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WHY GUESS? *ERIE* GUESSES AND THE EIGHTH CIRCUIT

Haley N. Schaffer† and David F. Herr††

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I. INTRODUCTION

In a diversity jurisdiction action, federal courts are required to apply the law of the state in which the court sits, except when deciding procedural matters, constitutional issues, or matters specifically governed by acts of Congress.[1] Accordingly, the Eighth

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1. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state").

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Circuit must apply the law as if it were a state court of the state in which it sits.[2] In interpreting state law, it first considers any pertinent decisions of the state's highest court.[3] However, when there is no case directly on point, a federal court, including the Eighth Circuit, must make what is informally referred to as an "*Erie* guess." An "*Erie* guess" is an attempt to predict what a state's highest court would decide if it were to address the issue itself.[4]

The Eighth Circuit frequently has to decide questions of law involving the law of Arkansas, Missouri, Iowa, Nebraska, Minnesota, and North and South Dakota, and occasionally addresses the law of more far-flung jurisdictions. This presents a challenging decision-making task for the court and the potential for incorrect determinations of state law. Understandably, federal courts might not accurately predict how a state high court would rule. The Eighth Circuit is not immune from this problem and has sometimes failed to correctly predict how state high courts will ultimately decide a question.[5] The problem is that "[a]n incorrect guess deprives the present litigants of justice insofar as the concept refers to accuracy of outcome, not merely procedural fairness."[6] Moreover, *Erie* guesses are "'unreliable' because a state court could later decide the same issue differently; thus citizens cannot rely on the federal court prediction in conducting their affairs."[7] This has happened in the Eighth Circuit.[8]

The purpose of this article is to encourage the Eighth Circuit to avoid making *Erie* guesses and instead utilize certification when confronting unsettled questions of state law generally and Minnesota

2. *Id.*

3. Lindsay Mfg. Co. v. Hartford Accident & Indem. Co., 118 F.3d 1263, 1267–68 (8th Cir. 1997).

4. *Id.*

5. *See* Kan. Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., 194 F.3d 922, 924 (8th Cir. 1999) (recognizing that the Kansas Supreme Court disapproved of the Eighth Circuit's interpretation of Kansas law); Farmland Indus. v. Republic Ins. Co., 941 S.W.2d 505, 510 (Mo. 1997) (concluding that the Eighth Circuit "misconstrue[d]" Missouri law); Rodriguez v. Gen. Accident Ins. Co., 808 S.W.2d 379, 383 (Mo. 1991) (rejecting the Eighth Circuit's interpretation of Missouri law as inconsistent with Missouri law).

6. Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) In North Carolina*, 58 DUKE L.J. 69, 75–76 (2008).

7. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 210–11 (2003).

8. *See Kan. Pub. Employees Ret. Sys.*, 194 F.3d at 924 (noting that the Kansas Supreme Court disapproved of the Eighth Circuit's interpretation of Kansas law).

law in particular. Certification allows the Eighth Circuit to avoid *Erie* guesses and thus avoid errors while at the same time providing litigants with a correct and more efficient determination of their legal rights than abstention. The Eighth Circuit itself has recognized: "As a federal court, our role in diversity cases is to interpret state law, not to fashion it."[9]

This article is divided into seven sections. It first provides a history of certification. The article then provides an overview of how certification works in the Minnesota Supreme Court. The article illustrates that when the Minnesota Supreme Court takes certified questions, it in fact does answer them, thereby providing certainty and finality to unresolved questions of state law. The article next discusses the advantages of certification. It then considers how the United States Court of Appeals for the Eighth Circuit has approached certification by providing an analysis of when the Eighth Circuit has chosen to certify questions and when it has declined to do so. The article then considers the arguments against certification. This article concludes that the Eighth Circuit should certify questions to the Minnesota Supreme Court when it faces unresolved questions of Minnesota law in order to avoid *Erie* guesses because the benefits of certification far outweigh its problems.

II. HISTORY OF CERTIFICATION

Certification grew out of the Supreme Court decision in *Erie Railroad Co. v. Tomkins.*[10] In *Erie*, the United States Supreme Court instructed federal courts sitting in diversity to apply state law to all substantive questions other than those governed by the federal Constitution or acts of Congress.[11] The *Erie* decision raised problems for federal courts trying to decide questions of state law, especially when the state law was less than clear.[12] One commentator explained

9. Orion Fin. Corp. v. Am. Foods Group, Inc., 281 F.3d 733, 738 (8th Cir. 2002).

10. Eisenberg, *supra* note 6, at 73.

11. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

12. *See, e.g.*, Richard Alan Chase, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN'S L. REV. 407, 411 (1992) ("Unfortunately, federal courts often face substantial obstacles when attempting to determine the status of state law on a given issue."); Coby W. Logan, *Certifying Questions to the Arkansas Supreme Court: A Practical Means for Federal Courts in Clarifying Arkansas State Law*, 30 U. ARK. LITTLE ROCK L. REV. 85, 85 (2007) ("[F]ederal courts have struggled

the problem as follows: "Obeying Erie is straightforward if state law is clear, but predicting how the state supreme court would decide an unclear issue is neither easy nor value-free. For unsettled issues implicating state policy, a federal court's Erie-based prediction creates 'needless friction with [the] state.'"[13] As a result of *Erie*, federal courts were often called to predict how a state's supreme court would decide a question of state law, requiring the federal courts to make "*Erie* guesses."[14]

In an effort to avoid *Erie* guesses, federal courts responded with the abstention doctrine, "under which a federal court, in narrow circumstances, may refuse to decide a case involving unclear issues of state law when a decision on the state law issue might raise a federal constitutional question."[15] Although abstention may have allowed a federal court to avoid *Erie* guesses, abstention had its own problems.[16] One commentator explained:

> [Absention] has significant flaws. Foremost among these is 'legendary' cost and delay: the parties must leave federal court to initiate a full round of state litigation plus any attendant appeals, and then return to federal court for another full round of litigation and appeals. Moreover, the state supreme court may not definitively resolve the relevant issue, as that court can decline review—undercutting the reason to abstain in the first place. Accordingly, many commentators have rejected abstention as unacceptable.[17]

Certification thus developed as the means for federal courts to receive instruction from a state's supreme court about unsettled questions of state law while avoiding the expense and delay associated

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with the best method to determine how a particular state's highest court might answer an unresolved question of state law.").

13. Eisenberg, *supra* note 6, at 73 (quoting R.R. Comm'n v. Pullman, 312 U.S. 496, 500–01 (1941)).

14. *See generally* Cochran, *supra* note 7, at 162–66 (discussing *Erie's* impact on federal court predictions of state law and the reactions of state courts).

15. Chase, *supra* note 12, at 411–12; *see also* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 415 (1988); Eisenberg, *supra* note 6, at 73.

16. Chase, *supra* note 12, at 412 ("[W]hile the absention doctrine allows federal courts to avoid predicting a state court's views, the process is costly and time consuming."); Corr & Robbins, *supra* note 15, at 415 ("The abstention procedure has long been criticized for several reasons, including the financial costs and delay that abstention may impose.").

17. Eisenberg, *supra* note 6, at 73–74.

with abstention.[18] Certification, however, was slowly accepted by the federal courts. In 1945, the Florida legislature had "rare foresight"[19] when it became the first legislature in the country to authorize its state supreme court to adopt rules for accepting questions certified from federal courts.[20] For approximately fifteen years, however, no court used that authority to certify questions to the Florida Supreme Court.[21] In fact, the United States Supreme Court was the first court to use certification by suggesting that the Fifth Circuit certify a question of Florida state law to the Florida Supreme Court in *Clay v. Sun Insurance Office, Ltd.*[22]

Since then, the Supreme Court has repeatedly recognized that certification provides a better alternative to *Erie* guesses than abstention: "[Certification] procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions."[23] The Supreme Court has used certification itself and encouraged other federal courts to use certification to resolve unsettled questions of state law.[24] It has even criticized lower federal courts that do not take advantage of the certification process.[25] For example, in *Arizonans for Official English v. Arizona*, the Supreme Court stated: "'Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly

18. *Id.* at 74; Chase, *supra* note 12, at 412–13.

19. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960).

20. Logan, *supra* note 12, at 86.

21. *Id.*

22. *Id.*; *see also Clay*, 363 U.S. at 226 (Black, J., dissenting) (explaining that under section 25.031 of the Florida Statutes, the Supreme Court of Florida has had the authority to develop rules for the use of certification for many years, "but . . . the Supreme Court of Florida has never promulgated any such rules, and evidently has never accepted such a certificate").

23. Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988).

24. *See, e.g.*, Fiore v. White, 528 U.S. 23, 29–30 (1999) (certifying question to Pennsylvania Supreme Court); *Am. Booksellers Ass'n*, 484 U.S. at 395–96 (certifying questions to Virginia Supreme Court); Zant v. Stephens, 456 U.S. 410, 416–17 (1982) (certifying question to Georgia Supreme Court); Bellotti v. Baird, 428 U.S. 132, 151 (1976) (concluding that the federal district court should have certified question of state law to state court); Aldrich v. Aldrich, 378 U.S. 540, 542–43 (1964) (explaining that the Court had certified questions to Florida Supreme Court). *See also* Cochran, *supra* note 7, at 166 n.45 ("The United States Supreme Court has consistently championed the cause of state law question certification.").

25. Cochran, *supra* note 7, at 166.

gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court.'"[26]

III. BENEFITS OF CERTIFICATION

Following the United States Supreme Court's support for certification, many judges and legal scholars have extolled the benefits of certification:[27]

> Predictably, federal judges have been receptive to certifying questions to state supreme courts. The process not only satisfies their *Erie* obligation, but also relieves them of the burden of deciding important state issues, a burden more readily apparent when the affected state is not one within the federal judge's circuit.[28]

Those judges and legal scholars recognize that certification has many benefits. One key benefit of certification is that it eliminates *Erie* guesses, which minimizes federal court errors in interpreting state law. Certification instead allows state court judges to decide questions of state law, which, according to certification supporters, leads to a better interpretation of state laws. One commentator has explained:

> Certification places state law issues before state court judges with greater competence in state law; therefore, these judges will render "better" decisions than federal judges. When state courts decide these issues, that process avoids the dual dangers of federal court speculation and federal court imposition of uniquely federal perspectives that lead to misinterpretation of state law issues.[29]

Moreover, "a certified question insures that the state supreme court decides important and often novel issues of state constitutional law."[30]

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26. *Arizonans for Official English*, 520 U.S. at 79 (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)).

27. *See, e.g.*, Logan, *supra* note 12, at 87 (noting that certification enjoys nearly unanimous approval among judges and legal scholars); Hon. Randall T. Shepard, *Is Making State Constitutional Law through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327, 336–37 (2004) (discussing how certification is "uniquely suited to further the principles of judicial federalism").

28. Shepard, *supra* note 27, at 339.

29. Cochran, *supra* note 7, at 168.

30. Shepard, *supra* note 27, at 339.

Proponents of certification also emphasize that certification promotes judicial economy.[31] "[B]ecause certification short-circuits state appellate procedure and presents questions directly to the state's highest court, it saves time and conserves finite state resources."[32] Certification also is more efficient than abstention.[33]

IV. MINNESOTA LAW ALLOWS THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY QUESTIONS TO THE MINNESOTA SUPREME COURT

In 1998, Minnesota adopted the Uniform Certification of Questions of Law Act,[34] which allows the Minnesota Supreme Court to receive certified questions from federal courts, including those from the Eighth Circuit. Subdivision 3 specifically provides the supreme court with this power:

> Subd. 3. Power to answer. The Supreme Court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.[35]

The statute also explains how a court such as the Eighth Circuit can certify questions of law to the Minnesota Supreme Court:

> Subd. 5. Certification order; record. The court certifying a question of law to the Supreme Court of this state shall issue a certification order and forward it to the Supreme Court of this state. Before responding to a certified question, the Supreme Court of this state may require the certifying court to deliver all or part of its record to the Supreme

31. *See, e.g.*, Eisenberg, *supra* note 6, at 78–79 (discussing how certification is a valuable resource for federal judges); Logan, *supra* note 12, at 103–04 (noting that the certification process will most likely be less complicated and less expensive than other options).

32. Shepard, *supra* note 27, at 339.

33. *See, e.g.*, Peter J. Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 657 (1999) (discussing how certification is viewed as more favorable than abstention).

34. MINN. STAT. § 480.065 (2008).

35. *Id.* § 480.065, subdiv. 3.

Court of this state.[36]

Subdivision 6 governs the contents of the certification order.[37] The certification order must contain four parts:

(1) the question of law to be answered;

(2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

(3) a statement acknowledging that the Supreme Court of this state, acting as the receiving court, may reformulate the question; and

(4) the names and addresses of counsel of record and parties appearing without counsel.[38]

Once the Minnesota Supreme Court receives a certification order, it has discretion to accept or reject the question.[39] The court may also reformulate the question of law presented to it.[40] If it accepts the certified question, it must "respond to an accepted certified question as soon as practicable"[41] and must issue a written opinion answering the certified question.[42]

The Minnesota Supreme Court has accepted certified questions in a wide variety of cases. For instance, the court has answered questions certified to it from the Eighth Circuit[43] and the United States District Court for the District of Minnesota,[44] as well as from other federal and state[45] courts.

36. *Id.* § 480.065, subdiv. 5.
37. *Id.* § 480.065, subdiv. 6.
38. *Id.* § 480.065, subdiv. 6(a).
39. *Id.* § 480.065, subdiv. 7.
40. *Id.* § 480.065, subdiv. 4.
41. *Id.* § 480.065, subdiv. 7.
42. *Id.* § 480.065, subdiv. 9.
43. *See, e.g.*, Minn. Citizens Concerned for Life, Inc. v. Kelley, 698 N.W.2d 424 (Minn. 2005) (construing Minnesota campaign finance statute).
44. *See, e.g.*, Olson v. Ford Motor Co., 558 N.W.2d 491 (Minn. 1997) (answering question on application of Minnesota's "seat belt gag" rule in automobile crashworthiness case). The issue was certified from the United States District Court for the District of Minnesota. *Id.* at 493.
45. *See, e.g.*, Minn. Mining & Mfg. Co. v. Nishika, Ltd., 565 N.W.2d 16 (Minn. 1997) (describing questions certified by Texas Supreme Court relating to Uniform Commercial Code and Minnesota rule requiring each plaintiff to prove its damages).

V. THE EIGHTH CIRCUIT'S USE OF CERTIFICATION

The Eighth Circuit Court of Appeals is certainly aware of its ability to certify questions to state courts in general and the Minnesota Supreme Court specifically, as the court has taken the opportunity to certify questions of law to state courts, including the Minnesota Supreme Court. The court, however, has only availed itself of that opportunity in a limited number of circumstances.

A. *The Eighth Circuit Court of Appeals Certifies Some Questions*

The Eighth Circuit Court of Appeals appears to have exercised its discretion to certify questions in three circumstances. First, the Eighth Circuit has exercised its discretion to certify questions of law when the issue involved is a unique and narrow question of state law. For instance, in *Budler v. General Motors Corp.*,[46] the Eighth Circuit faced the very narrow question of whether a Nebraska statute of repose may be tolled by legal disability.[47] It certified the question of law to the Nebraska Supreme Court.[48]

The Eighth Circuit Court of Appeals has also exercised its discretion to certify questions of law when the issue involved a state constitutional question. For example, in *Grayson v. Ross*,[49] it was tasked with determining the standard of care to be applied to the Arkansas Civil Rights Act where there was an alleged violation of the Arkansas Constitution.[50] Because no Arkansas case law on the issue existed, the Eighth Circuit declined to determine the standard of care and instead certified the question to the Arkansas Supreme Court.[51]

Additionally, the Eighth Circuit has certified state political questions. In *Emery v. Hunt*,[52] it certified a question of law to the Supreme Court of South Dakota in order to determine whether changes in South Dakota voting districts violated the South Dakota Constitution.[53] Similarly, in *Minnesota Citizens for Concerned Life, Inc. v. Kelley*,[54]

46. 400 F.3d 618 (8th Cir. 2005).
47. *Id.*
48. *Id.* at 619; Budler v. Gen. Motors Corp., 689 N.W.2d 847 (Neb. 2004).
49. 483 F.3d 887 (8th Cir. 2007).
50. *Id.* at 888.
51. *Id.* at 888–89; Grayson v. Ross, 253 S.W.3d 428 (Ark. 2007).
52. 272 F.3d 1042 (8th Cir. 2001).
53. *Id.* at 1045; *In re* Certification of a Question of Law (Emery v. Hunt), 615 N.W.2d 590, 592 (S.D. 2000).

the Eighth Circuit was asked to interpret a Minnesota statute involving contributions to political campaigns as it pertained to the First Amendment of the United States Constitution.[55] The Eighth Circuit declined to answer that question and instead certified the question to the Minnesota Supreme Court.[56]

B. *The Eighth Circuit Court of Appeals Declines to Certify*

The Eighth Circuit Court of Appeals has declined to exercise its discretion to certify when there was relevant supreme court dicta, consistent guidance from a state's lower courts, or sufficient guidance from other jurisdictions.

First, the Eighth Circuit has declined to certify when sufficient state supreme court dicta on the unsettled question of state law existed. For example, in *In re Western Iowa Limestone, Inc.*,[57] the Eighth Circuit was asked to determine whether a purchaser constructively possessed certain goods under Iowa state law.[58] Although no definitive Iowa state court decisions on the matter existed, the Eighth Circuit did not certify the question because it found sufficient Iowa Supreme Court dicta on constructive possession.[59]

The Eighth Circuit also has declined to certify questions when state appellate court decisions were well-established. In *Continental Casualty Co. v. Advance Terrazzo & Tile Co.*,[60] the Eighth Circuit did not the certify a question of law to the Minnesota Supreme Court because although there was no Minnesota Supreme Court decision on point, the Minnesota Court of Appeals decisions were long-standing, consistent, and "provide[d] adequate guidance as to the current state of Minnesota law."[61]

Finally, the Eighth Circuit has declined to certify when it could look to other jurisdictions for guidance on questions of state law. For instance, in *Midwest Oilseeds, Inc. v. Limagrain Genetics Corp.*,[62] the

54. 427 F.3d 1106 (8th Cir. 2005).
55. *See id.* at 1111.
56. *See id.* at 1110; Minn. Citizens for Concerned Life, Inc. v. Kelley, 698 N.W.2d 424, 425 (Minn. 2005).
57. 538 F.3d 858 (8th Cir. 2008).
58. *Id.* at 862.
59. *Id.* at 866.
60. 462 F.3d 1002 (8th Cir. 2006).
61. *Id.* at 1005.
62. 387 F.3d 705 (8th Cir. 2004).

Eighth Circuit looked to other jurisdictions when determining whether a contract provision was a valid liquidated damages clause.[63] The court found that although the Iowa Supreme Court had not directly spoken on the issue, the "prevailing" rule across jurisdictions gave it sufficient guidance to determine how the Iowa Supreme Court would decide the issue.[64]

VI. CRITICISM OF CERTIFICATION

To be sure, certification is not without its critics. Although three primary objections are made to certification, Minnesota's certification law is structured and may be implemented in a manner that minimizes each of these potential problems. Each criticism will be discussed in turn.

A. *Delay and Cost*

Critics correctly note that that certification causes delay and increased cost. With respect to the problem of delay, one commentator explained:

> There are numerous estimates as to the length of delay that the certification process causes. One federal judicial study reported that the time required for a state court to answer a certified question is approximately six to seven months. Other commentators concluded in their estimates that the certification process generally causes delays of longer than one year with an average being about fifteen months. These time estimates are in addition to the time spent by the federal court in deciding whether a case should be certified, which itself may generate the need for additional briefings and court appearances if the parties object.[65]

Although there does not appear to be empirical data on how long, on average, the certification process takes when the Eighth Circuit certifies a question of law to the Minnesota Supreme Court, it is clear that the Minnesota legislature intended to minimize delays, and thus associated costs, when it instructed the Minnesota Supreme

63. *Id.* at 715.
64. *Id.* at 715–17.
65. Logan, *supra* note 12, at 101 (internal footnotes omitted).

Court to resolve certified questions of law "as soon as practicable."[66] Moreover, the delay and cost caused by certification is less than the delay and cost caused by abstention and "reflects a tradeoff between fairness and efficiency: time in exchange for an authoritative ruling on a difficult issue."[67]

B. Advisory Opinions

Critics of certification also argue that certification results in advisory opinions.[68] That argument fails because certification only arises from ongoing litigation before a federal court.[69] "A certified question arises out of a bona fide case or controversy justiciable before an Article III court; the parties fully brief and argue the question to nest it within a concrete factual setting."[70]

Moreover, even if certification results in advisory opinions in some cases, Minnesota's certification process mitigates against that risk. Minnesota's certification statute allows the Minnesota Supreme Court to accept a certified question "if the answer may be determinative of an issue in pending litigation in the certifying court."[71] "[R]equiring that questions certified be 'determinative' of the issue, if not the case, has provided state courts with an effective rebuttal to the advisory opinion argument."[72]

C. Forum Shopping

Another critique of certification is that it can lead to forum shopping. One critic provided:

> Certification forum shopping considerations appear in at least two forms. First, a diversity plaintiff may file in federal district court, not to receive the court's ruling, but to move promptly to certify to the highest state court, avoiding the state court appeals process. Second, a defendant may re-

66. MINN. STAT. § 480.065, subdiv. 7 (2008).

67. Eisenberg, *supra* note 6, at 78; *see also* Corr & Robbins, *supra* note 15, at 429–30.

68. *See, e.g.*, Cochran, *supra* note 7, at 161 (noting that "in practice, certification . . . has resulted in advisory opinions").

69. Eisenberg, *supra* note 6, at 83.

70. *Id.*

71. MINN. STAT. § 480.065, subdiv. 3 (2008).

72. Corr & Robbins, *supra* note 15, at 422.

ceive or anticipate an unfavorable ruling in state court, foresee a long state appeals process, and seek removal to federal court. Once in federal court, the defendant moves to certify to the highest state court.[73]

Federal judges, including those in the Eighth Circuit, can respond to this issue by considering forum shopping in deciding whether to grant a certification motion.[74] State judges could likewise consider forum shopping in deciding whether to accept a certified question. Moreover, those judges may see strong benefits to granting a certification motion, despite forum shopping.[75]

VIII. CONCLUSION

In conclusion, certification provides a practical and efficient alternative to *Erie* guesses. It promotes accuracy, fairness, and judicial economy. The Eighth Circuit, therefore, should take advantage of this procedure and certify questions of unsettled questions of Minnesota law to the Minnesota Supreme Court when such questions are determinative of an issue in litigation.

73. Cochran, *supra* note 7, at 204.
74. *Id.* at 205–06.
75. *See id.* at 205 ("The decision to certify should have considered . . . forum shopping as one factor, not a dispositive one . . . .").