121 (10th Cir. 1971).
- Sperry Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir. 1971).
- Traders State Bank v. Continental Ins. Co., 448 F.2d 280 (10th Cir. 1971).

Travelers Indem. Co. v. Rosedale Passenger Lines, Inc., 450 F.2d 975 (4th Cir. 1971).

Trawick v. Manhattan Life Ins. Co., 447 F.2d 1293 (5th Cir. 1971).

United States Fidelity & Guar. Co. v. Empire State Bank, 448 F.2d 360 (8th Cir. 1971).

Vogan v. Byers, 447 F.2d 543 (3d Cir. 1971).

Alphabetical Listing by Circuits

Second Circuit

Friedman v. N.B.C. Motorcycle Imports, Inc., 452 F.2d 1215 (2d Cir. 1971).

Third Circuit

Buono Sales, Inc. v. Chrysler Motors Corp., 449 F.2d 715 (3d Cir. 1971).

Dillon v. Berg, 453 F.2d 876 (3d Cir. 1971).

Vogan v. Byers, 447 F.2d 543 (3d Cir. 1971).

Fourth Circuit

Cordero v. Pasquith, 450 F.2d 300 (4th Cir. 1971).

Safeway Moving & Storage Corp. v. Aetna Ins. Co., 452 F.2d 79 (4th Cir. 1971).

Sperry Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir. 1971).

Fifth Circuit

Alphonse v. W.M. Kinner Transp. Co., 452 F.2d 700 (5th Cir. 1971).

American Marine Corp. v. Citizens Cas. Co., 447 F.2d 1328 (5th Cir. 1971).

Bornmann v. Great Southwest Gen. Hosp., Inc., 453 F.2d 616 (5th Cir. 1971).

Gross v. Southern Ry., 446 F.2d 1057 (5th Cir. 1971).

Jenkins v. General Motors Corp., 446 F.2d 377 (5th Cir. 1971).

Scherff v. Missouri-Kansas-Texas R.R., 449 F.2d 23 (5th Cir. 1971).

Trawick v. Manhattan Life Ins. Co., 447 F.2d 1293 (5th Cir. 1971).

Seventh Circuit

Charm Promotions, Ltd. v. Travelers Indem. Co., 447 F.2d 607 (7th Cir. 1971).

Citizens State Bank v. Transamerica Ins. Co., 452 F.2d 199 (7th Cir. 1971).

Eastern Petroleum Co. v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971).

Etling v. Sander, 447 F.2d 593 (7th Cir. 1971).

1507 Corp. v. Henderson, 447 F.2d 540 (7th Cir. 1971).

Forest Labs., Inc. v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971).

Pietrucha v. Grant Hosp., 447 F.2d 1029 (7th Cir. 1971).

Eighth Circuit

United States Fidelity & Guar. Co. v. Empire State Bank, 448 F.2d 360 (8th Cir. 1971).

Ninth Circuit

Bigjoe v. Pioneer Am. Ins. Co., 446 F.2d 28 (9th Cir. 1971).

Fifty Assocs. v. Prudential Ins. Co. of America, 450 F.2d 1007 (9th Cir. 1971).

Potts v. Continental Cas. Co., 453 F.2d 276 (9th Cir. 1971).

Roberts v. Fidelity & Cas. Co., 452 F.2d 981 (9th Cir. 1971).

Tenth Circuit

Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115 (10th Cir. 1971).

Fireman's Fund Ins. Co. v. Millers' Mut. Ins. Ass'n, 451 F.2d 1140 (10th Cir. 1971).

Gushee v. Kalen, 449 F.2d 1276 (10th Cir. 1971).

Keeler v. Carpenter, 449 F.2d 437 (10th Cir. 1971).

Southern Pac. Transp. Co. v. Nielsen, 448 F.2d 121 (10th Cir. 1971).

Traders State Bank v. Continental Ins. Co., 448 F.2d 280 (10th Cir. 1971).

APPENDIX C

These cases are taken from volumes 470-78 of the *Federal Reporter, 2d Series*, and will be listed first in alphabetical order and then repeated alphabetically by circuits.

Abbott Redmont Thinlite Corp. v. Redmont, 475 F.2d 85 (2d Cir. 1973).

Bank of the Southwest v. National Sur. Co., 477 F.2d 73 (5th Cir. 1973).

Boyd Constr. Co. v. T.L. James & Co., 477 F.2d 34 (5th Cir. 1973).

- Boehm v. Fox, 473 F.2d 445 (10th Cir. 1973).
 Carter v. Aetna Cas. & Sur. Co., 473 F.2d 1071 (8th Cir. 1973).
 Council Bros. v. Ray Burner Co., 473 F.2d 400 (5th Cir. 1973).
 Eagle Star Ins. Co. v. Deal, 474 F.2d 1216 (8th Cir. 1973).
 Goodyear Rubber & Supply Co. v. Great Am. Ins. Co., 471 F.2d 1343 (9th Cir. 1973).
 Gustafson v. General Motors Acceptance Corp., 470 F.2d 1057 (8th Cir. 1973).
 Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973).
 Kaminer v. Franklin Life Ins. Co., 472 F.2d 1073 (5th Cir. 1973).
 Kull v. Mid-America Pipeline Co., 476 F.2d 271 (5th Cir. 1973).
 Lohman v. General Am. Life Ins. Co., 478 F.2d 719 (8th Cir. 1973).
 Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1972).
 Matthews v. Drew Chem. Corp., 475 F.2d 146 (5th Cir. 1973).
 Rotermond v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973).
 Security Ins. Co. v. Wimpy, 475 F.2d 1102 (5th Cir. 1973).
 Slay Warehousing Co. v. Reliance Ins. Co., 471 F.2d 1364 (8th Cir. 1973).
 Whitney Nat'l Bank v. Transamerica Ins. Co., 476 F.2d 632 (3d Cir. 1973).
 Zelinsky v. Associated Aviation Underwriters, 478 F.2d 832 (7th Cir. 1973).
 Zephyr Cove Lodge, Inc. v. First Nat'l Bank, 478 F.2d 1121 (9th Cir. 1973).

Alphabetical Listing by Circuits

Second Circuit

- Abbott Redmont Thinlite Corp. v. Redmont, 475 F.2d 85 (2d Cir. 1973).

Third Circuit

- Whitney Nat'l Bank v. Transamerica Ins. Co., 476 F.2d 632 (3d Cir. 1973).

Fifth Circuit

Bank of the Southwest v. National Sur. Co., 477 F.2d 73 (5th Cir. 1973).

Boyd Constr. Co. v. T.L. James & Co., 477 F.2d 34 (5th Cir. 1973).

Council Bros. v. Ray Burner Co., 473 F.2d 400 (5th Cir. 1973).

Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973).

Kaminer v. Franklin Life Ins. Co., 472 F.2d 1073 (5th Cir. 1973).

Kull v. Mid-America Pipeline Co., 476 F.2d 271 (5th Cir. 1973).

Matthews v. Drew Chem. Corp., 475 F.2d 146 (5th Cir. 1973).

Security Ins. Co. v. Wimpy, 475 F.2d 1102 (5th Cir. 1973).

Seventh Circuit

Zelinsky v. Associated Aviation Underwriters, 478 F.2d 832 (7th Cir. 1973).

Eighth Circuit

Carter v. Aetna Cas. & Sur. Co., 473 F.2d 1071 (8th Cir. 1973).

Eagle Star Ins. Co. v. Deal, 474 F.2d 1216 (8th Cir. 1973).

Gustafson v. General Motors Acceptance Corp., 470 F.2d 1057 (8th Cir. 1973).

Lohman v. General Am. Life Ins. Co., 478 F.2d 719 (8th Cir. 1973).

Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1973).

Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1972).

Slay Warehousing Co. v. Reliance Ins. Co., 471 F.2d 1364 (8th Cir. 1973).

Ninth Circuit

Goodyear Rubber & Supply Co. v. Great Am. Ins. Co., 471 F.2d 1343 (9th Cir. 1973).

Zephyr Cove Lodge, Inc. v. First Nat'l Bank, 478 F.2d 1121 (9th Cir. 1973).

Tenth Circuit

Boehm v. Fox, 473 F.2d 445 (10th Cir. 1973).

APPENDIX D

These cases are taken from volumes 297-312 of the *Federal Reporter, 2d Series*, and will be listed first in alphabetical order and then repeated alphabetically by circuits.

Aetna Ins. Co. v. Neville G. Penrose, Inc., 304 F.2d 612 (5th Cir. 1962).

Auto Racing, Inc. v. Continental Cas. Co., 304 F.2d 697 (10th Cir. 1962).

City of Memphis v. Ford Motor Co., 304 F.2d 845 (6th Cir. 1962).

Crane Supply Co. v. American States Ins. Co., 310 F.2d 712 (6th Cir. 1962).

Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962).

David R. Balogh, Inc. v. Pennsylvania Millers Mut. Fire Ins. Co., 307 F.2d 894 (5th Cir. 1962).

Eastmount Constr. Co. v. Transport Mfg. & Equip. Co., 301 F.2d 34 (8th Cir. 1962).

Haltom Oil Co. v. Phillips Petroleum Co., 304 F.2d 95 (5th Cir. 1962).

Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962).

Jamison v. Di Nardo, Inc., 302 F.2d 27 (3d Cir. 1962).

McJunkin Corp. v. North Carolina Natural Gas Corp., 300 F.2d 794 (4th Cir. 1961).

Morreale v. National Fire Ins. Co., 298 F.2d 96 (7th Cir. 1962).

Moyer v. Cass County Post No. 60, Dep't of Ind. Am. Legion, Inc., 298 F.2d 46 (7th Cir. 1962).

Minnesota Amusement Co. v. Larkin, 299 F.2d 142 (8th Cir. 1962).

Runge v. Welch, 307 F.2d 829 (5th Cir. 1962).

Skopes Rubber Corp. v. United States Rubber Co., 299 F.2d 584 (1st Cir. 1962).

Speedry Chem. Prods., Inc. v. Carter's Ink Co., 306 F.2d 328 (2d Cir. 1962).

Whetstone v. Orion Ins. Co., 302 F.2d 15 (10th Cir. 1962).

Wright v. B.F. Huntley Furniture Co., 299 F.2d 904 (4th Cir. 1962).

*Alphabetical Listing by Circuits***First Circuit**

Skopes Rubber Corp. v. United States Rubber Co., 299 F.2d 584 (1st Cir. 1962).

Second Circuit

Speedry Chem. Prods., Inc. v. Carter's Ink Co., 306 F.2d 328 (2d Cir. 1962).

Third Circuit

Jamison v. Di Nardo, Inc., 302 F.2d 27 (3d Cir. 1962).

Fourth Circuit

Darter v. Greenville Community Hotel Corp., 301 F.2d 70 (4th Cir. 1962).

McJunkin Corp. v. North Carolina Natural Gas Corp., 300 F.2d 794 (4th Cir. 1961).

Wright v. B.F. Huntley Furniture Co., 299 F.2d 904 (4th Cir. 1962).

Fifth Circuit

Aetna Ins. Co. v. Neville G. Penrose, Inc., 304 F.2d 612 (5th Cir. 1962).

David R. Balogh, Inc. v. Pennsylvania Millers Mut. Fire Ins. Co., 307 F.2d 894 (5th Cir. 1962).

Haltom Oil Co. v. Phillips Petroleum Co., 304 F.2d 95 (5th Cir. 1962).

Runge v. Welch, 307 F.2d 829 (5th Cir. 1962).

Sixth Circuit

City of Memphis v. Ford Motor Co., 304 F.2d 845 (6th Cir. 1962).

Crane Supply Co. v. American States Ins. Co., 310 F.2d 712 (6th Cir. 1962).

Seventh Circuit

Morreale v. National Fire Ins. Co., 298 F.2d 96 (7th Cir. 1962).

Moyer v. Cass County Post No. 60, Dep't of Ind. Am. Legion, Inc., 298 F.2d 46 (7th Cir. 1962).

Eighth Circuit

Eastmount Constr. Co. v. Transport Mfg. & Equip. Co., 301 F.2d 34 (8th Cir. 1962).

Minnesota Amusement Co. v. Larkin, 299 F.2d 142 (8th Cir. 1962).

Tenth Circuit

Auto Racing, Inc. v. Continental Cas. Co., 304 F.2d 697 (10th Cir. 1962).

Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962).

Whetstone v. Orion Ins. Co., 302 F.2d 15 (10th Cir. 1962).

APPENDIX E

These cases are taken from volumes 146-49 of the *Federal Reporter, 2d Series*, and will be listed first in alphabetical order and then repeated alphabetically by circuits.

George D. Horning, Inc. v. McAllenan, 149 F.2d 561 (4th Cir. 1945).

Massachusetts Mut. Life Ins. Co. v. George & Co., 148 F.2d 42 (8th Cir. 1945).

R.E. Crummer & Co. v. Nuveen, 147 F.2d 3 (7th Cir. 1945).

Subin v. Jones County Hosiery Mills, Inc., 146 F.2d 116 (5th Cir. 1945).

Alphabetical Listing by Circuits

Fourth Circuit

George D. Horning, Inc., v. McAllenan, 149 F.2d 561 (4th Cir. 1945).

Fifth Circuit

Subin v. Jones County Hosiery Mills, Inc., 146 F.2d 116 (5th Cir. 1945).

Seventh Circuit

R.E. Crummer & Co. v. Nuveen, 147 F.2d 3 (7th Cir. 1945).

Eighth Circuit

Massachusetts Mut. Life Ins. Co. v. George & Co., 148 F.2d 42 (8th Cir. 1945).

APPENDIX F

These cases are taken from volumes 150-159 of the *Federal Reporter, 2d Series*, and will be listed first in alphabetical order and then repeated alphabetically by circuits.

Al G. Barnes Amusement Co. v. Olvera, 154 F.2d 497 (9th Cir. 1946).

Beech Aircraft Corp. v. Ross, 155 F.2d 615 (10th Cir. 1946).

Cockburn v. O'Meara, 155 F.2d 340 (5th Cir. 1946).

Commercial Standard Ins. Co. v. Gilmore, Gardner & Kirk Oil Co., 157 F.2d 929 (10th Cir. 1946).

Continental Ins. Co. v. Fire Ass'n, 152 F.2d 239 (6th Cir. 1945).

Continental Ins. Co. v. Harrison County, 153 F.2d 671 (5th Cir. 1946).

Cook v. Phillips Petroleum Co., 158 F.2d 10 (5th Cir. 1946).

Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945).

Garrett v. First Nat'l Bank & Trust Co., 153 F.2d 289 (5th Cir. 1946).

Giesecke v. Pittsburgh Hotels, Inc., 152 F.2d 689 (3d Cir. 1945).

Hoffman v. Illinois Nat'l Cas. Co., 159 F.2d 564 (7th Cir. 1947).

Hurt v. Cotton States Fertilizer Co., 159 F.2d 52 (5th Cir. 1946).

Irick v. Irick, 150 F.2d 514 (4th Cir. 1945).

J.V. McNicholas Transfer Co. v. Pennsylvania R.R., 154 F.2d 265 (6th Cir. 1946).

John Hancock Mut. Life Ins. Co. v. Douglass, 156 F.2d 367 (7th Cir. 1946).

Kropp Forge Co. v. Employers' Liab. Assurance Corp., 159 F.2d 536 (7th Cir. 1947).

Maryland Cas. Co. v. Morrison, 151 F.2d 772 (10th Cir. 1945).

Mayfield v. Kansas City Life Ins. Co., 158 F.2d 331 (7th Cir. 1946).

Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548 (5th Cir. 1945).

Mutual Life Ins. Co. v. Picard, 155 F.2d 105 (5th Cir. 1946).

New York Life Ins. Co. v. Federal Nat'l Bank, 151 F.2d 537 (10th Cir. 1945).

Refinery Equip., Inc. v. Wickett Ref. Co., 158 F.2d 710 (5th Cir. 1947).

Saario v. Charles F. Vachris, Inc., 151 F.2d 668 (2d Cir. 1945).

Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946).

Schindley v. Allen-Sherman-Hoff Co., 157 F.2d 102 (6th Cir. 1946).

Shell Oil Co. v. Blumberg, 154 F.2d 251 (5th Cir. 1946).

Shepherd Tractor & Equip. Co. v. Page, 158 F.2d 655 (5th Cir. 1947).

Standard Sur. & Cas. Co. v. Plantsville Nat'l Bank, 158 F.2d 422 (2d Cir. 1946).

Swalley v. Addressograph Multigraph Corp., 158 F.2d 51 (7th Cir. 1946).

Westcott v. United States Fidelity & Guar. Co., 158 F.2d 20 (4th Cir. 1946).

Alphabetical Listing by Circuits

Second Circuit

Saario v. Charles F. Vachris, Inc., 151 F.2d 668 (2d Cir. 1945).

Standard Sur. & Cas. Co. v. Plantsville Nat'l Bank, 158 F.2d 422 (2d Cir. 1946).

Third Circuit

Giesecke v. Pittsburgh Hotels, Inc., 152 F.2d 689 (3d Cir. 1945).

Fourth Circuit

Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945).

Irick v. Irick, 150 F.2d 514 (4th Cir. 1945).

Westcott v. United States Fidelity & Guar. Co., 158 F.2d 20 (4th Cir. 1946).

Fifth Circuit

Cockburn v. O'Meara, 155 F.2d 340 (5th Cir. 1946).

Continental Ins. Co. v. Harrison County, 153 F.2d 671 (5th Cir. 1946).

Cook v. Phillips Petroleum Co., 158 F.2d 10 (5th Cir. 1946).

Garrett v. First Nat'l Bank & Trust Co., 153 F.2d 289 (5th Cir. 1946).

Hurt v. Cotton States Fertilizer Co., 159 F.2d 52 (5th Cir. 1947).

Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548 (5th Cir. 1945).

Mutual Life Ins. Co. v. Picard, 155 F.2d 105 (5th Cir. 1946).

Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946).

Shell Oil Co. v. Blumberg, 154 F.2d 251 (5th Cir. 1946).

Shepherd Tractor & Equip. Co. v. Page, 158 F.2d 655 (5th Cir. 1947).

Refinery Equip., Inc. v. Wickett Ref. Co., 158 F.2d 710 (5th Cir. 1947).

Sixth Circuit

Continental Ins. Co. v. Fire Ass'n, 152 F.2d 239 (6th Cir. 1945).

J.V. McNicholas Transfer Co. v. Pennsylvania R.R., 154 F.2d 265 (6th Cir. 1946).

Schindley v. Allen-Sherman-Hoff, 157 F.2d 102 (6th Cir. 1946).

Seventh Circuit

Hoffman v. Illinois Nat'l Cas. Co., 159 F.2d 564 (7th Cir. 1947).

John Hancock Mut. Life Ins. Co. v. Douglass, 156 F.2d 367 (7th Cir. 1946).

Kropp Forge Co. v. Employers' Liab. Assurance Corp., 159 F.2d 536 (7th Cir. 1947).

Mayfield v. Kansas City Life Ins. Co., 158 F.2d 331 (7th Cir. 1946).

Swalley v. Addressograph Multigraph Corp., 158 F.2d 51 (7th Cir. 1946).

Ninth Circuit

Al G. Barnes Amusement Co. v. Olvera, 154 F.2d 497 (9th Cir. 1946).

Tenth Circuit

Beech Aircraft Corp. v. Ross, 155 F.2d 615 (10th Cir. 1946).

Commercial Standard Ins. Co. v. Gilmore, Gardner & Kirk Oil. Co., 157 F.2d 929 (10th Cir. 1946).

Maryland Cas. Co. v. Morrison, 151 F.2d 772 (10th Cir. 1945).

New York Life Ins. Co. v. Federal Nat'l Bank, 151 F.2d 537 (10th Cir. 1945).