2010

Foreword

Thomas H. Boyd

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol36/iss4/1

This Prefatory Matter is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law
The United States Court of Appeals for the Eighth Circuit is one of thirteen federal courts of appeals. Each of these circuits is unique. The twelve regional federal appellate courts include eleven numbered circuits, which reflect the distinctive differences in the geography and the demographics of the states that make up their respective jurisdiction. Additionally, there is the District of Columbia Circuit, which tends to have the highest national profile due to its location in the capital and its direct review of decisions made by the various federal agencies. The Federal Circuit is the thirteenth circuit court of appeals, and is distinguished by its specialized areas of jurisdiction over a host of various types of federal actions.

The Eighth Circuit is located in the heartland of the nation, and is second to none in the quality of justice it has traditionally dispensed, its contributions to the development of federal law, and the distinguished service of its fine judges.

At one time, the Eighth Circuit was the largest of the federal circuit courts and included all of the states west of the Mississippi River, from the Canadian border in the north down to the southern border of Arkansas, and west across the Great Plains to the Rocky Mountains. The circuit was split in 1929, with the Eighth Circuit retaining jurisdiction over the seven states of North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Missouri, and Arkansas. Today, as has been true in the past, this vast and diverse region continues to give rise to cases that yield decisions of great importance to the nation. The Eighth Circuit’s rich history and monumental contributions have been chronicled by the distinguished scholar Professor Jeffrey Brandon Morris, who has written the fine, full-length history entitled, Shareholder, Winthrop & Weinstine, P.A.
Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit.¹

The judges of the Eighth Circuit have distinguished themselves throughout the circuit's history. The great jurists and cousins Walter H. Sanborn and John B. Sanborn, Jr. served successively on the court over a period of some seventy-two years—from 1892 to 1964—and brought great credit to this circuit.² The Honorable Harry A. Blackmun served as Judge John B. Sanborn’s first law clerk, and was a member of this circuit’s bench from 1959 to 1970, before he became the last of the four Eighth Circuit judges who have gone on to serve on the United States Supreme Court.³ Recently, and most fittingly, the life and great service of one of the Eighth Circuit’s finest jurists has been the subject of a first rate biography, Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench,⁴ authored by Professor Polly J. Price, one of Judge Arnold’s former law clerks.

The Eighth Circuit recently celebrated an important milestone of longevity on April 15, 2009, when the Honorable Myron H. Bright exceeded service of forty years and eight months, which is longer than any other circuit judge ever appointed to serve on the Eighth Circuit.⁵ He continues to sit on panels in this circuit and other circuits. In another historical development, the Honorable William J. Riley, who clerked for the Honorable Donald P. Lay, became Chief Judge of the Eighth Circuit earlier this year, thus following in Judge Lay’s footsteps.⁶

Given the rich traditions and ongoing contributions of this great circuit, it is entirely fitting for the William Mitchell Law Review to publish this special Eighth Circuit issue. This issue contains impor-

---

¹ JEFFREY BRANDON MORRIS, ESTABLISHING JUSTICE IN MIDDLE AMERICA: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (University of Minnesota Press 2007).
³ Id. at 300–02.
tant scholarship and provides thoughtful and insightful reflections on some of the important work in which the Eighth Circuit has been engaged in recent years.

In considering a relatively recent example of legislation in which the federal government has expanded into areas that have traditionally been left to the states, the Eighth Circuit has joined the large number of circuits throughout the nation that have reached different conclusions on the scope of federal jurisdiction in class actions. The Class Action Fairness Act (CAFA) was enacted in 2005 based on Congressional findings that local "abuses of the class action device" have undermined the "national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." To address these concerns, Congress changed diversity jurisdiction requirements to enable defendants to more freely remove state class action cases to federal court. Diane Bratvold and Daniel Supalla have written a very fine article analyzing the split among the circuits that has developed with respect to the standard of proof for determining the amount in controversy for class action cases removed under CAFA. Whether a function of poor legislative drafting, good lawyering, or an excess of judicial contemplation, there have been no fewer than four different standards developed in the nine circuits that have considered and decided what, on its face, would seem to be a fairly straightforward question. The Eighth Circuit is among those circuits that have adopted the common sense preponderance-of-the-evidence standard, which the authors advocate as the correct standard.

Kevin Decker, Jonathan Schmidt, and Christine Hinrichs have authored an intriguing piece on the Separation of Powers ramifications of the Eighth Circuit's decision in Lundeen v. Canadian Pacific Railway Co., which they argue has exasperated a conflict among the circuits regarding Congress's authority to encroach upon final judgments. Lundeen is another case that arose out of litigation in the United States District Court for the District of Minnesota, which had held the Federal Railroad Safety Act (FRSA) preempted plaintiffs' state law claims. While the case was on appeal for the second time, Congress enacted the National Commission on Terrorist Attacks

8. 532 F.3d 682 (8th Cir. 2008).
Upon the United States, which contained a provision that purported to amend the FRSA in a manner intended to legislatively reverse the district court’s decision in *Lundeen*. The authors contend that the Eighth Circuit should have interpreted the amendment as having prospective application only. However, the panel’s majority remanded the case for further proceedings in light of Congress’s “clarification” of FRSA, in the face of a vigorous dissent that raised separation-of-powers issues. This decision arguably conflicts with several other circuits that have declined to apply new rules to final decisions in which direct review has been exhausted, and may have broader implications with respect to the sanctity of interlocutory appellate decisions made in pending litigation.

It has been more than forty years since the United States Supreme Court decided *Terry v. Ohio*, which recognized a category of “seizures” that were less intrusive and therefore required a less rigorous probable cause showing under the Fourth Amendment. In the decades that have followed, so-called “Terry stops” have been the subject of an extensive body of jurisprudence. Yet, this area of the law is still unsettled and is currently the subject of a circuit split over whether coercive *Terry* stops call for authorities to provide the *Miranda* warnings that are required for custodial interrogations. Daniel R. Dinger has prepared an impressive tome that exhaustively reviews this issue and the split among the circuits, observing that the Eighth Circuit’s own recent holdings have been unclear on the issue of whether *Miranda* warnings are or are not required in coercive *Terry* stops. The author opines that this circuit appears to be divided on this issue.

While there may be uncertainty in some areas of its jurisprudence that may require definitive resolution by the United States Supreme Court, the Eighth Circuit, as well as other federal courts, have an underutilized tool at their disposal that can provide clear guidance on state law questions that arise in diversity cases. Under *Erie Railroad Co.*

---

13. Compare United States v. Pelayo-Ruelas, 345 F.3d 589 (8th Cir. 2003) (holding agent’s conduct during *Terry* stop did not curtail defendant’s freedom, and thus defendant was not entitled to *Miranda* warnings) with United States v. Martinez, 462 F.3d 903 (8th Cir. 2006) (holding that defendant that was placed in handcuffs during investigative stop was “in custody” for purposes of *Miranda*).
v. Tompkins,\textsuperscript{14} federal courts sitting in diversity cases are bound to apply state law as that law has been determined by that state’s highest court. When confronted with unresolved questions of state law, federal courts have the choice to either make their best prediction of how the state’s highest court would decide the issue—known as an “\textit{Erie} guess”—or to certify the question of law to the state’s highest court. The Minnesota Legislature has enacted the Uniform Certification of Questions of Law Act authorizing the Minnesota Supreme Court to accept such certified questions from federal courts.\textsuperscript{15} Chief Judge Lay had been an early proponent for the use of this procedure by federal courts, and even certified a question of Minnesota law in one of the many occasions he sat by designation as a federal trial judge.\textsuperscript{16} However, over the years, the Eighth Circuit has failed to take full advantage of this important means for obtaining definitive interpretations of state law. I hope that Haley N. Schaffer and David F. Herr’s excellent article will cause the judges on the Eighth Circuit to reconsider and reevaluate the very real benefits of the certification process to obtain guidance on state law.

This special issue also contains another plea to the Eighth Circuit to reconsider its past practices. For many years, the Eighth Circuit has staked out a unique position with respect to whether cases with defendants who are citizens of the forum state can be removed to federal court under a claim of diversity jurisdiction. Most circuits have held that the “Forum Defendant Rule” is not jurisdictional and does not deprive district courts of jurisdiction. However, the Eighth Circuit has for many years strictly construed the terms of the diversity statute, holding that the “better rule” is to view the presence of forum defendants as a jurisdictional defect that prevents removal and requires remand.\textsuperscript{17} Jack Metzler has written an essay that argues the merits of the majority view as it has been adopted by other circuits and endorsed by iconic federal jurists Learned Hand and Henry Friendly.

Given the vastly expanded importance of intellectual property in commerce and seemingly all other areas of our society, Kenneth Port’s survey of the Eighth Circuit’s jurisprudence in trademark law is particularly timely. Professor Port argues that the cases in this circuit

\begin{itemize}
\item \textsuperscript{14} 304 U.S. 64 (1938).
\item \textsuperscript{15} \textsc{Minn. Stat.} § 480.065 (2008).
\item \textsuperscript{16} Tomfohr v. Mayo Found., 450 N.W.2d 121 (Minn. 1990).
\item \textsuperscript{17} See Horton v. Conklin, 431 F.3d 602 (8th Cir. 2005); Hurt v. Dow Chemical Co., 963 F.2d 1142 (8th Cir. 1992).
\end{itemize}
have been decided with a properly balanced concern for protecting property rights while still allowing for vigorous competition in the marketplace. The author optimistically contends this approach will provide an optimal environment that should help position businesses located in the circuit to recover more rapidly from the recent economic downturns.

Julie Swedback and Kelly Prettner's article on student loan discharge cases offers an interesting analysis of another area of Eighth Circuit jurisprudence. Congress has consistently taken steps to limit the discharge of student debts to those cases of the utmost undue hardship, but has left it to the courts to define what constitutes such undue hardship. For a time, the Eighth Circuit seemed to be out of step with the other circuits by opting for a less restrictive "totality of the circumstances" test. However, in its recent decision in Educational Credit Management Corp. v. Jesperson, the Eighth Circuit appears to signal that it is moving toward the majority view.

The final article in this special issue is Mary Vasaly's important essay that makes the compelling case for gender diversity on the Eighth Circuit. It is startling to realize that the Honorable Diana E. Murphy is the only woman who has ever been appointed to the Eighth Circuit in its entire history. This is particularly astonishing given the progressive leadership and pioneering roles that many of the judges of this court have played to expand opportunities for women and minorities in our society, as well as the many important decisions that have been handed down in this circuit to eliminate discrimination and ensure equal rights. The Eighth Circuit was also an early leader in gender diversity in court administration, as was illustrated by June Boadwine's appointment as its circuit executive, who is only the second woman to hold that position in any of the circuits up to that point. Yet, inexplicably, the judicial appointments to the court have failed to reflect the progressive traditions of this circuit. The Infinity Project has been organized to pursue the important mission of enhancing gender diversity on the federal bench throughout the Eighth Circuit, and particularly on the circuit bench.

Once again, I commend the William Mitchell Law Review for compiling this fine collection of articles on these timely and important topics in this excellent special issue.

18. 571 F.3d 775 (8th Cir. 2009).