The Sedona Conference Journal

Volume 2 2001

Erie v. *Daubert*, A New Case or Controversy?

James S. Simonson

Recommended Citation: James S. Simonson, *Erie v. Daubert, A New Case or Controversy?*, 2 SEDONA CONF. J. 153 (2001).

ERIE v. *DAUBERT*, A NEW CASE OR CONTROVERSY?

*James S. Simonson**
Gray Plant Mooty, Minneapolis, MN

I. INTRODUCTION

Erie, that delightful doctrine which kept us on the edge of our seats in law school, has a way of re-surfacing in the most unexpected of places, often just when we had nearly forgotten it.

The last time the Supreme Court considered in any extensive way the meaning of *Erie* appears to have been in 1996.[1] On that occasion, the Court held in a diversity case that the federal courts were required to follow a particular state statute defining the standard for reviewing jury verdicts claimed to be excessive.

If the Court again considers the possible application of *Erie* to a seemingly procedural matter, it could well involve the admissibility of expert testimony, as defined by *Daubert*,[2] *Kumho Tire*[3] and *Joiner*.[4]

Most trial attorneys have on one or more occasions advanced or opposed the application of the Daubert requirements.[5] Generally, the assumption appears to be that in a federal court, obviously the Federal Rules of Evidence, particularly Rule 702 and the Daubert requirements, all apply. That, of course, is more than an assumption in federal question cases. It is the law. And it may be a reasonable assumption in diversity cases, as well. But, it should be noted, no known appellate decision in a diversity case has directly addressed the issue, although the Supreme Court has made reference to it.[6]

This paper is written in recognition that the Court may someday decide this issue. If so, it likely will arise where state standards on admissibility of expert testimony differ significantly from those imposed by *Daubert* and its progeny.[7] The Supreme Court's prior rulings in the significant Erie cases will be considered in the context of whether they apply

---

* Jim is Chair of the Litigation Department at Gray Plant Mooty. A Fellow in the American College of Trial Lawyers, Jim has also been selected for listings in "*The Best Lawyers in America*" since its inception in 1983 and appears in the Minnesota "Super Lawyers" listings, as well.
Jim wishes to acknowledge the valuable aid and assistance provided by Michael Martinez, Kevin Moran and Chris McCullough in connection with the preparation of this paper.

1 *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). *See*, *infra*, p. 11-12. Subsequently, in *Semtek International Corporation vs. Lockheed Martin Corporation*, 531 U.S. 497, 149 L. Ed.2d 32, 121 S.Ct. 1021 (2001), the Supreme Court held that the preclusive effect, if any, of a judgment of dismissal entered in a federal diversity case - "on the merits" based on state statute of limitations grounds - was governed by a federal common law rule, which in turn incorporated the forum state's law on claim preclusion, rather than by Rule 41 (b), Federal Rules of Civil Procedure. Thus, such a dismissal by a federal court in California was held not to preclude the plaintiff from commencing a new action in state court in Maryland if, under California state law, such a dismissal would have precluded only a new suit on the same cause of action in California, but not in another state where a longer statute of limitations prevailed. Rule 41 (b) did not apply to mandate a contrary result, at least where there was no countervailing federal policy.

2 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) .

3 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

4 *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

5 Despite the fact that this paper deals with *Daubert*, it nevertheless is not intended to provide yet another chronicle of the many decisions that courts have rendered since Justice Blackmun penned the opinion that has launched a thousand applications. Nor is it designed to explore the question whether *Daubert* was "right", i.e., whether the decision rests properly on its stated statutory basis, Rule 702 of the Federal Rules of Evidence. Finally, this writing does not take a position as to whether *Daubert* is generally more or less restrictive than the standard prescribed by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), or any other alternative approach to the admissibility of expert opinions. Consequently, it leaves to the reader to decide in any given case whether to embrace or seek to avoid *Daubert*.

6 *See Daubert*, 509 U.S. at 589 n.6 ("[W]e do not address petitioners' argument that application of the Frye rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie R. Co. v. Tompkins*."); *see infra*, p. 15.

7 Currently, 17 states continue to adhere to *Frye* or a subtle variation of *Frye* in their own courts. Of these 17, 7 have expressly adopted *Frye* and declined to follow *Daubert*, 6 have acknowledged *Daubert's* existence but have continued to adhere to *Frye,* nevertheless, and 4 have yet to even acknowledge *Daubert*. Thirty-three states and the District of Columbia have expressly adopted *Daubert*, and 45 states and the District of Columbia have adopted the equivalent of Rule 702, Federal Rules of Evidence, although that does not necessarily preclude application of *Frye* standards, as opposed to those of *Daubert*. *See Goeb v. Tharaldson, et al*, 615 N.W.2d 800 (Minn. 2000).

to the Daubert requirements. In other words, will the Erie doctrine mean that in diversity cases, the federal courts will not apply *Daubert*, but instead simply look to whether the expert testimony in question would have been admissible in the sister state court? In the end, the conclusion here will be that while subjecting *Daubert* to *Erie* is an imaginative and interesting idea, the Court is unlikely to accept it.

II. FEDERAL COURTS, GOVERNING LAW AND THE EVOLUTION OF ERIE

The choice between federal or state law in a federal court diversity action reflects a history that is tangled and knotty. The decisions of the Supreme Court do not fit into a single, defined pattern. Nor, unfortunately, do they send a clear and unequivocal message to lower federal courts and prospective litigants as to the law to be applied to all questions.

Any effort to make sense of the Erie doctrine, and what preceded and followed its first articulation, requires that one begin with the Constitution. There, it will be recalled, the judicial power of the United States is extended to all cases "arising under this Constitution, the Laws of the United States, and Treaties."[8] This is the basis for what we know as "federal question" jurisdiction. In addition, jurisdiction is also extended to all cases "between citizens of different States."[9] This, of course, is the basis for what we know as "diversity" jurisdiction. These two bases for federal court jurisdiction are then articulated in the enabling legislation of Congress.[10]

There being two, independent, bases for subject matter jurisdiction of the federal courts, it is not surprising that there are then two different sets of laws that might be applied in such cases. What would that law be? In federal question cases, the answer would seem to be simple enough: if jurisdiction rests on claims "arising under" federal law, then such federal law is the law to be applied. With respect to "diversity jurisdiction," however, the question is not quite so easily answered.

The Judiciary Act of 1789, chapter 20, section 34, sometimes referred to as the "Rules of Decision Act," attempted to answer the question for diversity cases as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision, in civil actions in the courts of the United States, in cases where they apply.[11]

For the most part, litigation arising under this statute has involved the meaning of the phrase "the laws of the several states." A cornerstone case dealing with this question is *Swift v. Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L. Ed. 865 (1842). Justice Joseph Story wrote the majority opinion of the Supreme Court. This was a suit on a negotiable instrument for some $1,500. Under the law generally prevailing in the United States a bona fide holder for valuable consideration could enforce such an instrument if unaware of facts that might have made it unenforceable between the original parties to the instrument. However, the particular instrument involved in *Swift* was accepted by the plaintiff in the state of New York, and under much of its case law a pre-existing debt did not constitute a valuable consideration. Plaintiff had no other consideration. The issue presented to the Supreme Court thus was whether the phrase "laws of the several states" included the states' decisional or common law, as well as their statutes. The Court held that it did not.

---

8 U.S. CONST. art. III, section 2, cl. 1.
9 *Id.*
10 *See* 28 U.S.C. sections 1331-1332 (1999).
11 Section 34, chapter 20 of the Act is currently codified at 28 U.S.C. section 1652 (1999), the provisions of which are substantially as adopted in 1789.

The holding and analysis provided in *Swift v. Tyson* remained extant for nearly a century. During that time, 96 years to be exact, the federal courts in diversity cases applied what they determined and understood to be the correct law, sometimes even in the face of contrary rulings by the highest state court of the state in which the federal court was located. The theory prevailing was that state court decisions were not the law, itself, but were merely evidence of the law. Federal judges were equally entitled to look to all the authorities and to determine for themselves what that law really was. In the process, there developed a "general law" or "federal common law," often at odds with the law followed in one or another of the states. That difference often played into the choices that litigants made as to whether to litigate in state or federal court.

Swift v. Tyson ceased to be governing law on the subject when the Supreme Court decided *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), holding that the phrase "the laws of the several states" should be read to include not only state statutes, but also state judicial decisions or "judge-made" law. Justice Brandeis wrote the majority opinion, basing his conclusion in part on a recognition that, under the Constitution, the Congress did not have authority to create law in a subject that reflected state concerns only. If the legislative branch of the federal government could not do so, then neither could its judicial branch. Accordingly, from and after the Supreme Court's decision in *Erie*, it has been the announced practice of federal courts to apply state substantive law in diversity cases.

Several subsequent decisions of the Supreme Court undertook to shed additional light on what *Erie* meant, and how it was to be applied. But the early cases continued to focus primarily on a distinction between matters of substance and matters of procedure: *Erie* required that the former be governed in diversity cases by state law; the latter were to be governed by federal law.

Then came one of the most significant of the early post-*Erie* cases, *Guaranty Trust Company of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). In a majority opinion written by Justice Frankfurter, the Court acknowledged the difficulty that lower courts had encountered in drawing a distinction between "substance" and "procedure." Moreover, such a distinction was not conducive to achieving the intent of *Erie*:

> to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[12]

It was to achieve this uniformity of result, Justice Frankfurter noted, that the Court had ruled that in diversity cases, federal courts should follow state law on burden of proof,[13] conflict of laws[14] and contributory negligence.[15] For the same reason, the Court went on to hold in *Guaranty Trust* that if a suit would have been barred as untimely had it been brought in state court, then it had to be barred as untimely in the federal court, as well. In the particular context of *Guaranty Trust*, a difference in result between state and federal courts was not permitted simply because the plaintiff sought an equitable remedy which federal courts had on prior occasions liberally dispensed. The federal court had to apply the state court's approach to such a remedy, not its own. In other words, this uniform result was required in suits both in equity and at common law.[16]

12 326 U.S. at 109.
13 *See Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 60 S. Ct. 477, 84 L. Ed. 196 (1939).
14 *See Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941).
15 *See Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).
16 Justices Rutledge and Murphy dissented. *See Guaranty Trust*, 326 U.S. at 112.

Further evidence that the Supreme Court a half century ago regarded dearly a result consistent with one that would have been reached in state court is found in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233 (1949). In an opinion written by Justice Douglas, and announced by Justice Reed, the Court held that in a diversity case the plaintiff had to do what was required in the state court in order to commence an action (service on the defendant) before expiration of the statute of limitations.[17] This was required in federal court notwithstanding the clear provisions of Rule 3, Federal Rules of Civil Procedure, that an action in federal court is commenced upon filing the complaint with the court.

The argument was made to the Court in *Ragan* that *Erie* did not require this result, because *Erie* dealt only with matters of substance, not procedure, and the mechanics of commencing an action were purely procedural. Not so, the Court ruled. First, it noted that the requirement of service was "an integral part of that state's statute of limitations."[18] Secondly, the Court cited *Guaranty Trust* for the proposition that "where one is barred from recovery in the state court, he should likewise be barred in the federal court."[19] Accordingly, the judgment below, dismissing the action under the state statute of limitations, was affirmed.[20]

An additional and perhaps different refinement on *Erie* came a few years later in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958), with Justice Brennan writing for the majority. Plaintiff had been injured in an industrial accident. He recovered workers' compensation benefits from his employer. He then commenced this diversity suit, alleging a common-law tort, against another company which also had been involved in the project on which he was injured.

Under a statute of South Carolina, where the accident occurred, the defendant in the lawsuit would have had a good defense to the suit if the work in connection with which plaintiff was injured was being performed pursuant to a contract between his employer and the defendant, and if that work was part of the defendant's usual "trade, business or occupation." In addition, under South Carolina law, the determination of whether this statute applied so as to make workers' compensation the plaintiff's exclusive remedy would be for the judge, rather than a jury. On the other hand, federal court convention was for a jury to decide all issues of fact.

At the conclusion of all of the evidence at trial, the district court ruled in favor of the plaintiff on the issue, as a matter of law. The Court of Appeals for the Fourth Circuit reversed, concluding that the question presented a fact issue, and resolved that fact issue itself in favor of the defendant.

The Supreme Court reversed the Court of Appeals' ruling. It began with an acknowledgement that there was indeed a question of fact as to whether the defendant came within the statutory definition. However, the issue with which the Court struggled was whether, in resolving that fact question, a federal court was required by *Erie* to apply the judge-jury practice followed in the corresponding state court system, or whether it could follow federal practice on resolving fact questions.

In the first part of its analysis, the Court in *Byrd* appears to have seen the issue as whether the South Carolina practice of having this particular fact question decided by the

17 A Kansas statute provided: "An action shall be deemed commenced within the meaning of [the statute of limitations], as to each defendant, at the date of the summons which is served on him." KAN. STAT. section 60-306 (1935), *quoted in* 337 U.S. 532 n.4.
18 337 U.S. at 532.
19 *Id. See also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 2d 199, (1955) (If an arbitration agreement governed by state law would bar a legal proceeding in state court, then a federal court would stay a diversity action, as well).
20 Again, Justice Rutledge dissented. *See Ragan*, 337 U.S. at 534.

judge was "bound up with the definition of the rights and obligations of the parties."[21] In other words, was it part of the body of governing substantive state law? If it was, the analysis proceeded, then a federal court exercising diversity jurisdiction was obliged by *Erie* to follow it, just as it follows the balance of the state's substantive law, rather than its own practice of having juries resolve fact questions under the Seventh Amendment. But if the state's method of determining the application of the statute was not so interwoven with the rights and obligations of the parties, then *Erie* did not require that it be followed in federal court. Here, the Court concluded that the state's practice was not part and parcel of the substantive rights and obligations of the parties.

In the second part of its analysis, the Court in *Byrd* observed that if "outcome" uniformity were the only consideration under *Erie*, as illustrated by *Guaranty Trust*, then following state practice in the situation before it may have been appropriate. However, the Court held, *Erie* is not simply a matter of outcome determination, for there may be a strong federal interest in "the manner in which, in civil common-law actions, [the federal system] distributes trial functions between judge and jury."[22] In other words, even if there is a state rule that may affect the outcome, there may be a countervailing federal interest in its own method of trying cases. Such a federal interest was identified by the Court, and found to rest both in Supreme Court precedent and in the Seventh Amendment. Accordingly, state practice was not allowed in *Byrd* to supersede a long-standing federal allocation of functions between judge and jury.

Moreover, the Court noted in the third and final facet of its analysis, it was by no means certain that the result would be different if the question were decided by a jury instead of by a judge. Accordingly, plaintiff was held to be entitled to have a jury decide the relationship between his employer and the defendant, and with it his right to proceed with this tort action.[23]

Byrd seems logically to have led to *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). In this diversity case, the district court ordered summary judgment for the defendant because the summons and complaint were not personally served on the defendant as required by a state statute, even though Rule 4(d)(1), Federal Rules of Civil Procedure, permitted the substituted service which had been accomplished. The Court of Appeals affirmed, concluding that the difference between state and federal requirements for commencing an action was a "substantive rather than a procedural matter."[24] Accordingly, both the trial and appellate courts concluded, *Erie* applied and the state requirements for the method of service of process controlled.

The Supreme Court, with Chief Justice Warren writing for the majority, reversed. The Court noted, first of all, that the federal system had in place its Rule 4(d)(1). This Rule, it was further noted, clearly complied with the provisions of the Enabling Act,[25] by which Congress authorized the Supreme Court to prescribe by rules "the practice and procedure of the district courts in civil actions." Moreover, the Chief Justice wrote, it is one thing to require a federal court to follow a state law where there is no federal law directly on point. It would be another to require that the federal court ignore its own Rule 4 and apply instead a conflicting state rule. That would in effect mean, the Court suggested, if a federal court were required to ignore its own rule and follow a state rule, that *Erie* could invalidate one of the federal Rules of Civil Procedure on constitutional grounds. But Justice Brandeis'

21 356 U.S. at 536.
22 *Id.* at 537.
23 Justice Whittaker concurred in part and dissented in part. *See id.* at 540. Justices Frankfurter and Harlan also dissented. *See id.* at 551.
24 331 F.2d at 157, 159 (1st Cir. 1964).
25 28 U.S.C. section 2072 (1958).

1938 opinion, Chief Justice Warren wrote, neither declared nor implied such a result. To the contrary, the Chief Justice referred to the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[26] In other words, one aim was to achieve a uniformity of application of the substantive law between the state and federal systems so as to avoid litigants picking their venue in order to obtain one result over another. But a second aim, reflected as one of the "'shaping purposes'" of the Federal Rules, was to achieve a uniformity of application of the procedural law between one federal court and another by getting away from local rules.[27] Such purpose would be frustrated, in the view of the Court, if the federal judicial system could not prescribe for itself "housekeeping" rules that might or might not differ from comparable state rules.[28] Accordingly, the judgment below, affirming the choice of the state rule on the requirements of service of process, was reversed.[29] At this point in the history of *Erie*, 1965, with *Hanna* in the Reports, and *Swift v. Tyson* having been retired for 27 years, were we back to the procedural vs. substantive test? And what about *Ragan*? Was it no longer good law?

The Supreme Court itself may have been wondering about the status of *Ragan* when it granted certiorari[30] in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980), although the Court's stated reason was a conflict in the circuits.[31] *Walke*r was another diversity case that presented in essence the *Hanna* situation. Here, a plaintiff commenced suit by filing his complaint in accordance with Rule 3 of the Federal Rules of Civil Procedure.[32] At that point in time, the statute of limitations had three more days to run. However, the summons and complaint were not served for more than another sixty days. Under Oklahoma law, an action was not deemed commenced for statute of limitations purposes until service was accomplished, unless the suit were filed on time and service was thereafter had within sixty days of filing.[33] In short, if plaintiff had been in state court, he would have missed the statute of limitations. For that reason, the district court dismissed the action as barred by the statute of limitations because, it concluded, the service requirement was an integral part of the state statute of limitations.

The Court of Appeals for the Tenth Circuit, although it concluded that the state requirements were in direct conflict with Federal Rule 3, nevertheless affirmed.[34]

Although the Supreme Court disagreed with the Court of Appeals' view that Federal Rule 3 was in conflict with the state service requirements, it concluded that "[t]he present case is indistinguishable from Ragan."[35] In response to plaintiff's argument that *Hanna* required a different result, and that *Ragan* had not survived the ruling in *Hanna*, the latter case was distinguished on the grounds that Federal Rule 4 was in direct conflict with the state rule (substituted service permitted versus personal service required). Only then does it displace the state rule, Justice Marshall wrote, assuming that the federal rule was within the scope of the Rules Enabling Act.[36] Apparently no one contended that Rule 3 was unauthorized by the Act, and nothing about it evidenced an intent to disturb the state's statute of limitations or its personal service requirements, found by the court to be an integral part of that statute. Accordingly, judgment below was affirmed.[37]

---

26 380 U.S. at 468.
27 *Id.* at 472 (Warren, C.J.) (quoting *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).
28 380 U.S. at 473.
29 Justice Black concurred in the result reached by the majority, and Justice Harlan wrote a separate concurring opinion. *See id.* at 474-75.
30 444 U.S. 823, 100 S. Ct. 43, 62 L. Ed. 2d 29 (1979).
31 *See* 446 U.S. at 744.
32 "Rule 3. Commencement of Action – A civil action is commenced by filing a complaint with the court."
33 OKLA. STAT. tit. 12, section 97 (1971), *quoted in* 446 U.S. at 743, n.4, provided in pertinent part: "An action shall be deemed commenced, within the meaning of this article [the statute of limitations], as to each defendant, at the date of the summons which is served on him . . . ."
34 592 F.2d 1133, 1135 (10th Cir. 1979). It was because of this conflict that the Supreme Court in *Hanna* held that the federal rule prevailed over the state rule. *See supra* pp. 8-9.
35 446 U.S. at 748.
36 *See* 28 U.S.C. section 2072 (1999).
37 446 U.S. at 753.

A subsequent effort by the Supreme Court to resolve questions raised by *Erie* is *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). This was a diversity case brought in the Southern District of New York. Plaintiff sought damages for certain photographic transparencies lost allegedly due to the negligence of the defendant. Plaintiff asserted other state-law claims for relief. At trial, a jury returned a relatively large verdict, apparently based on an expert opinion presented by plaintiff. The District Court denied a Rule 59 motion for new trial on the grounds of excessive damages. The Court of Appeals for the Second Circuit reversed. Applying a New York statute giving appellate courts the ability to set aside a verdict if it determined, de novo, that the damage award "materially deviated" from an amount that would constitute "reasonable compensation," it ordered a new trial unless plaintiff accepted a substantial remittitur.

Prior to the adoption in 1966 of the New York statute, both federal and state courts in New York had applied a "shock the conscience" standard, rulings on which were reviewed on appeal only for an abuse of discretion.[38] Legislative history of the 1966 statute indicated that it was part of a "tort reform" movement, designed to increase the power of appellate courts to review the size of jury verdicts.

The Supreme Court granted certiorari to resolve the "important question"[39] as to whether state or federal law applied the standard by which allegedly excessive verdicts were to be judged. Plaintiff argued that an adherence to the state statute by the federal court would violate the Seventh Amendment to the Constitution, particularly its re-examination clause.[40] Nevertheless, in the majority opinion written by Justice Ginsburg, the Supreme Court ruled that state law, including the subject statute, governed this question in diversity cases in federal courts.

The majority opinion saw both substantive and procedural aspects in the New York statute, as those terms are used in an *Erie* analysis. Insofar as the "outcome determination" test propounded by *Guaranty Trust*[41] was concerned, Justice Ginsburg noted, applying the state statute would serve the ends of reaching the same result as would have been reached had the suit been brought to trial in state court.[42] In light of *Hanna*, the Court recognized "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[43] Giving credit to those articulations as to the proper relationship between state and federal law in a diversity action, the Court turned to the standards provided by *Byrd*[44] relative to judge vs. jury differences between state and federal practices, and the application of the re-examination provisions of the Seventh Amendment. After a lengthy discussion on those various standards, the Court concluded that the District Court was required to apply the state statute in ruling on the Rule 59 motion for new trial, vacated the Court of Appeals ruling to the contrary, and instructed it to remand the case to the District Court for that purpose.[45]

III. *ERIE* IN SUMMARY

As appears from the cases that reflect the evolution of *Erie*, the Supreme Court began in 1938 with an approach of determining what was "procedural" and what was "substantive," following its own standards as to the former and state law as to the latter. If the evolution had

38 518 U.S. at 422.
39 *Id.*
40 "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States . . . ." U.S. CONST. amend. VII.
41 "In essence, the intent of [*Erie*] was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust*, 326 U.S. at 109.
42 518 U.S. at 429-430.
43 380 U.S. at 468.
44 356 U.S. 525.
45 *See* 518 U.S. at 439. Justices Stevens, Scalia, Rehnquist and Thomas dissented. *Id.* at 439, 448.

stopped there, the question whether *Daubert* applied in a diversity case would have been difficult, but probably answered in the affirmative. Standards for the admissibility of testimony of all witnesses, including experts, sounds more like "procedure" than "substance."

But the evolution did not stop where it started in 1938. By 1945, and the ruling in *Guaranty Trust*, the test had become primarily whether the standards were "outcome determinative." If they were, then state law was to apply to the question. All one has to do is to read a few cases ruling that expert testimony was inadmissible under *Daubert*, including the seminal case, itself, to appreciate that how the question is answered would likely determine who would win the lawsuit. At least, if the offering party is not able to present the evidence, defeat on the merits often follows. That would sound to most students of the English language as something fairly "outcome determinative."

And the evolution did not stop even in 1945. By the time *Byrd* was decided in 1958, there had emerged a recognition that there may be federal interests in preserving a particular way of doing things. If so, then a federal district court was to continue to follow that practice, even if state practices were different and even if following the federal practice would likely yield a different outcome in the litigation. A federal court's allocation of fact finding functions between judge and jury, resting at least in part on the Seventh Amendment, provides a good example, for it was the situation presented by *Byrd*. Further, *Hanna* shows us that if the federal practice is set forth in a Federal Rule of Civil Procedure, such as Rule 4, a district judge is not required to follow a conflicting state rule on the same subject, again even if doing so would lead to a different outcome of the litigation.

Perhaps the issue boils down to whether it is better to have uniformity with respect to the admissibility of expert testimony among all federal trial courts, rather than uniformity on that subject between a federal court and the corresponding state court. It may all get back to the observation of Judge Easterbrook:

> Thus there are bound to be differences between state and federal practice . . . Absorbing bits and pieces of some other procedural system cannot eliminate effects on the outcome, but it can cause confusion and uncertainty in a federal system with more than 50 distinct jurisdictions. A court has a hard enough time keeping track of one set of procedural rules. *Mayer v. Gary Partners and Co.*, 29 F. 3d 330, 333-334 (7th Cir. 1994).

What Judge Easterbrook seems to have had in mind could well be illustrated by the requirements established for district court and court of appeals judges by the Supreme Court in *Gasperini*.[46] In that case, the Court had the opportunity to address such concerns as those voiced by Judge Easterbrook. The choice that it made appears to favor substantive consistency between federal and state courts in diversity cases at the cost of procedural consistency and simplicity in the federal courts. Under its *Erie* analysis, the Court felt compelled to enforce the New York statute that defined the scope of appellate review of a jury's damage award.[47] The Court noted, however, that "practical reasons" and the Seventh Amendment prevented it from accepting the New York legislature's approach of having the appellate court perform this task.[48] Instead, it ordered the district court to apply the standard of review meant for the New York appellate court. Then, the Supreme Court further wrote, if that district court ruling were ever to be challenged on appeal, the usual federal standard of "abuse of discretion" would apply.[49] This approach would seem to invite

46 518 U.S. 415.
47 *See Gasperini*, 518 U.S. at 430-31.
48 *Id.*, at 438.
49 *See id.*, at 439.

procedural turmoil in federal district courts wherever a litigant in a diversity case could argue that state law provides the standard of review of a jury's award of damages.

But even after appropriate recognition of legitimate federal interests in some of its own practices and procedures, situations may arise where the federal practices or procedures are not in direct conflict with those of a state, and where the state practices or procedures are interwoven into the substantive state law. In such situations, the federal court may well apply what would seem at first blush to be a state practice or procedure, but which in fact is part of its substantive law. Particularly, this would be done where ignoring the state practice or procedure would lead to a different outcome on the merits. *Ragan* and *Walker* are examples of this.

And so we conclude our discussion of *Erie* where we began. *Erie* is an ever-present, ever-changing, ever-appearing and ever-elusive doctrine. It serves as a lightning rod for competing considerations. On the one hand, there is the need for a strong, uniform, predictable federal judicial system. On the other hand, there is the need to provide a place in the federal system for non-resident defendants, dragged into court far from home, longing for a qualified and impartial system that will give them justice, a system that will duplicate, as closely as possible, the local state court system, less only its perceived "hometown bias."

IV. CONCLUSION

So, what do all of these *Erie* cases have to do with *Daubert*? Do they require that in a diversity case, the federal court simply ignore *Daubert*? Must a federal court in a diversity case treat the admissibility of expert testimony just as the question would be resolved in the corresponding state court, whether under *Frye* or some other approach?

As noted at the outset, no reported case is known to have answered directly this question. In *Daubert*, itself, the alternative argument was briefed that *Erie* considerations require that the federal courts apply state standards for the admissibility of expert testimony, standards that were claimed to be more permissive than *Frye*. The Supreme Court was aware of that contention, but as Justice Blackmun noted in the majority opinion, that issue was not reached because the Court agreed with plaintiffs that *Frye* did not survive the adoption of the Federal Rules of Evidence.[50]

Despite the lack of controlling authority, we may nevertheless endeavor to predict how the federal courts are likely to decide the issue, if and when the appropriate occasion is presented. In that event, it appears that even though a *Daubert* ruling may well be "outcome determinative" in any given case, the courts will not likely defer to state standards on this issue.

There is one possible exception to the foregoing: where the state standards on expert witness qualifications and testimony are so inextricably intertwined with the substantive law which is provided by the state under *Erie* that the application of state law necessarily brings with it such standards. An example of a situation where a federal court may choose to apply state standards on expert witness qualifications and testimony is found in a Minnesota law, MINN. STAT. section 145.682. That statute provides that in a medical malpractice action where expert testimony is required to establish a *prima facie* case, the plaintiff must, subject to a narrow exception, serve an expert witness affidavit with the summons and complaint. That affidavit must demonstrate, among other things, that the expert believes the defendant deviated from the applicable standard of care and thereby

50 *See Daubert*, 509 U.S. at 589 n.6.

caused injury to the plaintiff.[51] Those requirements, apparently because they are part and parcel of the substantive law relating to liability, have been followed in diversity jurisdiction litigation in the federal District of Minnesota.[52]

In introducing this topic in Section I, it was noted that subjecting *Daubert* to *Erie* would be an interesting idea but would likely be unsuccessful in federal court. Given the state of the existing law, persuading a federal court to use *Erie* in applying state law on the admissibility of expert testimony in a federal diversity case would indeed seem to be an uphill battle. On the other hand, where an argument can be made that expert witness testimony is inextricably intertwined into a particular cause of action - i.e., the applicable substantive law - such as the expert affidavit requirement of Minn. Stat. section 145.682, perhaps a federal court will see beyond the interesting and imaginative aspect of the argument and accept an *Erie*-based argument for applying a state's alternative standard in a federal diversity case.

51 MINN. STAT. section 145.682 (2000).
52 *See Ellingson v. Walgreen Co.*, 78 F. Supp. 2d 965 (D. Minn. 1999).