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Erie Railroad Rule on Brave New Track



As a civil procedure professor and practice guide author for some thirty years, I do indeed get it that law students and lawyers have trouble applying the tectonic rule enunciated in 1938 by the Supreme Court in *Erie R. Co. v. Tompkins*¹. And certainly it means more than remembering a high profile federal personal injury lawsuit revolving around Harry Tompkins' tragic loss of a limb in a depression-era railroad accident in Hughestown, Pennsylvania.

In the last few years, the *Erie* rule has been on a high speed rail journey as it traverses the 21st Century phenomenon of state tort reform. From state house to state house across this country, local legislators are passing laws imposing seemingly procedural barriers to curb perceived threats of frivolous lawsuits. The question is whether they must be applied in federal court actions.

The *Erie* rule is deceptively simple: if there is a state law claim in federal court (via diversity or supplemental jurisdiction), the court will apply state *substantive* and federal *procedural* law. Simple perhaps – but the U.S. Supreme Court itself commented that the classification of a law as substantive or procedural can be “a challenging endeavor.”²

Every law student and lawyer should know that the *Erie* decision is in the Top Ten cases of all time, and for good reason. Disallowing federal courts to intuit general federal common law as part of an otherwise state law claim raised and raises vital issues of separation of powers, federalism, judicial administration, and all to say nothing of questions concerning the tactical manipulation of procedural and jurisdictional rules when initiating or removing actions.

Let's take an important and current example of state legislative tort reform in an area where the federal courts are completely split as to whether it applies in federal court: state anti-SLAPP statutes designed to authorize the prompt striking of unsupported lawsuits arising from a defendant's exercise of free speech or petitioning rights (e.g. defamation

claims).³ Since most of these statutes (enacted in some thirty states) allow for the shifting of attorney's fees and an immediate appeal, they present a powerful shield in the litigator's toolbox.

As stated, the federal circuits are deeply split as to whether the nominally “procedural” anti-SLAPP dismissal statutes nevertheless should be applied in federal court as part of manifest attempts by state legislatures to achieve substantive objectives.⁴ This important debate involves two competing analytic camps: one, reasoning that the state statutes reflect substantive commands, and the other concluding that Fed. R. Civ. P. 12 and 56 answer the same question (i.e., when and how a court dismisses a case before trial) and therefore must be applied notwithstanding contrary state rules.

Defining what is substantive and what is procedural is an illuminating first step. A law is substantive if it is bound up with the rights and obligations of state law (e.g. elements of a claim or defense, burden of proof, statutes of limitations, choice of law, damage caps, etc.). In contrast, a law is treated as procedural if it affects the manner and means of the claim's presentation, i.e., merely a form and mode of enforcing a state law (e.g. pleading standards, class action rules, discovery, dismissal for failure to prosecute, briefing rules, etc.).

But as law students have been telling me for decades, the definitions are easy to state and hard to apply. For example, many facially procedural rules such as the time limits for serving a complaint or requiring out-of-state defendants to post a bond can often be outcome determinative despite the obvious fact they are contained in self-described procedural rules. Comparatively, courts uniformly rule that the right to prejudgment interest is a substantive part of the damages analysis, yet obtaining post-judgment interest has long been held to be a procedural rule governed by the law of the sovereignty (state or federal) in which the judgment was obtained.⁵

It should become easier, perhaps, if one examines the substance/procedure question through the prism of the twin purposes of *Erie*: (1) discourage the evils of forum shopping, and (2) avoid the inequitable administration of laws.⁶ Viewed either way, substantive rules are those that affect the outcome of the case, while defining the rights and obligation of the parties. Conversely, procedural rules are “housekeeping” in nature and echo the mandate issued for generations by parents welcoming home their college-age children: “If you are in my house, you follow my rules.”

Over fifty years ago, in *Hanna v. Plumer*⁷, the Supreme Court gave us a threshold bright line for making this important distinction to determine if the *Erie* analysis is on the right track. If there is a federal rule directly on point that is in “collision” with a conflicting state rule, the federal rule will be applied as long as it does not violate the Rules Enabling Act.⁸ In other words, if Congress or the courts label a rule procedural when including it in their governing rules or judicial statutes that designation will control unless such rule abridges or creates substantive rights.

Not so fast and not so easy. While essentially all of the rules in the Federal Rules of Civil Procedure will be deemed not to violate the Rules Enabling Act, it is essential to determine if such rules actually are in collision with alternative state law rules and rights. For example, Federal Rule 68 allows offers of judgment by defendants with the consequence that if the plaintiff does not obtain a judgment more favorable at trial, costs and expert fees can be redirected. But what about state statutes that allow for *plaintiff* offers of judgment with similar consequences or even allowing attorney fees to the prevailing party? The case law is in some disarray.⁹

Of course, if there is a federal rule that is clearly on point it will be applied in federal court notwithstanding directly conflicting state law procedures. For example, the time to serve a complaint (90 days under Federal Rule 4(m)) will be applied in federal court actions. Similarly, the *Twombly/Iqbal* pleading rules of Rule 8 and the summary judgment standards in Rule 56 will apply in federal court. In fact, the plethora of federal rules will govern even in diversity actions (e.g. the filing of motions, joinder, discovery, expert disclosures and the like). They will be treated as federal “housekeeping” rules of civil procedure even if litigation practices in state court are completely different.

So how does one address situations where the practice in federal court differs from modern state tort reform statutes? This question is important because state legislature have become adept at passing what seem to be procedural laws



that clearly are designed to achieve substantive objectives. In addition to anti-SLAPP statutes, states across the country have enacted statutes requiring “certificates of merit” before suing a professional for malpractice—statutes plainly designed to limit the filing of seemingly meritless lawsuits against defendants perceived—rightly or wrongly—to have suffered an unfair explosion of litigation.

Similarly, states often pass statutes requiring that litigants file various pre-lawsuit notices before suing and in some cases obligating them to go through alternative dispute resolution procedures as a prerequisite to filing the lawsuit. What to do when the state law case is filed in or removed to federal court? Again, courts have reached varying results.¹⁰

The U. S. Supreme Court has made it clear that simply because a state law might facially be deemed procedural does not mean it will not be applied in federal court if the state was attempting to achieve a manifest substantive outcome. For example, in *Gasperini v. Ctr. For Humanities, Inc.*¹¹ the state of New York passed a law restraining runaway jury verdicts by lowering the standard for granting a new trial. Plainly the state was attempting to achieve a substantive objective, Fed. R. Civ. P. 59 while governing new trials did not contain an explicitly conflicting standard, and therefore the state statute would apply.

In *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*,¹² the *Erie* train track became analytically more cluttered when the Court considered another New York statute this time precluding class actions that sought recovery of penalties as statutory interest. The High Court concluded in a plurality opinion by Justice Scalia that Rule 23 (not the state statute) governed the situation because presumably it was on point. However, most commentators and courts have turned to Justice Steven’s concurring opinion where he reiterated the *Gasperini* principle that states enacting procedural rules

designed to achieve substantive objective must be applied in federal court. However and more pertinently, Justice Stevens reasoned that the state class action statute in question was not directly a part of the state's framework of substantive rights or remedies, nor "so intertwined with the state right or remedy that its function was to define the scope of the state cleared right." Hence, the statute would not apply in federal court.

Given the number of conflicting decisions in this area, particularly on the anti-SLAPP state statutes, the *Erie* issue no doubt is heading again to the United States Supreme Court train station. What an array of analytic spurs that could be traveled:

- Must the federal courts apply state statutes with a heightened sensitivity to the importance of state interests?
- How does one examine whether a state is passing a procedural statute to achieve a substantive objective?
- Must the collision be entirely irreconcilable so as to allow application of the federal "housekeeping" rule?
- Will egalitarian and equal protection interests prevail so that state statutes will be applied if the litigant genuinely would pick state or federal court based on the presence (or absence) of such a rule?

So, now, over 80 years later, the *Erie* rule reemerges as vitally important to litigants in making their choices between state and federal court. On the one hand, courts could take into account state interests and the practical reality that many litigants might select their forum based on rule differences thus mandating equal application. By the same token, federal judges understandably may parochially insist that federal case-dispositive rules are not to be co-opted by alternatively thinking state legislators.

My proposed test may not be nearly so intellectual as the twin purposes prism, the *Gasperini* manifest substantive objective approach or Justice Stevens' enthralling "intertwining" interest analysis. I ask the mundane but perhaps revealing question: When the state law was passed were there lobbyists hanging around? If so, then almost certainly the law should be treated as substantive. If, on the other hand, the legislative hearing room was occupied primarily with civil procedure nerds like myself, it's probably procedural. How's that for a helpful analysis?

And by the way, if you are a true civil procedure nerd you know that Harry Tompkins lost his *right* arm in that awful accident leading to the number one procedure case of all time.



Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil

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¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, § 3-III (LexisNexis 2018) for a full discussion of the *Erie* doctrine.

² *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415 (1996).

³ For examples of anti-SLAPP (strategic lawsuits against public participation), see Cal. Code Civ. Proc. § 425.16; Tex. Civ. Prac. & Rem. Code § 27.002; D.C. Code § 16-5502(b); O.C.G.A. § 9-11-11.1; K.S.A. § 60-5320; Mass. Gen. Laws chapter 23, § 59H.

⁴ See *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (anti-SLAPP statutes are substantive and thus apply in federal court); *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (same); contra *Los Lobos Renewable Power v. AmeriCulture*, 885 F.3d 659 (10th Cir. 2018) (anti-SLAPP statutes do not apply in federal court because federal rules govern case-dispositive motions); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018) (same); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (same).

⁵ See *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 750 F.3d 573 (6th Cir. 2014)—prejudgment interest governed by state law; *In re Redondo Const. Corp.*, 820 F.3d 460 (1st Cir. 2016)—post-judgment interest governed by federal law in federal court.

⁶ See *The Wagstaffe Practice Guide: Federal Civil Procedure Before Trial*, § 3-III [C].

⁷ 380 U.S. 460 (1965).

⁸ 28 U.S.C. 2072 provides in part that the federal rules "shall not abridge, enlarge or modify any substantive right."

⁹ *Goldberg v. Pacific Indemnity Co.*, 627 F.3d 752 (9th Cir. 2010) (Rule 68 governs defendant offers of judgment); *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995) (same); cf. *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305 (7th Cir. 1995) (state rule allowing plaintiffs to recover on offer of judgment applies in federal court); *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273 (10th Cir. 2016) (same); see also *Divine Motel Group, LLC v. Rockhill Ins. Co.*, 722 Fed. Appx. 887 (11th Cir. 2018) (includes statute allowing shifting of fees).

¹⁰ See *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011) (certificate of merit rule applies in federal court); *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014) (same); contra *Estate of C.A. v. Grier*, 752 F.Supp.2d 763 (S.D. Tex. 2010).

¹¹ 518 U.S. 415 (1996).

¹² 559 U.S. 393 (2010).