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Factors, Etc., Inc. v. Pro Arts Inc.

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 COMMENTS

FACTORS, ETC., INC. v. PRO ARTS INC.

FEDERAL CIVIL PROCEDURE—A federal circuit court of appeals, in resolving a question of unclear state law, must defer to another federal circuit court's determination of that law where the state is located within the latter court's jurisdictional bounds. 652 F.2d 278 (2d Cir. 1981).

INTRODUCTION

The utility of federal court diversity jurisdiction has been severely questioned in recent years.1 One challenge to its existence notes that the fear of local bias against parties from other states—the traditional justification for diversity jurisdiction—has virtually disappeared in today's modern and mobile society.2 Another challenge has been based on analysis of the statute authorizing diversity jurisdiction,3 which permits a plaintiff to utilize the federal court system in his or her home state. Since such a plaintiff has no basis to fear local bias, this argument goes, the reason for diversity jurisdiction disappears and so should its availability.4 Diversity jurisdiction has also been attacked as being nothing more than a "tactical weapon" to be manipulated by the lawyer.5

Still another criticism of diversity jurisdiction focuses on the difficulty the federal system has shouldering the burdens of a diver-

2. See Bratton, supra note 1, at 347; Hunter, supra note 1, at 349 n.1.
4. Field, supra note 1, at 491-92. An in-state defendant does not, however, have the power to remove to the federal courts. 28 U.S.C. § 1441(b) (1976).
5. Hunter, supra note 1, at 351.
sity case after *Erie Railroad v. Tompkins.* The *Erie* requirement that federal courts in diversity cases apply the law of the state in which they sit has placed a difficult burden on the courts. This burden is so heavy that it has been suggested that the federal courts often fail or simply refuse to find and apply state law. The difficulty of ascertaining and applying state law increases when the state law with regard to a particular issue is confused or even nonexistent. This predicament has been called "the most troublesome, the most unsatisfying in its consequences" of all *Erie* situations. When state law is unclear, a federal court's ability to predict the state law outcome correctly is especially important because its decision may play a role in the future development of state law. It is also in these cases that the courts frequently err in their judgment. This high failure rate has been advanced as a reason for the abolition of diversity jurisdiction.

This *Erie* "educated guess" problem arose again recently in *Factors, Etc., Inc. v. Pro Arts, Inc.* In *Factors,* a diversity case which presented, as a determinative issue, the descendibility of publicity rights under Tennessee law, the Second Circuit was faced with the absence of any Tennessee law on the subject. The court resolved the problem by deferring to a previous Sixth Circuit decision which had declared its opinion of the relevant Tennessee law in a diversity case. The Second Circuit deferred to that decision even though it expressly disagreed with the Sixth Circuit's view.

In granting conclusive deference to the Sixth Circuit's decision, the Second Circuit extended the recognized doctrine of circuit court

6. 304 U.S. 64 (1938).
10. State courts are free, of course, to ignore a federal ruling regarding state law. 20 *Am. Jur. 2d Courts § 225* (1965); see infra note 90 and accompanying text.
11. Hertz, *supra* note 9, at 867. For a list of cases where federal courts have erred in ascertaining state law, see *id.* at 867 n.41.
15. 652 F.2d at 282.
to district court deference. That analogy, however, was improper because the policies behind circuit-to-district deference were clearly not applicable to the Factors situation. In addition to this misplaced reliance, the Second Circuit granted deference to a circuit court which has in the past reversed a district court decision of state law without explanation. This was in effect an abandonment of its own "clearly wrong" standard for district court reversal. This comment examines other instances in which circuit courts defer to other courts' determinations of law and whether the policies behind those decisions support deference by one circuit court to another's determination of state law merely because the state whose law is at issue is located within the latter court's jurisdictional bounds. It also analyzes the Factors court's position that its decision will aid the orderly development of state law, and whether that is a proper concern of a federal court.

THE Factors DECISION

The Factors court was required to decide whether Tennessee law recognized an exclusive right to exploit Elvis Presley's name and likeness even after his death. The Second Circuit's research of Tennessee law uncovered no authority regarding descendibility of publicity rights. It did, however, reveal a Sixth Circuit decision, Memphis Development Foundation v. Factors Etc., Inc., which held that publicity rights do not survive the holder under Tennessee law. Although the Second Circuit disagreed with the ruling it held itself bound by Memphis Development. This was the first instance of one circuit deferring to another on a question of state law.

16. Id. at 281.
17. Roberts v. Berry, 541 F.2d 607, 609-10 (6th Cir. 1976).
18. 652 F.2d at 281.
20. Id. at 958-59.
21. Judge Newman, who authored the Second Circuit's opinion, "would probably [have upheld] a descendible right of publicity, were he serving on the Tennessee Supreme Court." 652 F.2d at 282.
22. Id. at 283.
23. See id. at 281. The D.C. Circuit once faced a similar situation but decided to conduct a de novo examination of the law of Missouri, eventually ruling against prior Eighth Circuit interpretations of that law and ignoring the fact that Missouri is within the Eighth Circuit. Waters v. American Auto. Ins. Co., 363 F.2d 684 (D.C. Cir. 1966). It was spared the difficult decision the Factors court faced because an intermediate state court had decided the issue. Id. at 687-89. Mandatory deference to an intermediate state court decision has also been criticized since the state's highest court could reverse. See infra text accompanying notes 91-92.
The Factors decision produced a strong dissent by Judge Mansfield. His first disagreement with the majority was with its characterization of the Sixth Circuit decision as an interpretation of Tennessee law.\textsuperscript{24} Mansfield argued that it was not an interpretation of any law of Tennessee, but merely a decision by the circuit court of what it thought would be a preferable common law rule for that state.\textsuperscript{25} Mansfield further took issue with the majority's extension of the doctrine of circuit-to-district-court deference to a circuit-to-circuit-court situation. Recognizing that the former is based upon the district judge's presumed familiarity with the state's law, he noted that there is little reason to assume that a circuit court is equally familiar with that law, since only a small percentage of their business derives from diversity appeals.\textsuperscript{26} In furtherance of this argument, Mansfield pointed out that the Sixth Circuit decision exhibited no familiarity with Tennessee law, but relied instead on general policy considerations.\textsuperscript{27} Finally, Mansfield argued that the majority's attempt to aid the orderly development of state law was misconceived, because Tennessee courts are free to act to the contrary.\textsuperscript{28} The Factors court based its reasoning for giving conclusive deference to the Sixth Circuit decision partially on the deference often given by a court of appeals to a district court.\textsuperscript{29} That deference is based upon the confidence some circuit courts have that district judges possess a "familiarity with the law of the state in which their district is located."\textsuperscript{30} This circuit-to-district deference is a well established doctrine.\textsuperscript{31} The Ninth Circuit has stated the doctrine succinctly: "Analysis by a district judge of the law of the state in which he sits, his determination of the result which the highest court of that state would probably reach under the same facts, is entitled to

\textsuperscript{24} 652 F.2d at 284 (Mansfield, J., dissenting).
\textsuperscript{25} Id. (Mansfield, J., dissenting).
\textsuperscript{26} Id. at 285 (Mansfield, J., dissenting).
\textsuperscript{27} Id. (Mansfield, J., dissenting).
\textsuperscript{28} Id. at 286. Judge Mansfield also discussed the merits of the substantive decision, id. at 287-90 (Mansfield, J., dissenting), but that discussion is not relevant to the issues considered in this comment.
\textsuperscript{29} See id. at 281.
\textsuperscript{30} Id. (citation omitted).
great weight.\textsuperscript{32} One reason given for trusting the judgment of a district court judge regarding state law is that he is often a member of the bar of that state\textsuperscript{33} and might have long experience in dealing with that law.\textsuperscript{34} The policy behind the deference seems to be based upon the belief that a district judge will be more in touch with the policies of the state than would a court of appeals, since the circuit court concentrates less specifically on the law of that particular state.

The \textit{Factors} decision is analytically weak because the court relied on the doctrine of circuit-to-district deference without properly considering the rationale of that doctrine. If the Second Circuit had deferred to a sister circuit which had affirmed a district judge's determination of state law, its deference to the sister circuit would not have been improper. In that case deference to the circuit court might be warranted as a form of extended deference to the district court. The Supreme Court has, in the absence of any clear state law, affirmed circuit court decisions that deferred to a district court's analysis of state law.\textsuperscript{35} The Sixth Circuit's decision in \textit{Memphis Development} that the \textit{Factors} court deferred to was, however, a reversal of a Tennessee district judge's well reasoned\textsuperscript{36} interpretation of that state's law.\textsuperscript{37} This exposes an anomaly: The conclusive deference to the circuit court, in effect, followed the opinion of a court which according to the basic reasoning of circuit-to-district deference, is once removed from state contact and therefore less qualified than the district court to make the necessary \textit{Erie} "educated guess." If the \textit{Factors} court had followed its reasoning to its logical end it would have followed the decision of the Tennessee district court.\textsuperscript{38} That decision declaring publicity rights descendible under Tennessee law was, after all, a decision with which the Second Circuit agreed.\textsuperscript{39}

Deferece by circuit courts to district court decisions of state law\textsuperscript{40} is not automatically granted.\textsuperscript{41} Though some courts agree with

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\item{32.} Owens v. White, 380 F.2d 310, 315 (9th Cir. 1967)(citation omitted).
\item{33.} \textit{E.g.}, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 204 (1956).
\item{34.} \textit{See, e.g.}, MacGregor v. State Mut. Life Assurance Co., 315 U.S. 280, 281 (1942)(per curiam).
\item{35.} \textit{E.g.}, \textit{id.} at 280.
\item{36.} \textit{Factors}, 652 F.2d at 285 (Mansfield, J., dissenting).
\item{38.} \textit{See Factors}, 652 F.2d at 285 (Mansfield, J., dissenting).
\item{39.} \textit{Id.} at 281.
\item{40.} \textit{See supra} text accompanying notes 31-34.
\item{41.} \textit{E.g.}, Bagby v. Merrill, Lynch, Pierce, Fenner & Smith, 491 F.2d 192 (8th Cir. 1974). \textit{Compare} Ziman v. Employers Fire Ins. Co., 493 F.2d 196 (2d Cir. 1974) (deference
the Second Circuit that they will not reverse a district court decision unless it is "clearly wrong,"

42 others point out that they are not strictly bound by district court decisions.43 The Sixth Circuit, whose opinion the Second Circuit deferred to in Factors, has itself announced that although it gives "considerable weight" to the district judge's interpretation of State law44 the parties are "entitled to [a] review of the trial court's determination of state law just as they are of any other legal question."45 The Sixth Circuit has, in fact, reversed a district court decision where it merely disagreed with the district judge's application of the law.46 This is significantly less deference than the Second Circuit grants district judges under its own "clearly wrong" standard for reversal.47

This discrepancy between the standards for review of district court decisions exposes a second problem with the Factors court's deference to the Sixth Circuit's decision and with circuit-to-circuit deference in general. The Second Circuit normally requires that a district judge be clearly wrong before he will be reversed.48 It clearly disregarded that standard, however, in the Factors decision. By giving conclusive deference to the Sixth Circuit, the Second Circuit followed a court that has in the past,49 and apparently in this case as well,50 based a reversal of a district court upon mere disagreement. Granting conclusiveness to such a decision by a circuit that has less faith in the ability of a district court to decipher state law is, in essence, an abandonment of the deferring court's expressed faith in

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42. E.g., Dixson v. Newsweek, Inc., 562 F.2d 626, 633 (10th Cir. 1977).
45. Id. (quoting Buehler Corp. v. Home Ins. Co., 495 F.2d 1211, 1214 (7th Cir. 1972)).
46. "We respectfully disagree . . . with the district court's application of the [law]." Roberts v. Berry, 541 F.2d 607, 609 (6th Cir. 1976).
48. E.g., id.
49. See, e.g., Roberts v. Berry, 541 F.2d 607 (6th Cir. 1976).
50. The Memphis Development decision by the Sixth Circuit gives no reason for reversal. 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980).
the ability of district judges. The Second Circuit left this apparent inconsistency unexplained.

The Factors court based its deference to the Sixth Circuit, to a large extent, upon its belief that it would be contributing to the orderly development of Tennessee law on the descendibility of publicity rights. It acknowledged the proposition that one of the principal shortcomings of diversity jurisdiction is the interruption of orderly development of state law. Such an interruption should be avoided, where possible, because it thrusts federal tribunals into areas of decision-making in which their ability to interpret the law definitively is severely limited. As one commentator has noted, "[t]he diversion of state law litigation to federal tribunals . . . delays the authoritative development of state law and imposes upon federal courts the risky, laborious and wasteful task of predicting what the state law may be on issues upon which only the state courts may speak with authority." The Factors court conceded that this is the price which must be paid as long as diversity jurisdiction exists, but thought that its deference to the Sixth Circuit might add to the certainty of Tennessee's law. This would result, it thought, because a state legislature would be more likely to take action to clarify state law if it were confronted with a uniform federal interpretation.

The desire to contribute to the orderly development of state law—assuming for the moment that this is a legitimate goal of a federal court in a diversity case—and thereby provide predictability of outcome may not, however, be best furthered by creating a uniform federal interpretation of the state's law. First, a uniform interpretation contrary to the wishes of the state would contribute nothing to the development of its law since a state court is free to disregard the federal line of decisions. Second, as Judge Mansfield pointed out in his dissent, not only might the Tennessee legislature be more likely to act were its law being interpreted differently by various federal courts, but the notion that uniform interpretation by the federal system would force a state to act were it dissatisfied

51. 652 F.2d at 282-83.
52. Hunter, supra note 1, at 351.
53. See 652 F.2d at 282-83.
54. But see infra text accompanying notes 86-91.
55. See supra note 10.
with that interpretation is speculative at best. Because courts cannot generally act to clarify state law until a case is presented to them for decision, state legislatures might be forced to act in areas which have traditionally been left to the courts if they desired to declare state law contrary to the federal decisions.

Circuit-to-circuit deference is common and more easily justifiable on questions of federal law. The practice has been traced to the time when circuit courts were merely extensions of the Supreme Court and therefore reluctant to differ in their interpretations of law. Although the courts of appeal no longer perceive themselves as branches of the same court, they continue to defer to each other in many circumstances.

One area in which such intercourt deference is extremely common is federal tax law. The courts of appeal recognize that "[r]espect for the decisions of other circuits is especially important in tax cases because of the importance of uniformity ...." The Eighth Circuit has been particularly enthusiastic in its deference to sister circuits on questions it considers peculiarly deserving of national uniformity. It recently expressed a desire "to promote a cohesive network of national law" in order to avoid "needless division and confusion" among the circuits and "unnecessary burdens on the Supreme Court docket."

Deference to a sister circuit decision regarding federal law does not implicate the federalism problems inherent in a federal court decision of state law. If federalism concerns were the only ones mili-

57. 652 F.2d at 286 (Mansfield, J., dissenting).
60. See, e.g., North Am. Life & Casualty Co. v. Commissioner, 533 F.2d 1046, 1051 (8th Cir. 1976); Federal Life Ins. Co. v. United States, 527 F.2d 1096, 1098 (7th Cir. 1975).
63. Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979), cert. denied, 446 U.S. 919 (1980).
64. See infra text accompanying notes 70-78.
tating against circuit-to-circuit deference, circuit courts would regularly defer to each other on questions of federal law. It is well recognized, however, that the circuits are free to differ with each other, though this maxim is rarely articulated. Circuit courts sometimes refuse to follow their sister circuits even in cases where national uniformity might appear to be desirable.

The D.C. Circuit, when presented with a federal claim, called the idea that federal courts should defer to decisions of other circuits with which they disagreed “unworthy of comment.” That circuit has also stated that sister court opinions, as well as district court opinions, do not bind it and should be employed solely for their “persuasive effect.” If “they fail to persuade by the use of sound and logical reasoning, they will not be followed no matter how great their number.” Since even the pressing need for national uniformity in federal law cases does not trigger automatic circuit-to-circuit deference, there appears to be little reason for such deference in diversity cases where uniformity is a much less important value.


66. See, e.g., Western Oil and Gas Ass'n v. United States Envtl. Protection Agency, 633 F.2d 803 (9th Cir. 1980)(environmental law); United States v. Dawson, 576 F.2d 656 (5th Cir. 1978)(federal criminal law), cert. denied, 439 U.S. 1127 (1979). When presented with a federal claim the Fifth Circuit went out of its way to assert that it was not bound by a prior Fourth Circuit decision even though its own decision was, by its own account, consistent with the prior decision. United States v. Northside Realty Assocs., 518 F.2d 884, 886 & n.4 (5th Cir.), cert. denied, 424 U.S. 977 (1975). The Eighth Circuit expressly rejected deference to another circuit’s decision in an appeal of a criminal prosecution for tax evasion. Jaben v. United States, 333 F.2d 535 (8th Cir.), aff’d, 381 U.S. 214 (1964). The Seventh Circuit similarly rejected a request to follow a sister circuit’s decision regarding the Federal Rules of Civil Procedure, and proceeded to follow the dissenter’s approach in that case. Blaski v. Hoffman, 260 F.2d 317, 322 (7th Cir. 1958)(citing Paramount Pictures, Inc. v. Rodney, 186 F.2d 111, 119 (3d Cir. 1950)(Hastie, J., dissenting)). That court also pointed out that it was under “no more obligation to follow” another circuit’s decision “as the law of the case than that Circuit would be to follow what it considers an erroneous decision by the court.” Id. An analogous situation could have arisen in the Factors case. Judge Mansfield explained that had the Second Circuit declared its decision on the preliminary injunction to have been an interpretation of Tennessee law (rather than New York law), “the Sixth [Circuit] or any other circuit would have been free to take a contrary view and thus create the very inconsistency which the majority seeks to avoid.” 652 F.2d at 286 (Mansfield, J., dissenting).


69. Id.
FEDERAL COURT DUTY REGARDING STATE LAW

The *Erie Railroad v. Tompkins*\(^{70}\) decision extended the applicability of section thirty-four of the Federal Judiciary Act of 1789\(^{71}\) beyond state statutes to include state court decisions as well.\(^{72}\) In so doing the Supreme Court expressly overruled the doctrine of *Swift v. Tyson*\(^{73}\) which had allowed the federal courts to apply "general law"\(^{74}\) when there was no controlling state statute. This reversal by the Supreme Court reflected not only the fear of forum shopping\(^{75}\) but also a fear by the Supreme Court that the federal courts were acting unconstitutionally in deciding questions of state law unrestrained by the state's conception of its law. The Court quoted the earlier opinion of Justice Holmes that the rule of *Swift v. Tyson* was "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."\(^{76}\) The Court also agreed with Justice Field's view of the rule that

"notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States— independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

*Erie* reflected a strong federal interest in the sovereignty of the states and their ability to fashion their own law. The *Factors* court's desire to aid in the orderly development of Tennessee law ignored this concern, and was wrong in that respect.

The affirmative duty of the federal courts to decide issues of

\(^{70}\) 304 U.S. 64 (1938).
\(^{71}\) Ch. 20, § 34, 1 Stat. 73, 92.
\(^{72}\) 304 U.S. at 78.
\(^{73}\) 41 U.S. (16 Pet.) 1 (1842).
\(^{74}\) *Erie*, 304 U.S. at 75.
\(^{75}\) *Id.* at 76.
\(^{76}\) 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).
unclear state law as a state court would is well established. The federal courts must take a painstaking look at "all the available data" and ascertain state law "with the aid of such light as [is] afforded by the materials for decision at hand." It must keep in mind that it sits merely as "another court of the State" for the purpose of the case at hand and "should be careful to avoid the 'danger' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances.' In fulfilling these duties the federal courts must remember that they are bound to determine "what the state law is, not what it ought to be."

The duty to decide questions of state law as a state court would is not diminished merely because it is difficult to perform when state law is unclear. The Supreme Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain.

Similarly, a potential conflict between circuits should not diminish the importance of this federal court duty. Conflicts between circuits are, after all, an accepted result of the federal judiciary system.

The Factors court totally abandoned this duty in the interest of uniformity of decision. By deciding to grant "conclusive deference" to the Sixth Circuit decision, the court never satisfactorily reached the point of examining "state precedents, analogous decisions, considered dicta, scholarly works and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." This is certainly a violation of their duty to act

79. Meredith v. Winter Haven, 320 U.S. 228, 238 (1943).
84. Id. at 237 (citations omitted).
86. 652 F.2d at 279.
87. McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 663 (3d Cir.), cert. denied, 449 U.S. 976 (1980). For a discussion of some of the materials that were available to the court, see Factors, 652 F.2d at 287-88 (Mansfield, J., dissenting).
as a state court would, because a state court would probably engage in such an analysis with a case of first impression.\textsuperscript{8} Were \textit{Factors} before the Tennessee court for disposition, there is little doubt that the \textit{Memphis Development}\textsuperscript{9} decision would be considered persuasive authority, but the Tennessee courts would clearly not be restrained from deciding to the contrary.\textsuperscript{90} In sum, the Second Circuit should not have been bound by \textit{Memphis Development} because a Tennessee court would not have been.

The Second Circuit also neglected its more general duty to act judicially. In considering the position of a federal diversity court that has only lower state court decisions available to it for guidance, Professor Corbin concluded that the federal court “must determine the applicable law by recourse to all the juristic data that are available to the state court.”\textsuperscript{91} Failure to do so results in a denial of full justice to the parties because that data would have been considered had the suit been brought in state court.\textsuperscript{92} By not considering all this pertinent information the Second Circuit’s chances of correctly predicting Tennessee law were severely diminished. A Tennessee court might well have ruled that publicity rights are descendible, and one may still do so. If that were to occur, the plaintiff in \textit{Factors} would be left in the peculiar position of having enforceable rights against all parties except those involved in its suit in the Second Circuit. The \textit{Factors} court’s unwarranted deference reduced it to “a hollow sounding board, wooden indeed”\textsuperscript{93} for the Sixth Circuit’s decision and deprived the parties of its “best judicial and scholarly effort.”\textsuperscript{94}

The discouragement of forum shopping was probably an underlying goal of the \textit{Factors} court. That concern has been expressed

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\item The \textit{Factors} majority did state that a future decision by a state court upholding the descendibility of publicity rights would free it to decide contrary to the \textit{Memphis Development} decision. 652 F.2d at 283; \textit{accord} Waters v. American Auto. Ins. Co., 363 F.2d 684, 689 n.8 (D.C. Cir. 1966); \textit{supra} note 10.
\item Corbin, \textit{The Laws of the Several States}, 50 \textit{YALE L.J.} 762, 774 (1941).
\item \textit{Id.} at 774.
\item Clark, \textit{supra} note 8, at 290.
\item \textit{Id.} at 291.
\end{enumerate}
before as a proper reason for granting circuit-to-circuit deference.\textsuperscript{95} A closer analysis of the factual setting, however, suggests that the court's focus was much too broad. The plaintiff, Factors, had been told by the Sixth Circuit less than a year before its suit in the Second Circuit that its interest in Elvis Presley's publicity rights was worthless under Tennessee law, having ceased upon Presley's death.\textsuperscript{96} Factors' subsequent suit in the Second Circuit appears at first glance to be the most blatant form of forum shopping. Factors brought suit, however, to perpetuate a temporary injunction which it had already obtained in the Second Circuit\textsuperscript{97} prior to the adverse decision in \textit{Memphis Development}.\textsuperscript{98} The Second Circuit should not, therefore, have been concerned with forum shopping in the suit to perpetuate the injunction.

The court's concern over \textit{future} forum shopping does remain legitimate. If Factors were allowed to profit in the Second Circuit from a right which another circuit did not acknowledge, it would surely attempt to bring all future actions in New York federal courts providing they could establish diversity jurisdiction and obtain personal jurisdiction over the other parties.\textsuperscript{99} That possibility is always present when there is a conflict between circuits, but concern over potential forum shopping has not deterred circuit courts in the past from applying their own interpretation to both state-\textsuperscript{100} and federal-law questions.\textsuperscript{101}

One possible solution to the problems presented by Factors would be to allow the state whose law is at issue to decide the substance of its law before the federal court proceeded to judgment on the facts of the particular case. One way of accomplishing this would

\textsuperscript{95} "Possibly petitioners chose to appeal . . . in this Circuit in the hopes of finding a court more inclined toward their view. Such 'forum shopping' should be discouraged." Pan Am. World Airways, Inc. v. C.A.B., 517 F.2d 734, 741 (2d Cir. 1975); accord, e.g., Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979), cert. denied, 446 U.S. 919 (1980).


\textsuperscript{97} New York law was applied in granting the temporary injunction. 579 F.2d 215, 220 (2d Cir. 1978).


\textsuperscript{99} It should be noted that the jurisdictional basis in the Second Circuit was weak at best, being based upon the business done in New York by a codefendant. Pro Arts contended in its original motion that the case should have been removed to the Northern District of Ohio, since the codefendant was "merely a 'straw man' joined to make possible a New York suit." See 579 F.2d at 218.


\textsuperscript{101} \textit{See supra} notes 64-69 and accompanying text.
be to certify the pertinent question to the Tennessee Supreme Court. Unfortunately, the possibility of certification was not available to the Factors court. Because this was not a possibility, the only available alternative open to the Second Circuit was to employ the abstention doctrine. This would have allowed it to withhold a decision until a clear signal was received from the state regarding the descendibility of publicity rights. The propriety of employing abstention solely to clarify a question of unclear state law has been questioned, however, and it has been suggested that it should be utilized for this purpose only in "special circumstances." Although waiting for clarification from the state may be costly and time consuming, the problems which may potentially arise without it far outweigh those concerns.

CONCLUSION

The problems presented in a post-Erie diversity case are magnified when state law is unclear or undeclared, and serve only to strengthen the argument in favor of abolishing diversity jurisdiction. Resolution of these problems, however, should not be achieved by methods which create more questions than they solve.

The duty of the federal courts in diversity cases is to divine state law and apply it as a court of that state would. This duty should not be neglected or abandoned because of an interest in the orderly development of state law. The duty also extends to affording litigants the full decisionmaking power of the federal forum. A federal court cannot fulfill its obligation when it is limited in its decisionmaking by a self-imposed doctrine which has no basis in legal precedent or in the court's role in diversity jurisdiction cases.

102. For a list of the nineteen states that do provide such procedures, see C. Wright, A. Miller & E. Cooper, 17 Federal Practice & Procedure § 4248, at 525 n.29 (1978).
103. The doctrine of abstention allows a federal court to decline to proceed to judgment even though there is clearly federal court jurisdiction and to allow state courts to decide relevant state issues. C. Wright, The Law of the Federal Courts § 52, at 196 (2d ed. 1976).
104. Id. § 52, at 202-03.
When forum shopping becomes relevant in such situations because one of the parties has previously litigated the pertinent issue, or a potential exists for future actions by the same party, the court's problems are multiplied. Concern over future forum shopping is at best speculative, however, and should not take precedence over the court's duty to divine state law.

The most efficient route for a federal court to travel when a state's law is unclear is to seek a definite answer regarding that law prior to its decision. This would avoid potential unfairness to the parties in the future should the state decide the issue contrary to the federal court interpretation. This alternative of certifying the state law question was unfortunately not available to the Factors court and will likely be unavailable to future courts. The Factors court therefore was bound to utilize its full judicial ability to ascertain how Tennessee would rule on the pertinent issue. The scope of its inquiry into that issue should have been no more limited than that of a Tennessee court deciding a case of first impression.

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