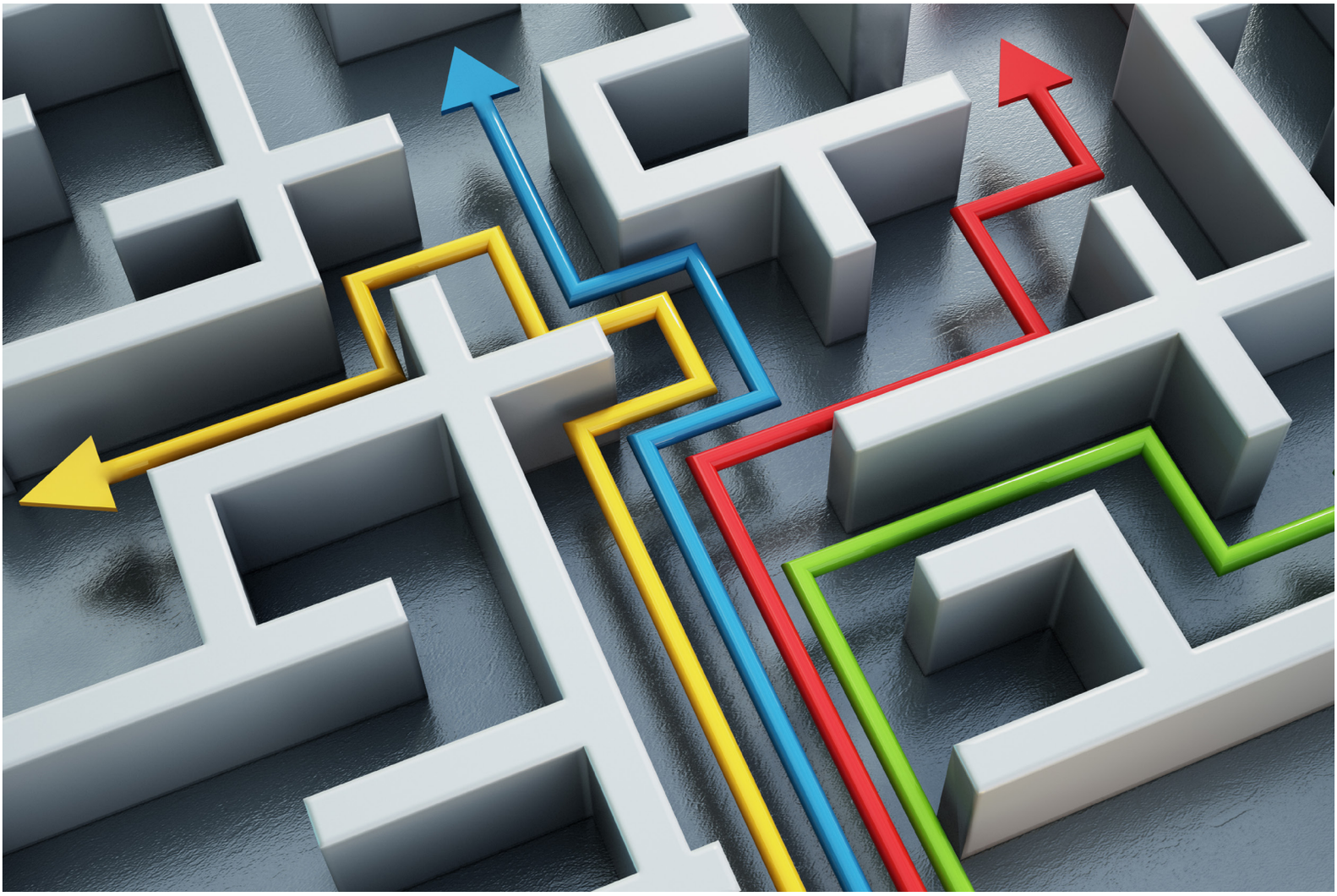
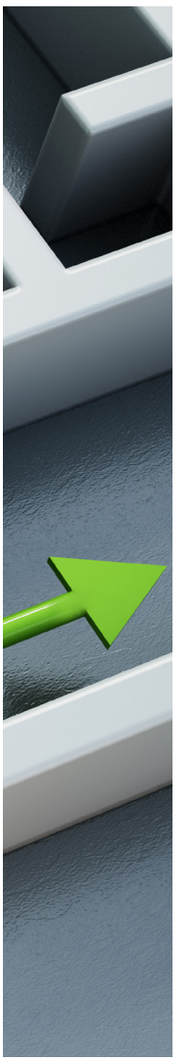
Anybody's Guess:
Reducing Federal Courts' Conjecture in Determining Wisconsin Law



How should a federal court determine Wisconsin law when there is a published Wisconsin Court of Appeals decision but no Wisconsin Supreme Court decision on point? This article considers the Seventh Circuit Court of Appeals' approach to the task, including recent noteworthy cases, and suggests several guidelines.

BY CHARLES H. BARR



Submitted for your consideration (to paraphrase Rod Serling)[1] are two decisions of the U.S. Court of Appeals for the Seventh Circuit. The decisions are real; the parties and their reactions are imagined. Each appeal turned on a question of Wisconsin law, and in each the only Wisconsin opinion on point was a published decision of the Wisconsin Court of Appeals.

Appeal #1: *Home Valu Inc. v. Pep Boys*

In *Home Valu*, the U.S. Court of Appeals for the Seventh Circuit declared that it is not bound by the decision of the intermediate state appellate court because it must decide the case as the Wisconsin Supreme Court would decide it.[2] In fact, the Wisconsin Supreme Court affirmed the intermediate appellate decision by an equally divided vote without opinion, with one justice not participating,[3] but the Seventh Circuit observed that such a decision is not entitled to precedential weight.[4] Finally, the panel concluded that when it is confronted by two equally plausible interpretations of state law, it generally chooses the narrower interpretation that restricts liability, rather than the more expansive interpretation that creates substantially more liability.[5] The Wisconsin Court of Appeals had chosen the "more expansive" interpretation.

The losing party finds it strange that if she could have or would have litigated the issue in the state court system, she was guaranteed a favorable result from the Wisconsin Court of Appeals – because that court is bound by its own published decision[6] – yet on the same issue she got the opposite result from the federal court of appeals. She thought federal and state courts were supposed to decide state law issues uniformly.

Appeal #2: *Smith v. RecordQuest LLC*

In *Smith*, the Seventh Circuit expressed its disagreement with the Wisconsin Court of Appeals' decision but said it could not conclude that the Wisconsin Supreme Court would also disagree with it.[7] Accordingly, it was constrained to decree what it clearly considered to be the "wrong" result "out of deference to the Wisconsin Court of Appeals."[8]

The losing party is flummoxed. She thought the courts were supposed to do justice between the parties.

Which disappointed appellate litigant has the more legitimate gripe? The answer depends on how a federal court should determine Wisconsin law when there is a published Wisconsin Court of Appeals decision but no Wisconsin Supreme Court decision on point. This article surveys the Seventh Circuit's approach to the task, including recent noteworthy cases, and suggests several guidelines.[9]

Erie Fundamentals

In *Erie Railroad Co. v. Tompkins*,[10] the U.S. Supreme Court held that there is no general federal common law, and in the absence of a rule of decision supplied by the U.S. Constitution or an act of Congress, a federal court must apply the law of the state in which it sits. The *Erie* doctrine, which limits federal judicial power to that granted by Article III of the U.S. Constitution, seeks to avoid a dual system of enforcing state-created rights in which substantive law depends on the choice of forum.[11]

In cases with state law issues, a federal court's "north star, and one constitutionally mandated by *Erie*, is to discern, as best it can, the content of state law as the highest court of the state would

view it today."[12] In several opinions issued in 1940, shortly after *Erie*, the U.S. Supreme Court held that if a state's intermediate appellate court but not its highest court has decided a state law issue, the state court decision should be treated as authoritative in the absence of "persuasive" or "convincing" data that the state's highest court would decide otherwise.[13]

The task of determining state law without definitive authority from that state's highest court has been irreverently dubbed the "*Erie* guess"[14] because the task is challenging and, as even some federal judges have admitted, federal courts have not been adept at it.[15] Wrong *Erie* guesses "can have a grave impact on the principled and orderly growth of state law principles."[16] Even when the federal court "guesses right," it unavoidably puts its thumb on the scale by influencing the subsequent state high court decision it predicted.[17]

The Seventh Circuit's Articulation and Application of the *Erie* Standard

In several late-20th-century decisions that adhered to intermediate state court determinations of state law, the Seventh Circuit articulated a standard for determination of state law that on its face is more deferential than the standard the U.S. Supreme Court prescribed in 1940: "in the absence of authority from the highest court of a state, 'this court must follow authority from the state intermediate appellate court if it represents a sound, *or even defensible*, prediction' of how the state's highest court would rule on an issue."[18] Under this standard, appeal #1 (*Home Valu*) should have come out the other way. Given the fact that the issue produced a 50-50 split in the Wisconsin Supreme Court, the Wisconsin Court of Appeals decision of that issue was *ipso facto* a "defensible prediction" of how the Wisconsin Supreme Court would rule.

The Seventh Circuit has more frequently, and with apparent uniformity in the 21st century, repeated or paraphrased the Supreme Court's 1940 standard.[19] As the two examples demonstrate, however, the Seventh Circuit's application of that standard has yielded wildly divergent results.

Using Default Mechanisms to Avoid Predictions. In *Home Valu*, the issue was "whether the economic loss doctrine prohibits a plaintiff from recovering tort damages when an intentional misrepresentation fraudulently induces a party to enter a contract."[20] The Seventh Circuit had predicted in an earlier case that the Wisconsin Supreme Court would answer "yes,"[21] but subsequently the Wisconsin Court of Appeals answered "no" and the Wisconsin Supreme Court affirmed by an equally divided vote.[22] While it is true that such an affirmance is not precedent,[23] the Wisconsin Supreme Court did not vacate the lower court's opinion. But the Seventh Circuit panel saw "two equally plausible interpretations of state law"[24] and essentially ignored the fact that the Wisconsin Court of Appeals had adopted one and rejected the other.

Next, instead of assaying a prediction of how a "fully benched" state high court would rule on the issue, the Seventh Circuit invoked its own preference for "restricted liability." Because there was no attempt to attribute this preference to the teachings of the Wisconsin Supreme Court or other "persuasive data" of Wisconsin law, it is difficult to avoid the conclusion that this is a federal, not a Wisconsin, rule of decision – the opposite of what *Erie* requires. The Seventh Circuit has used the restricted-liability rule to support its decisions of state law issues in other cases, both before[25] and after[26] *Home Valu*.

In two 2024 cases, the restricted-liability rule appears to have morphed into a more equitable version that on its face does not favor defendants: "when presented with 'two equally plausible readings of state law,' we 'should not choose the alternative that requires us to predict a change or an expansion in extant state legal doctrine.'"[27] Under this rule, again appeal #1 should have had a different result because in that case the defendant sought expansion of the economic loss doctrine to preclude fraudulent-inducement claims.

Nonetheless, both the anti-expansion and the restricted-liability rules are default mechanisms that enable a federal court judge to *avoid* making the prediction that *Erie* ostensibly requires by resorting to a federal or even personal preference in cases of doubt about how the state high court would rule.[28] In some cases, the Seventh Circuit has recited its predictive obligation under *Erie* but then has ruled contrary to intermediate state court decisions, apparently not based on direct indicia that the state supreme court would rule differently but because it found the reasoning of those decisions unpersuasive.[29] In a 2004 case, the Seventh Circuit refused to reexamine its previous prediction of how a state supreme court would rule despite two intervening intermediate state court decisions to the contrary: "Instead of guessing over and over, it is best to stick with one assessment until the state's supreme court, which alone can *end* the guessing game, does so."[30] These cases pay lip service to federalism.

Making Predictions While Maintaining Dialogue with State Courts. In marked contrast to this line of cases is appeal #2 (*Smith v. RecordQuest LLC*).[31] In that case, the issue, which the Wisconsin Supreme Court had not addressed, was whether a health-care provider's agent can be

Charles H. Barr, Harvard 1977, is of counsel to Health Sciences Law Group LLC in Mequon, focusing on arbitration, litigation, and support of the firm's health care practice. He is a member of the State Bar of Wisconsin's Nonresident Lawyers Division. Access the digital article at www.wisbar.org/wl.

www.cbarrlaw.com
cbarr@cbarrlaw.com

liable for exacting excessive fees for copies of health-care records under a Wisconsin statute governing a patient's access to those records.[32] After a federal district court answered "no," the Wisconsin Court of Appeals answered "yes," expressly disagreeing with the district court's decision.[33] The Seventh Circuit, in turn, expressly disagreed with the intervening decision of the Wisconsin Court of Appeals but felt compelled to follow it:

"[A]bsent a conflict with the Constitution or a federal law, we cannot overturn established state precedent. The so-called '*Erie* guess' is not an *Erie* veto. We may disagree with [*Townsend v.*] *ChartSwap*, but we cannot convincingly say that the Wisconsin Supreme Court would do the same. Our system of dual sovereignty is well served by a respectful dialogue between state and federal courts."[34]

In addition to this possible sign of greater willingness to defer to an intermediate state court decision, the Seventh Circuit has seemingly narrowed the ambit of a federal default mechanism in the absence of a state high court decision. In a 2024 case, *Green Plains Trade Group LLC v. Archer Daniels Midland Co.* – in which there was *no* state court decision on point – the Seventh Circuit exhorted district courts not to avoid their constitutional *Erie* responsibility to determine state law and restricted resort to a federal default rule to instances in which "the evidence concerning the content of state law is in equipoise" – that is, the predictive scales are exactly balanced.[35] Application of this approach to a case in which there is a single intermediate state court decision on point effectively precludes use of a federal default rule.[36]

Role of the Wisconsin Court of Appeals in the *Erie* Context

Several features of Wisconsin's appellate court system arguably enhance the deference that a federal court should accord a published decision of the Wisconsin Court of Appeals if the Wisconsin Supreme Court has not spoken on the issue. First, the Wisconsin Court of Appeals is a unitary court, and its four districts exist only for the convenience of litigants.[37] Therefore, "[t]he published decision of any one of the panels has binding effect on all panels of the Court."[38]

Second, the Wisconsin Court of Appeals, as noted, cannot modify or overrule its own published opinions; that power resides only in the Wisconsin Supreme Court.[39] Thus, *all* inferior Wisconsin courts are bound by a published decision of the Wisconsin Court of Appeals. Theoretically, there should be no conflict among decisions of the Wisconsin Court of Appeals unless the Wisconsin Supreme Court has ruled on the issue between those decisions. That is not true of the intermediate appellate courts in Illinois and Indiana, the other states comprising the Seventh Circuit.[40] Whereas conflicts between intermediate appellate court decisions in those states are permissible and expected, the structure of the Wisconsin court system requires the Wisconsin Court of Appeals to speak with one voice.

Third, in most instances the Wisconsin Court of Appeals "is the final arbiter, the court of last resort," and thus "it is not surprising that its decisions have taken on a law-making function that is greater perhaps than was anticipated when the new court was created."[41] With the inception of the Wisconsin Court of Appeals, the Wisconsin Supreme Court's appellate jurisdiction became wholly discretionary in nature.[42] In the 2022-23 term, the Wisconsin Supreme Court granted only 1.9% of the petitions for review it addressed.[43] It is common knowledge that not every case that meets a criterion for review[44] is accepted for review, nor does the court accept every case that three or

more of its justices believe to have been wrongly decided.[45]

The Wisconsin Supreme Court rule that authorizes the supreme court to answer a certified question from a non-Wisconsin court reflects the importance of the Wisconsin Court of Appeals in the state court system and incidentally indicates that certification is not a viable alternative to *Erie* guessing when the Wisconsin Court of Appeals has spoken. That rule imposes the condition that "it appears to the certifying court there is no controlling precedent in the decisions of the supreme court *and the court of appeals* of this state."[46] On that basis, the Seventh Circuit declined to certify *Smith* to the Wisconsin Supreme Court because the Wisconsin Court of Appeals had definitively addressed the decisive issue and therefore "controlling precedent" existed.[47]

When the Seventh Circuit has refused to defer to intermediate state court decisions that are on point, its premise has been that those decisions, like a federal court's *Erie* guesses, "are just prognostications" of how the state supreme court would rule.[48] At least in Wisconsin, that is untrue. They are "valid pronouncements of state law" unless and until changed by the state supreme court.[49]

Paring Back *Erie* Guesswork

The U.S. Supreme Court has declared that a federal court sitting in diversity is "in substance only another court of the state."[50] Judge Flaum of the Seventh Circuit more specifically observed that "Article III of the Constitution only affords us the power to ascertain the law of [the forum state] and apply it to the litigants before us as if we were an *inferior* state court."[51] That observation is consistent with *Erie*, which dictates that the federal court not make or change, but merely find, the law of the state. If that were all there were to the matter, the Seventh Circuit should, like any other inferior Wisconsin court, always be bound by a published decision of the Wisconsin Court of Appeals.

The problem is that a federal court litigant cannot directly petition the Wisconsin Supreme Court for review of an intermediate state court decision, as a state court litigant can. Thus, *Erie's* mandate that the same substantive rule of decision be applied in both court systems will be unfulfilled unless the federal court can predict in appropriate cases that the Wisconsin Supreme Court would reverse or modify the Wisconsin Court of Appeals decision if the case were in that state's court system.[52] This is the point at which prediction, that is the *Erie* guess, gets dicey.

But if a federal court litigant should have no *less* opportunity than a state court litigant to challenge a Wisconsin Court of Appeals ruling, neither should the federal court litigant have *more* opportunity. If the Wisconsin Court of Appeals has resolved an issue of Wisconsin law in a published opinion, a federal court that contemplates going the other way should, as a preliminary matter, assess whether the Wisconsin Supreme Court would even accept the case for review if the case were in the state rather than the federal court system. Only if that preliminary answer were "yes" would the federal court then predict whether the Wisconsin Supreme Court would reverse or modify the decision.

There is no indication in Seventh Circuit case law that the Seventh Circuit makes that preliminary inquiry. Recognition of the limited access to plenary review in the Wisconsin Supreme Court would promote federal courts' deference to published decisions of the Wisconsin Court of Appeals and thereby reduce *Erie* guesswork. Notwithstanding the axiom that the federal court should decide the case as the state's highest court would, it is more precise to say the federal court should decide the case as it would be decided in the state court system, which might not include input from the state supreme court.[53]

Even if a federal court is convinced that the Wisconsin Supreme Court would enter the fray, it should exercise restraint in waving its *Erie* wand. The Seventh Circuit itself conceded in *Green Plains* that "a state's intermediate appellate courts engage in constant dialogue with the state's highest court and therefore have a sophisticated idea of the jurisprudential vectors that its high court is setting."[54] As a general matter it is illogical, then, to suppose

that the Seventh Circuit or another federal court is a better predictor than the Wisconsin Court of Appeals of the views of the state's highest court, especially given the unitary nature and prominent law-making role of the court of appeals in the state court system.

But this supposition necessarily underlies every *Erie* case in which the Seventh Circuit rules contrary to precedent established by the Wisconsin Court of Appeals. That result should be reserved for a case in which the Wisconsin Court of Appeals' ruling resulted from an obvious, as opposed to merely arguable, analytical error, which the Wisconsin Supreme Court presumably would not fail to correct;[55] or the supreme court has clearly and specifically called the court of appeals' decision into question. Such cases should be rare.

Conclusion

If appeal #1 (*Home Valu*) had been decided immediately after the Wisconsin Supreme Court addressed the issue in that case, it is unclear whether the loser in the Seventh Circuit would have prevailed. The Seventh Circuit guessed wrongly that the state high court would not recognize a "fraud in the inducement" exception to the economic loss doctrine.[56] The supreme court did retreat from the "broad" version of that exception that the court of appeals had espoused and on which the Seventh Circuit loser relied[57] but again was unable to muster a majority on a crucial issue – precise formulation of the exception.[58]

Appeal #2 (*Smith*), on the other hand, would have gone the other way had it been decided after the Wisconsin Supreme Court addressed the issue in that case, because that court reversed the court of appeals' decision to which the Seventh Circuit deferred.[59] The *Erie* guess from which the Seventh Circuit refrained would have been correct. The loser in the Seventh Circuit was the victim of bad timing.

Nonetheless, the goal of "a respectful dialogue between state and federal courts" suggests that the Seventh Circuit unjustifiably hazarded an *Erie* guess contrary to Wisconsin intermediate state court authority in appeal #1 and properly refrained from doing the same in appeal #2. If the Wisconsin Supreme Court has not weighed in on an issue, Wisconsin Court of Appeals precedent should command deference under *Erie* unless it rests on obvious analytical error or the supreme court has unmistakably cast doubt on the court of appeals' decision.

Several features of Wisconsin's appellate court system arguably enhance the deference that a federal court should accord a published decision of the Wisconsin Court of Appeals if the Wisconsin Supreme Court has not spoken on the issue.

While the Seventh Circuit has not consistently exhibited such deference, the *Smith* case, among others, may signal a trend in that direction. To encourage federal courts (including itself) to minimize *Erie* guesswork, the Seventh Circuit should reinstate and adhere to the standard that it will follow the ruling of an intermediate state court if the ruling represents a sound or even defensible prediction of how the state high court would rule.

It is jarring when a federal court applying *Erie* reaches what it considers to be the wrong result. Those hard cases, however, are the price exacted by a disciplined concept of federalism. **WL**

ENDNOTES

[1]In three episodes of the TV show *Twilight Zone*, Rod Serling's commentary included the phrase "submitted for your approval." And in one, he introduced the episode with "Pleased to present for your consideration…".

[2]*See Home Valu Inc. v. Pep Boys*, 213 F.3d 960 (7th Cir. 2000).

[3]*See Douglas-Hanson Co. v. BF Goodrich Co.*, 229 Wis. 2d 132, 598 N.W.2d 262 (Ct. App. 1999), *aff'd by evenly divided court*, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621, *holding limited by Digicorp Inc. v. Ameritech Corp.*, 2003 WI 54, 262 Wis. 2d 32, 662 N.W.2d 652.

[4]*See Home Valu Inc.*, 213 F.3d at 965.

[5]*Id.* at 964-65.

[6]*Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

[7]*Smith v. RecordQuest LLC*, 989 F.3d 513, 519 (7th Cir. 2021).

[8]*Id.* at 520.

[9]*See* Charles H. Barr, *Seventh Circuit Determination of Wisconsin Law: Prediction or Prescription?*, Milwaukee B. Ass'n Messenger (2002) (short exposition of state of law at that time).

[10]*Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938).

[11]*See id.* at 78; *Salve Regina Coll. v. Russell*, 499 U.S. 225, 234 (1991) (citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), and *Erie*, 304 U.S. at 74-75); *Allstate Ins. Co. v. Menard's Inc.*, 285 F.3d 630, 634-35 (7th Cir. 2002); *see also Fidelity Union Tr. Co. v. Field*, 311 U.S. 169, 180 (1940) ("It is inadmissible that there should be one rule of state law for litigants in the state court and another rule for litigants who bring the same questions before the federal courts owing to the circumstance of diversity of citizenship.")

[12]*Green Plains Trade Grp. LLC v. Archer Daniels Midland Co.,* 90 F.4th 919, 921 (7th Cir. 2024); *see also Community Bank of Trenton v. Schnuck Mkts. Inc.*, 887 F.3d 803, 811 (7th Cir. 2018) ("the focus is always a prediction about the state's highest court").

[13]*West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (intermediate state court decision "is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise"); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940) ("must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently"); *Six Cos. of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940) ("We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise."); *Fidelity Union Tr. Co.*, 311 U.S. at 177-78 ("An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court").

[14]*Smith*, 989 F.3d at 519; *Sanchelima Int'l Inc. v. Walker Stainless Equip. Co.*, 920 F.3d 1141, 1146 (7th Cir. 2019); *Allstate,* 285 F.3d at 638.

[15]*See id.* at 637-38 (citing Dolores K. Sloviter, *A Federal Judge Looks at Diversity Jurisdiction*, 78 Va. L. Rev. 1671, 1675, 1678-80 (1992)).

[16]*Allstate,* 285 F.3d at 638.

[17]*See id.* (citing Sloviter, *supra* note 15, at 1681).

[18]*Stephan v. Rocky Mountain Chocolate Factory Inc.,* 136 F.3d 1134, 1137 (7th Cir. 1998) (quoting *McCoy v. Richards*, 771 F.2d 1108, 1110 (7th Cir. 1985)) (emphasis added); *see also Indianapolis Airport Auth. v. American Airlines Inc.,* 733 F.2d 1262, 1272 (7th Cir. 1984), *overruled on other grounds by Northwest Airlines Inc. v. County of Kent,* 510 U.S. 355 (1994) ("if we think the intermediate state appellate court has made a correct or even, perhaps, just a defensible prediction of what the state supreme court would do if the question were put to it, then we are bound to follow its ruling").

[19]*See, e.g.*, *Green Plains,* 90 F.4th at 928 (stating that federal court needs "persuasive reasons" to reject decision of intermediate state court); *Smith*, 989 F.3d at 517 ("convincing reason"); *Surgery Ctr. at 900 N. Mich. Ave. LLC v. American Physicians Assurance Corp.*, 922 F.3d 778, 785 (7th Cir. 2019) ("compelling reason"); *Tippecanoe Beverages Inc. v. S.A. El Aguila Brewing Co.*, 833 F.2d 633, 638-39 (7th Cir. 1987) ("good reason"); *Eljer Mfg. Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992) ("a reason"); *Williams, McCarthy, Kinley, Rudy & Picha v. Northwestern Nat'l Ins. Grp.*, 750 F.2d 619, 624 (7th Cir. 1984) (may reject decision "when it is not a good predictor" of decision by state's highest court).

[20]*Home Valu,* 213 F.3d at 964 (quoting *Douglas-Hanson*, 229 Wis. 2d at 270-71).

[21]*Id.* (citing *Cooper Power Sys. Inc. v. Union Carbide Chems. & Plastics Co.*, 123 F.3d 675, 682 (7th Cir. 1997)).

[22]*Douglas-Hanson,* 229 Wis. 2d 132.

[23]*See Home Valu,* 213 F.3d at 965.

[24]*Id.*

[25]*Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) (citing *Todd v. Societe Bic S.A.*, 21 F.3d 1402, 1412 (7th Cir. 1994 (en banc)) ("When given a choice between an interpretation of Illinois law which *reasonably* restricts liability, and one which *greatly* expands liability, we should choose the narrower and *more reasonable* path ...." (emphasis added)).

[26]*Pisciotta v. Old Nat'l Bancorp,* 499 F.3d 629, 635-36 (7th Cir. 2007); *Southern Ill. Riverboat Casino Cruises Inc. v. Triangle Insulation & Sheet Metal Co.,* 302 F.3d 667, 674 (7th Cir. 2002); *Insolia v. Philip Morris Inc.,* 216 F.3d 596, 607 (7th Cir. 2000).

[27]*Coatney v. Ancestry.com DNA LLC*, 93 F.4th 1014, 1020 (7th Cir. 2024) (citing *Green Plains,* 90 F.4th at 929).

[28]*See* Benjamin C. Glassman, *Making State Law in Federal Court* 46 (Bepress 2005), https://law.bepress.com/cgi/viewcontent.cgi?article=3661&context=expresso (referring to such rules as "default rules"); *see also id.* at 33-40 (criticizing conception of *Erie* that uses such rules).

[29]*See Weigle v. SPX Corp.*, 729 F.3d 724, 736-39 (7th Cir. 2013) (declining to follow intermediate state court decision that manufacturer may avoid product liability by placing adequate warnings on product even when there is evidence of "safer" alternative design); *Adams v. Catrambone*, 359 F.3d 858, 862, 864 (7th Cir. 2004) (declining to follow as "unpersuasive" intermediate state court decision on scope of exclusion from definition of "employee" under wage law).

[30]*Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004).

[31]*Smith,* 989 F.3d 513.

[32]*See id.*at 517-18.

[33]*Townsend v. ChartSwap LLC*, 2020 WI App 79, ¶¶ 11-12, 395 Wis. 2d 229, 952 N.W.2d 831, *rev'd*, 2021 WI 86, 399 Wis. 2d 599, 967 N.W.2d 21.

[34]*Smith,* 989 F.3d at 519 (internal citations omitted). The Wisconsin Supreme Court later agreed with the federal district court and the reservations expressed by the Seventh Circuit. *Townsend*, 2021 WI 86, ¶ 32, 399 Wis. 2d 599 (citing *Smith*, 989 F.3d at 519).

[35]*Green Plains,* 90 F.4th at 921; *see also id.* at 929-30.

[36]*See* Glassman, *supra* note 28, at 16 ("the statement of an intermediate appellate court is particularly strong datum"); *see also In re: Emerald Casino Inc.*, 867 F.3d 743, 765 (7th Cir. 2017) (reversing district court that declined to follow intermediate state court decision because it was not convinced state supreme court would agree; analysis was "exactly backwards" because question should have been whether district court was convinced state high court would *not* agree).

[37]*In re Ct. of Appeals*, 82 Wis. 2d 369, 263 N.W.2d 149 (1978); *cf. Allstate*, 285 F.3d at 639 (decisions of Illinois intermediate appellate courts in conflict).

[38]*In re Ct. of Appeals*, 82 Wis. 2d at 371; Wis. Stat. § 752.41(2).

[39]*Cook,* 208 Wis. 2d 166. *See also Fidelity Union Tr. Co.,* 311 U.S. at 179 (decisions of New Jersey Court of Chancery ordinarily treated as binding in later cases in chancery and can be overruled only by state high court); *King v. Order of United Com. Travelers of Am.,* 333 U.S. 153, 161 (1948) (federal court not bound by decision of South Carolina Court of Common Pleas, a trial court, which did not bind other courts of that state).

[40]*See O'Casek v. Children's Home & Aid Soc. of Ill.*, 892 N.E.2d 994, 1006-07 (Ill. 2008) ("the opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels"); *Wellman v. State*, 210 N.E.3d 811, 816 n.4 (Ind. Ct. App. 2023) (citing *Indiana Dep't of Child Servs. v. C.F. (In re C.F.)*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009)) ("each panel of this Court has coequal authority on an issue and considers any previous decisions by other panels but is not *bound* by those decisions").

[41]Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* ch. 22 (State Bar of Wis. 9th ed. 2022); *id.* (2nd ed. 1996) at 1-6.

[42]*See* Wis. Stat. § 809.62(1); *Elm Park Iowa Inc. v. Denniston*, 91 Wis. 2d 227, 229-30, 280 N.W.2d 262 (1979).

[43]Supreme Court Annual Statistics Report, 2023-2024 Term, at 4, https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=865441. In the two preceding terms, the supreme court granted 3.8% (2022-2023 term) and 8.2% (2021-2022 term) of the petitions for review it addressed. *Id.*

[44]Wis. Stat. § 809.62(1r).

[45]*See* Wis. Sup. Ct. Internal Operating Proc. II.B.1 at 6 ("A petition for review is granted upon the affirmative vote of three or more members of the court"); Wis. Sup. Ct. Internal Operating Proc. II at 4 ("When a matter is brought to the Supreme Court for review, the court's principal criterion in granting or denying review is not whether the matter was correctly decided or justice was done in the lower court, but whether the matter is one which should trigger the institutional responsibilities of the Supreme Court.")

[46]Wis. Stat. § 821.01 (emphasis added); *cf.* Ill. Sup. Ct. R. 20 (authorizing court to answer to a certified question if "there are no controlling precedents in the decisions of this court ...." (italics added)). *See also* Ind. R. App. P. 64 (requiring that there be "no clear controlling Indiana precedent"). Indiana's rule resembles Wisconsin's more than Illinois's, so certification appears to not be a viable alternative to *Erie* guessing of Indiana law if there is an Indiana Court of Appeals decision on point. On the other hand, conflicts between decisions of that court are, as in Illinois, permissible and expected. *See supra note* 40.

[47]*Smith*, 989 F.3d at 519 ("This case may not even be certifiable under Wisconsin law because *ChartSwap* [the Wisconsin Court of Appeals decision] is controlling precedent under Wis. Stat. § 821.01.")

[48]*Reiser,* 380 F.3d at 1029.

[49]Glassman, *supra* note 28, at 54.

[50]*Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956); *King*, 326 U.S. at 108.

[51]*Todd*, 21 F.3d at 1414 (dissent) (emphasis added).

[52]*See Allstate,* 285 F.3d at 635.

[53]*See* Glassman, *supra* note 28, at 24 ("The basic principle at issue in [*Erie*] cases is that federal courts should seek to apply state law as a paradigmatic state court would.")

[54]*See Green Plains,* 90 F.4th at 928.

[55]*See, e.g.*, *Adams,* 359 F.3d at 864 (intermediate state court ruled that exception from definition of "employee" applied by considering only one of three prongs of exception, even though statute's use of conjunctive clearly required that all three prongs must be satisfied).

[56]*See Digicorp*, 2003 WI 54, ¶ 3, 262 Wis. 2d 32 (recognizing narrow fraud-in-the-inducement exception to economic loss doctrine); *see also Van Lare v. Vogt*, 2004 WI 110, ¶¶ 44-46, 274 Wis. 2d 631, 683 N.W.2d 46 (Bradley, J., concurring); *id.*, ¶¶ 47-52 (Crooks, J., concurring).

[57]*See Digicorp,* 2003 WI 54, ¶ 3, 262 Wis. 2d 32.

[58]*See id.* ¶ 5 n.2.

[59]*Townsend,* 2021 WI 86, ¶ 37, 395 Wis. 2d 229. **WL**