

ASCERTAINING APPLICABLE LAW

§ 6.01 Rules of Decision Act

The Rules of Decision Act, 28 U.S.C. § 1652, provides that federal courts must apply state law except where otherwise required by the United States Constitution, the laws of the United States, or treaties. Thus, cases tried in federal court based on a federal question are decided by federal law. However, the issue of whether state or federal law applies in diversity cases may be less clear.

Swift v. Tyson, 41 U.S. 1 (1842), interpreted the Rules of Decision Act to require federal courts to apply state constitutional and statutory law but not state common law. The *Swift doctrine* permitted federal judges to **displace state common law with federal general common law in diversity cases**.

§ 6.02 *Erie Doctrine*; “Substance versus Procedure” Test

The 100-year reign of *Swift* was terminated by the Supreme Court’s decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In *Erie*, the plaintiff sought to recover for injuries he received when struck by an object protruding from defendant’s passing train. Plaintiff was on a path adjacent to the tracks at the time of the accident. The defendant railroad argued that the common law of Pennsylvania regarded the plaintiff as a trespasser under the circumstances and imposed upon the defendant railroad only the duty to refrain from acts of wanton negligence. Plaintiff countered that the federal diversity court was free under *Swift* to disregard Pennsylvania common law and to regard plaintiff as an invitee to whom defendant owed a duty of ordinary care under federal general common law.

The United States Supreme Court ruled in favor of the defendant and, in so doing, overruled *Swift*’s by concluding that **there is no federal general common law**. The Court found that the Rules of Decision Act did not distinguish between state law that is legislatively created and state law that is judicially created, and thus the *Act did not confer upon federal courts the power to determine substantive common law*. *Erie* established that in federal diversity cases, matters characterized as **substantive would be governed by state law**, and those characterized as **procedural would be governed by federal law**. This became known as the “substance versus procedure” test.

§ 6.03 “Outcome Determination” Test

In *Guaranty Trust Co. v. Yor*, [326 U.S. 99](#) (1945), the Court concluded that the substance-versus-procedure test would not be adequate to resolve all issues arising under the Rules of Decision Act **where a state law is both substantive and procedural in purpose**, such as statutes of limitations. In *Guaranty Trust* the defendant argued that *Erie* required application of the state statute of limitations, which would have barred the action, while the plaintiff argued that federal law, under which the action was timely filed, governed.

Agreeing with the defendant, the Supreme Court found the intent of the *Erie* doctrine to be that in diversity cases “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.**” Under this “outcome-determination” test, **state law controls if the choice** between state or federal law **could be outcome-determinative** in the case.

§ 6.04 “Balancing of Governmental Interests” Test

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, [356 U.S. 525](#) (1958), a negligence case, the defendant argued that the plaintiff’s claim was covered by workers’ compensation, for which South Carolina precluded a jury trial. Noting that the outcome of the case could be substantially affected by the issue of whether the case was tried by a judge or a jury, the Supreme Court nevertheless concluded that the outcome-determination test did not suffice in close cases. The Court added a step to the analysis that involved a **balancing of the governmental interests behind the rules contending for application**. On the facts at issue in *Byrd*, the Court held that the plaintiff was entitled to a jury trial, finding that the federal policy supporting jury trials was stronger than any policy beneath South Carolina’s rule precluding jury trials in such cases.

§ 6.05 Federal Rules of Civil Procedure

[1] Federal Rules Control When State Law Conflicts

The Supreme Court added yet another step to the choice-of-law analysis in *Hanna v. Plumer*, [380 U.S. 460](#) (1965). The plaintiff suffered personal injuries in an automobile accident and brought a federal diversity action against the estate of the alleged wrongdoer. The plaintiff served the administrator of the estate by leaving a copy of the papers at his home in compliance with [FRCP \(4\)\(d\)\(1\)](#). The defendant-administrator argued, however, that the action could not be maintained because he had not been personally served as required by Massachusetts law.

The Court held that *federal procedural rules* (unless found constitutional and invalid under the Rules Enabling Act) *are not overridden by state law* or policy. Thus, *Erie does not control* when there exists an *applicable federal rule* that *conflicts* with the state law or policy.

[2] Rules Enabling Act

An applicable Federal Rule of Civil Procedure controls, so long as it is constitutional and complies with the Rules Enabling Act, 28 U.S.C. § 2072, which in part states that federal rules “shall not abridge, enlarge or modify any substantive right.” In *Burlington Northern Railway v. Woods*, 480 U.S. 1 (1987), the Supreme Court determined that *rules which incidentally affect litigants’ substantive rights* do not violate the Rules Enabling Act if reasonably necessary to maintain the integrity of that system of rules. In fact, the Court has never invalidated any Federal Rule of Civil Procedure under the Rules Enabling Act.

[3] Conflict Between Federal Rule and State Law

When a federal rule and state law or policy conflict, the *Hanna* analysis is relevant and the federal court is to apply the federal rule. However, when there is *no conflict, the Erie doctrine controls*.

In *Walker v. Armco Steel Corp.*, [446 U.S. 740 (1980)], the Court found no such conflict because a court’s refusal to apply the federal rule at issue would not in fact thwart some purpose the federal rule was intended to achieve. Thus, *Walker* reminds that favored treatment for federal procedural rules under the Rules Enabling Act is only appropriate when a rule is in fact applicable.

§ 6.06 Summary of Erie Analysis Under Modern Law

Modern *Erie* doctrine invokes all three tests — substance-versus-procedure, modified outcome determination, and the balancing test of state and federal interests — depending on the circumstances of individual cases.

(1) The substance-versus-procedure test serves as a first-stage screening device in *Erie* analysis. An issue that clearly addresses legal rights is substantive and is to be resolved according to state law; issues that clearly pertain to the judicial process alone are procedural and invoke federal law.

(2) Where the issue is not grounded entirely on substantive or procedural policies but instead derives from both, such as a statute of limitations, the next level of

analysis of the *Erie* doctrine is the outcome-determination test, under which state law controls where it serves substantive interests at least in part and where refusal to do so would affect the outcome of the case.

(3) *Erie* doctrine does not apply if there exists a federal rule that addresses the issue at hand, and it conflicts with state law. In such cases, the federal procedural rule controls.

(4) When the issue invokes the *Erie* doctrine but is not adequately resolved by the substance-versus-procedure and modified outcome-determination tests, the policies underlying both the federal law and state law are examined, with weight given to the policy of greater importance.

§ 6.07 Conflicts of Law

Where there are parties from different states or the events leading to the cause(s) of action occurred in more than one state, the presiding court must determine which state's substantive laws apply, including which choice-of-law rules apply. In *Klaxon Co. v. Stentor Electric Mfg.*, [313 U.S. 487](#) (1941), the Supreme Court extended the *Erie* principle to conflicts questions, and required ***federal diversity courts to administer the conflicts law of the states in which they were sitting*** ("forum states").

§ 6.08 Ascertaining the Content of State Law

A federal court presiding over a diversity action must apply the relevant state law as would the highest state court whose law is being applied if it was hearing the case. When the issue at hand has been decided by the state's highest court, the federal court sitting in diversity must generally follow such precedent. However, federal diversity courts need not follow state high court precedents when they are convinced that the state high court would not follow them either if given the chance to again rule on the issue.

When state law is unsettled, unless the federal court is successful in getting the question certified by the state's highest court, the federal court must attempt to forecast the state's law as it would be expressed by its highest court. Decisions of intermediate state appellate courts carry considerable weight in such situations, although there is a difference in opinion as to whether federal courts *must* follow the decisions of intermediate state appellate courts in the absence of convincing evidence that the state's highest court would decide differently.