

V. CHOICE OF LAW: THE ERIE DOCTRINE

A. IN GENERAL

When an action is commenced in U.S. district court, the court must determine the substantive law and rules of procedure that will govern the action.

1. Federal Question Claim

If the action is a federal question claim, federal substantive and procedural law will control.

2. Federal Diversity Claim

a. Substantive law

In a diversity action, the district court is required to apply the substantive state law that would be applied by the state in which the district court is located. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

b. Procedure

1) Applicable federal law

With regard to procedure in a diversity action, however, if a procedural issue is addressed by a valid federal law (a statute, Federal Rule of Civil Procedure, Federal Rule of Evidence, etc.), the federal law will be applied, even if a state rule or statute is in conflict. *Hanna v. Plumer*, 380 U.S. 460 (1965).

2) No applicable federal law

If no federal law applies, the general rule is that the district court must follow state law with regard to substance, but it can choose to ignore state law with regard to procedure, under certain circumstances.

The determination of substance versus procedure and the circumstances under which state procedural law must be followed or may be ignored are discussed below.

3) Other claims

The same rules that apply when a federal court hears a federal diversity claim apply when federal courts hear pendent state claims or state-law counterclaims, cross-claims, and third-party claims that arise in federal cases.

B. SUBSTANCE VERSUS PROCEDURE

1. Analytical Approach

It is sometimes difficult to determine if an issue involves substance or procedure for the purposes of applying the *Erie* doctrine. The following general approach is often used:

- i) The district court will start by determining whether there is a **conflict between state and federal law** with respect to the issue before the court. If no conflict exists, then the analysis does not need to proceed any further because the court can apply state and federal law harmoniously to the issue.
- ii) If, however, the applicable state and federal laws do conflict, the district court must ask whether a **valid federal statute** or Federal Rule covers the disputed issue. *Hanna, supra*.
 - a) If there is a **valid federal statute** or rule of procedure on point, the district court must **apply federal law** rather than state law.
 - b) If no federal statute or rule is on point, then the court must determine whether federal common law, rather than state law, should be applied. In making this determination with respect to federal common law, the district court will ask whether the **failure to apply state law will lead to forum shopping and an inequitable administration of the laws**. These are the "twin aims" of *Erie*. *Hanna, supra*.
 - 1) If the answer is no, then the district court will generally apply federal common law, rather than state law.
 - 2) If the answer is yes, the court will apply the state law, unless affirmative countervailing federal interests are at stake that warrant application of federal law.
 - c) The court may also choose to examine the issue by weighing the interests of the state and federal judiciaries and apply the law whose policy is of greater importance. *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958). If there are strong federal policy interests at stake, the court may choose to apply federal law, notwithstanding a finding that one or both of the twin aims of *Erie* might be implicated.
 - d) Finally, the court may ask whether the **failure to apply state law will lead to different outcomes** in state and federal court. *Guar. Trust Co. v. York*, 326 U.S. 99 (1945). Again, if the answer is no, the district court will generally apply federal common law, rather than state law, but if the answer is yes, the court may decide to apply state law.

In *Gasperini v. Center for the Humanities*, 518 U.S. 415 (1996), the Supreme Court interpreted a Federal Rule extremely narrowly in order to protect an important state interest, while purporting to follow the Court's decision in *Hanna*. While the decision seemed to balance state and federal interests rather than simply apply the Federal Rule, it is unclear whether the Court in *Gasperini* altered existing law.

2. Substantive Law

Examples of specific areas of law that have been held to be substantive rather than procedural include:

a. Elements of a claim or defense

The elements of a claim or defense in contract or tort, for example, are considered substantive and are generally controlled by state law in a federal diversity action.

b. Statutes of limitations and tolling provisions

The Supreme Court has indicated that state statutes of limitations and the rules for tolling state statutes of limitations are substantive in nature and are thus applicable in diversity. *Guaranty Trust Co., supra*.

c. Burden of proof

The specification of the applicable standards of proof is considered a substantive matter, and the law of the forum state will govern in a diversity case. *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956).

3. Procedural Law

Examples of areas of law that have been determined to be procedural, rather than substantive, include:

a. Judge-jury allocation

If there is a jury in a diversity case on a state law claim, the jury—rather than a judge—will decide all factual issues in the case, regardless of whether state law would provide otherwise. *Byrd, supra*.

b. Assessment of attorney's fees

In a diversity case on a state law claim, the federal court may properly use its inherent power to assess attorney's fees as a sanction for a defendant's bad-faith conduct during the litigation, even if the law of the forum state provides that attorney's fees may not be awarded to a successful party. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

c. Equitable versus legal

Federal law usually governs whether an issue is legal or equitable. *Simler v. Conner*, 372 U.S. 221 (1963).

C. DETERMINING APPLICABLE STATE LAW

Under *Erie*, a U.S. district court with diversity jurisdiction must apply the substantive law—including the choice-of-law rules—of the state in which it is located. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

Example: The U.S. District Court of Delaware will generally apply Delaware substantive law to the diversity actions over which it sits.

1. Highest State Court's Rulings on Substantive Law Control

In determining a state's substantive law, the U.S. district court will be bound by the rulings of the state's highest court.

2. Highest State Court Not Yet Ruled

If the state's highest court has not spoken on an issue, however, the federal court must try to determine how the state's highest court would rule on the issue, if it did consider it. To make this determination, the federal court will generally look to any lower state court decisions that have considered the issue and will follow a lower court's view, unless it believes that the highest state court would not follow it. If no state court has considered the issue, the federal court will have to determine how it believes the highest court in the state would rule if it looked at the issue today. Some states have procedures that allow the federal district court to certify a question of substantive law to the state supreme court for clarification.

3. Highest Court Rules After Federal Suit Complete

If, after the U.S. district court action has been completed, the state's highest court rules on an issue in a way that is different from the way the district court predicted, a federal appeals court is bound by the state court's ruling. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

4. Conflict of Laws

In diversity actions, a U.S. district court is bound by the conflict-of-law rules of the state in which the district court is located, but only to the extent that the state's rules are valid under the Full Faith and Credit and Due Process Clauses of the U.S. Constitution. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

State conflict-of-law rules frequently determine whether to apply the law of the forum state or the law of a foreign jurisdiction by considering whether the law to be applied is substantive or procedural. States apply their own procedural laws and sometimes apply the substantive law of a foreign jurisdiction. Although the substance-procedure distinction arises in federal-state choice of law under *Erie*, it is not the same substance-procedure distinction in state-state choice of law under the law of conflicts under *Klaxon*.

Questions about the following issues are generally considered procedural and controlled by the law of the forum state:

- i) The proper court in which to bring an action;
- ii) The form of the action to be brought;
- iii) The sufficiency of the pleadings;
- iv) The effect of splitting a cause of action;
- v) The proper or necessary parties to an action;
- vi) Whether a counterclaim may be brought;
- vii) Venue;
- viii) The rules of discovery;
- ix) The right to a jury trial;
- x) Service of process;
- xi) The burden of proof;
- xii) Trial procedure; and
- xiii) The methods of enforcing a judgment.

5. **When Venue Is Transferred**

If the venue of a diversity action is transferred under § 1404, the court to which the action is transferred must apply the law of the state of the transferor court, including that state's rules regarding conflicts of law. If the transfer is made pursuant to § 1406(a), however, the court to which the case is transferred applies the conflict-of-law rules of the state in which it is located.

6. **Substance and Procedure in Choice-of-Law Cases**

The substance and procedure distinctions in choice-of-law cases are not necessarily the same as those under *Erie*. If a particular state's conflict-of-law rules treat a certain law as procedural or substantive, a federal court applying those conflict-of-law rules will generally follow the state's distinction.

Example: There is an automobile accident in Maine, and one driver sues the other in federal court in Massachusetts, based on diversity jurisdiction. Maine and Massachusetts have different rules regarding the burden of proof of who was at fault. Maine requires that the defendant prove that the plaintiff was contributorily negligent, while Massachusetts requires the plaintiff to disprove contributory negligence. Because the accident occurred in Maine, the Massachusetts court would follow Maine law as to substantive issues (i.e., what is negligence), but it would treat burden of proof as procedural, and so follow its own rule requiring the plaintiff to disprove contributory negligence.