

THE NATIONAL LAW JOURNAL

DAILY UPDATES ON WWW.NLJ.COM

NEWS FOR THE PROFESSION

MONDAY, APRIL 27, 2009

An incisivemedia publication

APPELLATE LAW

Home Circuit Rule

IN DIVERSITY CASES that raise state law issues of first impression, federal appellate courts must try to predict how the state's highest court would rule on the issue. When a federal circuit has done just that—ruled on a novel issue of law from a state within its jurisdiction—should other federal circuits simply defer to its decision as the “home circuit” for that state, or should they make their own *Erie* determination? The federal circuits have wrestled with this question, with inconsistent guidance from the U.S. Supreme Court on the extent to which deference to the state law expertise of local federal courts is warranted.

Deferring to the ‘home circuit’

The 2d U.S. Circuit Court of Appeals first addressed the issue of “home circuit” deference in *Factors Etc. Inc. v. Pro Arts Inc.*, 652 F.2d 278 (2d Cir. 1981), in which it faced an issue of first impression under Tennessee law. Although the Tennessee courts had not ruled on the issue, the 6th Circuit had addressed it in an earlier diversity case.

Judge Jon Newman concluded that the court should give “conclusive deference” to the 6th Circuit’s interpretation of Tennessee law because doing so minimized the disruptive effect of diversity jurisdiction on the orderly development of Tennessee law and promoted fairness to the public by preventing needless doctrinal divisions. *Id.* at 279, 282.

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In a vigorous dissent, Judge Walter Mansfield saw no reason to “blindly follow” the 6th Circuit and argued that the majority’s deference rule served no purpose. *Id.* at 284. He rejected the notion that the “6th Circuit has some special knowledge or expertise in

There are limits to the deference that appellate courts will pay to state law decisions of a ‘home circuit.’

Tennessee law to which deference must be paid,” particularly without any Tennessee authority on the issue. *Id.* at 285. Newman’s

views prevailed, and the 2d Circuit still follows the home-circuit rule. See *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 91-92 (2d Cir. 2007).

The D.C. Circuit has adopted a similar rule, concluding that “[j]udges of the home circuit are likely to be more experienced in the law of states within their circuit.” *Charter Oil Co. v. American Employers’ Ins. Co.*, 69 F.3d 1160, 1164 (D.C. Cir. 1995). “[S]uch deference makes for uniform results taking advantage of that expertise” and deters forum shopping. *Id.*

A number of other circuits, most without significant comment, have also adopted a practice of deferring to a sister circuit’s construction of the law of a state within that circuit. See *Dawn Equip. Co. v. Micro-Trak Sys. Inc.*, 186 F.3d 981, 989 n.3 (7th Cir. 1999); *U.S. v. Maness*, 23 F.3d 1006, 1008 (6th Cir. 1994); *Mellon Bank N.A. v. Ternisky*, 999 F.2d 791, 796 (4th Cir. 1993).

The 5th Circuit, however, has ruled that, even though “sister circuits’ experience construing the laws of the states within their jurisdiction may render their decisions persuasive,” it is not bound to follow such decisions. *Peters v. Ashcroft*, 383 F.3d 302, 306 n.2 (5th Cir. 2004) (9th Circuit’s interpretation of Arizona law doesn’t bind the 5th Circuit).

There are certain limits to the deference courts will pay to decisions of a home circuit.

In *Factors*, the 2d Circuit recognized two exceptions—when a sister circuit’s holding has been “superseded by a later pronouncement from state legislative or judicial sources,” and when the circuit “inadvertently overlooked” applicable state court decisions. 652 F.2d at

283. It also recognized “rare instance[s]” in which deference is inappropriate because the home circuit “has disregarded clear signals” from the state’s highest court on the relevant legal issue. *Id.*

Other circuits have adopted similar exceptions, because, as the D.C. Circuit noted, “[d]eference is one thing; blind adherence quite another.” *Indep. Petrochemical Corp. v. Aetna Cas. & Surety Co.*, 944 F.2d 940, 944-47 (D.C. Cir. 1991) (rejecting deference to 8th Circuit ruling on Missouri law because it “ignored clear signals” from Missouri courts and “clearly misread” that state’s law); see *Maness*, 23 F.3d at 1008-09 (6th Cir. 1994) (rejecting deference to 4th Circuit ruling on North Carolina issue of first impression because it disregarded a contrary, relevant North Carolina Supreme Court decision).

What happens when a federal circuit has ruled on a novel issue of state law, predicting how the state’s highest court would rule on the issue, and there is a subsequent, contradictory ruling by the state’s intermediate appellate court?

The federal circuits have taken divergent views on whether they should continue to follow their own *Erie* precedent divining state law on the issue or defer to the intervening state appellate court decision. See Colin Wrabley, “Applying Federal Court of Appeals’ Precedent: Contrasting Approaches to Applying Court of Appeals’ Federal Law Holdings and *Erie* State Law Predictions,” 3 *Seton Hall Cir. Rev.* 1, 4-11 (2006-2007). Federal circuits face the same issue in determining whether to follow a home-circuit ruling in this situation. See *Blue Cross & Blue Shield Mutual of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 328 (6th Cir. 1997) (6th Circuit declined to follow 7th Circuit’s ruling on Illinois law when Illinois intermediate appellate courts had subsequently issued contrary decisions).

The U.S. Supreme Court has never squarely addressed the home-circuit rule, and it has been inconsistent in its views on the extent to which local judicial expertise warrants deference by federal appellate courts. In *Salve Regina College v. Russell*, 499 U.S. 225 (1991), the court specifically held that a circuit court should not defer to the state law interpretation of a federal district court in that state.

Concluding that *de novo* review by the circuit court serves the dual goals of doctrinal coherence and judicial economy, the court rejected the notion that a local district judge’s home-state experience provides an advantage in interpreting the state’s law. *Id.* at 239.

The Supreme Court has issued varying decisions on whether it should defer to a federal circuit’s construction of state law within its jurisdiction. Earlier decisions endorsed such deference. See, e.g., *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 738 (1989) (declining to review 5th Circuit’s decision on an issue of Texas law because its “expertise in interpreting Texas law is greater than our own” and the circuit “is in a better position” to determine the issue of state law).

In *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996), however, the court refused to defer to a 10th Circuit decision interpreting a Utah abortion statute. The court rejected as “particularly weak” Justice John Paul Stevens’ dissenting argument that the 10th Circuit’s construction of Utah law deserved deference.

It belittled the 10th Circuit’s “supposed greater expertise” with that state’s law, noting that none of the panel judges was even from Utah. Relying on *Salve Regina*’s holding that no deference is due to district judges’ interpretation of their states’ law, the court found no basis for believing a circuit court has any “natural advantage” in interpreting state law. *Id.*

Although *Leavitt* and *Salve Regina* strongly suggested that deference to local federal courts is unwarranted, subsequent cases sent the opposite message, particularly when the circuit panel included judges from the state whose law was at issue. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the court rejected the plaintiff’s arguments on an issue of Texas law as “insufficient to dispel the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction.” *Id.* at 167. Similarly, in *McMillan v. Monroe County*, 520 U.S. 781, 786 (1997), the Court stated that, because the 11th Circuit’s jurisdiction includes Alabama, “we defer considerably to that court’s expertise in interpreting Alabama law.”

In each case, the court noted that two of the panel judges were from the state whose law was at issue, 524 U.S. at 166; 520 U.S. at 786 n.3, reinforcing the notion that local experience warrants deference.

Thus, notwithstanding *Leavitt*, the Supreme Court continued to defer to a circuit court’s construction of state law within its circuit. See Jonathan Nash, “Resuscitating Deference to Lower Federal Judges’ Interpretations of State Law,” 77 *S. Cal. L. Rev.* 991-995 (2003-2004).

In 2005, the Supreme Court attempted to reconcile *Leavitt* with these later cases. In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the court reiterated the presumption of deference it had articulated in *Phillips*, but said that the presumption could be overcome, as it was in *Leavitt*.

The court concluded that deference was “inappropriate” in *Castle Rock* because the 10th Circuit’s en banc decision “did not draw upon a deep well of state-specific expertise” or rely on Colorado-specific law. *Id.* at 757. Of course, when the issue is one of first impression, as in *Factors*, it is difficult to rely on state-specific law on the issue, because there is none.

Certification to the state’s highest court

Given the confusion surrounding home-circuit deference, appellate practitioners and courts should consider an alternative course: requesting that a dispositive question of state law be certified to the state’s highest court for resolution.

When *Factors* was decided, few states permitted certification of state law issues from federal courts. See 652 F.2d at 282 & n.5. In other cases deferring to a home circuit’s construction of state law, certification was also not an option. See, e.g., *Charter Oil*, 69 F.3d at 1163-64 (relying on home-circuit rule and noting that Missouri Supreme Court does not accept certified questions from federal courts).

Today, however, the majority of states have adopted procedures for reviewing certified questions of state law, and, although it involves some delay, it may well be the best option for definitively resolving an open issue of state law. **NLJ**