2022

# Federal Courts' Recalcitrance in Refusing to Certify State Law COVID-19 Business Interruption Insurance Issues

Christopher French

# Texas Law Review Online

Volume 100

Essay

# Federal Courts' Recalcitrance in Refusing to Certify State Law COVID-19 Business Interruption Insurance Issues

Christopher C. French[†]

Abstract

*Over 2,000 COVID-19 business interruption insurance cases have been filed in state and federal courts the past two years with most of the cases filed in or removed to federal courts. The cases are governed by state law. Rather than certify the novel state law issues presented in the cases to the respective state supreme courts that ultimately will determine the law applicable in the cases, each of the eight federal circuit courts to issue decisions on the merits in such cases to date has done so by making an* Erie *guess regarding how the controlling state supreme courts would decide the cases.*

*This Essay argues the federal circuit courts' decisions to make* Erie *guesses rather than certify the novel COVID-19 business interruption state law issues is a mistake that federal courts also have made in the past in regard to nationwide insurance coverage litigation governed by state laws. The Essay also argues that U.S. Supreme Court precedents regarding the abstention doctrine support state supreme court certification regarding the novel state law issues presented by COVID-19 business interruption insurance cases. Finally, the Essay discusses how early federal circuit court decisions on COVID-19 business interruption insurance claims are having a butterfly effect with respect to subsequent court decisions because other courts are relying upon, and adopting, the reasoning and holdings—right or wrong—of the federal circuit court decisions.*

---

† Christopher C. French is the Director of Trial Advocacy Program and Professor of Practice at Penn State Law; J.D., Harvard Law School; B.A., Columbia University.

## Introduction

Since the COVID-19 pandemic started in March 2020, countless businesses across the country, including local hair salons, dental practices, restaurants, and bars, have suffered hundreds of billions of dollars in losses due to COVID-19 government shutdown orders.[1] Many of these small businesses had purchased business interruption insurance, which is intended to reimburse the policyholders for business revenues lost due to interruptions in their businesses that are covered by the policies.[2] As policyholders have presented their claims for coverage to their insurers over the past two years, the insurers have rejected the claims en masse.[3] Consequently, in the face of financial ruin, over 2,000 lawsuits regarding COVID-19 business interruption insurance claims have been filed against insurers in state and federal courts across the country, with most of them being filed in, or removed to, federal courts on the basis of diversity jurisdiction.[4]

The COVID-19 business interruption insurance cases are governed by state law and present novel legal issues.[5] One of the central issues in the

1. *See* Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1, 3–4 (2020) [hereinafter French, *COVID-19 Business Interruption Insurance*] (citing Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020), http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60052 [https://perma.cc/2A3W-DRTY]).

2. *See, e.g.*, Nw. States Portland Cement Co. v. Hartford Fire Ins. Co., 360 F.2d 531, 534 (8th Cir. 1966)) ("[T]he essential nature and purpose of business interruption insurance generally is to protect the earnings which the insured would have enjoyed had there been no interruption of the business."); Gregory D. Miller & Joseph D. Jean, *Effect of Post-Loss Economic Factors in Measuring Business Interruption Losses: An Insured's and Insurer's Perspectives*, NEW APPLEMAN ON INS.: CURRENT CRITICAL ISSUES INS. L., Winter 2010, at 25, 25 ("Business interruption insurance, at its core, is intended to place the insured in the position it would have been in had it not suffered a loss.").

3. *See* French, *COVID-19 Business Interruption Insurance*, *supra* note 1, at 4–5, 4 n.11 (citing Am. Prop. Cas. Ins. Ass'n, *supra* note 1 ("Many commercial insurance policies, including those that have business interruption coverage, do not provide coverage for communicable diseases or viruses such as COVID-19. Pandemic outbreaks are uninsured because they are uninsurable."); and then citing Julia Jacobs, *Arts Groups Fight Their Insurers Over Coverage on Virus Losses*, N.Y. TIMES (May 5, 2020), https://www.nytimes.com/2020/05/05/arts/insurance-claims-coronavirus-arts.html [https://perma.cc/CW5P-64KG]).

4. *See CCLT Case List*, INS. L. CTR.: COVID COVERAGE LITIGATION TRACKER, https://cclt.law.upenn.edu/cclt-case-list/ [https://perma.cc/46N8-5AP8]. The Covid Coverage Litigation Tracker reports cases a few weeks after filing. The tracker may be underestimating the number of relevant state cases, due to data limitations. *See FAQs*, INS. L. CTR.: COVID COVERAGE LITIGATION TRACKER, https://cclt.law.upenn.edu/faqs/ [https://perma.cc/XXD6-KWWU].

5. *See, e.g.*, Daniel Schwarcz, *Redesigning Widespread Insurance Coverage Disputes: A Case Study of the British and American Approaches to Pandemic Business Interruption Coverage*, DEPAUL L. REV. (forthcoming 2022) (manuscript at 3); French, *COVID-19 Business Interruption Insurance*, *supra* note 1, at 5–6 (citing PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE § 26.03[B] (1st ed.

COVID-19 business interruption insurance cases, for example, is whether the losses that the businesses suffered when they were ordered to shut down by government authorities were due to "direct physical loss or damage" to their properties, as the phrase is used in business interruption policies.[6] In light of the fact that the policy language has never been interpreted by any state supreme court in the context of a pandemic,[7] the meaning of the language in the COVID-19 context presents novel state law questions.[8]

In the fall of 2020, I wrote an essay that was critical of policyholder counsel's filing of COVID-19 business interruption insurance lawsuits in federal courts because such claims are governed by state law, and the conventional wisdom among sophisticated coverage counsel is that state courts are more favorable to policyholders than federal courts for purposes of litigating insurance claims.[9] Despite being considered unfavorable for policyholders, one still could expect federal courts to defer to state supreme courts when deciding the novel state law issues presented by COVID-19 business interruption insurance claims.[10] Such deference would manifest by federal courts certifying the dispositive state law issues of first impression to the respective state supreme courts whose laws apply to the disputes.[11]

The federal circuit courts, however, have not deferred to state supreme courts by certifying the various novel COVID-19 business interruption insurance law issues to the respective state supreme courts for resolution.[12] Instead, they have treated the COVID-19 business interruption insurance cases as simple contract disputes for which they do not need any guidance from the state supreme courts to adjudicate, so the federal courts are making "*Erie*

Supp. 2009) ("Insurance contracts are interpreted according to state law. Not surprisingly, the manner in which the courts of the various states address similar interpretive issues can vary widely from one state to the next.").

6. Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185, 198−99 (2020).

7. *See infra* note 26.

8. Schwarcz, *supra* note 5 (manuscript at 29 n.174) (citing Dianoia's Eatery, LLC v. Motorists Mut. Ins. Co., No. 20-787, 2020 WL 5051459, at *3 (W.D. Pa. Aug. 27, 2020), *vacated*, No. 20-2954, 2021 WL 3642111 (3d Cir. Aug. 18, 2021) (declining to exercise jurisdiction over the case because the "[c]omplaint raises novel insurance coverage issues under Pennsylvania law, . . . which are best reserved for the state court to resolve in the first instance.")).

9. *See generally* Christopher C. French, *Forum Shopping COVID-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. ONLINE 187 (2020).

10. *See supra* note 5 and accompanying text.

11. *See, e.g.*, Schwarcz, *supra* note 5 (manuscript at 20–21) ("The law of virtually every state allows federal courts to certify unsettled questions of state law to that state's Supreme Court, where they can be definitively resolved in a way that binds future courts").

12. *See id.* (manuscript at 20) ("Federal courts have . . . largely refused to certify legal questions related to pandemic [business interruption] coverage disputes to state Supreme Courts.").

guesses"[13] regarding how the respective state supreme courts would interpret and apply the relevant policy language when the issues eventually are presented to the state supreme courts.[14]

Indeed, as of January 20, 2022, the Second,[15] Fifth,[16] Sixth,[17] Seventh,[18] Eighth,[19] Ninth,[20] Tenth,[21] and Eleventh[22] Circuits all have reached final decisions in COVID-19 business interruption insurance cases even though not one state supreme court has reached a decision in any of the COVID-19 business interruption insurance cases, and the state supreme courts will be the ultimate authorities regarding the issues being presented in the cases.[23] In making their *Erie* guesses, every single federal circuit court to date has ruled in favor of the insurers.[24] In doing so, the federal circuit courts have rejected requests by policyholders to certify the novel legal issues in the cases to the controlling state supreme courts.[25] Because they are unable to cite any controlling state supreme court precedents interpreting the relevant policy language in the context of a pandemic to support their opinions, the federal circuit courts have cited each other's opinions and noncontrolling state court cases decided in other contexts.[26]

---

13. When state law controls a claim pending in federal court, the federal court makes a prediction regarding how the relevant state supreme court would decide the case in the absence of an existing, controlling decision. This is commonly known as an "*Erie* guess," based upon the U.S. Supreme Court case Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See* John Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. 455, 456 n.3 (2015) (citing Grey v. Hayes-Sammons Chemical Co., 310 F.2d 291, 295 (5th Cir. 1962)) ("The term '*Erie* guess' . . . appears to have originated with the United States Court of Appeals for the Fifth Circuit, which stated in *Grey v. Hayes-Sammons Chemical Co.* . . . that *Erie* required it to 'make an *Erie*, educated guess' as to Mississippi law.").

14. Schwarcz, *supra* note 5 (manuscript at 18, 20). The federal courts' holdings and approach to the COVID-19 business interruption insurance cases have been heavily criticized on substantive grounds by some well-known insurance law scholars. *See generally* Knutsen & Stempel, *supra* note 6.

15. 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., 21 F.4th 216 (2d Cir. 2021).

16. Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450 (5th Cir. 2022).

17. Santo's Italian Cafe, LLC v. Acuity Ins. Co., 15 F.4th 398 (6th Cir. 2021).

18. Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327 (7th Cir. 2021).

19. Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 2021).

20. Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885 (9th Cir. 2021).

21. Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co., 21 F.4th 704 (10th Cir. 2021).

22. Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co., 2021 WL 3870697 (11th Cir. Aug. 31, 2021).

23. *See Appellate Decisions on the Merits*, *supra* note 7; *CCLT Case List*, *supra* note 4.

24. *See Appellate Decisions on the Merits*, *supra* note 7; *CCLT Case List*, *supra* note 4.

25. Schwarcz, *supra* note 5 (manuscript at 20).

26. *See, e.g.*, *Goodwill Indus. of Cent. Okla., Inc.*, 21 F.4th at 710, 711–12 (applying Oklahoma law and acknowledging "[t]he policy does not define [the key policy term] 'direct physical loss,' and the Oklahoma Supreme Court has not construed this term," and then citing other recent federal court opinions to support its holding); Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327,

This Essay argues that the federal courts' decisions to make *Erie* guesses regarding the novel state law issues presented in COVID-19 business interruption insurance cases rather than certify the issues to the controlling state supreme courts is a mistake. It makes the argument in three parts. Part One discusses the federal courts' history of making incorrect *Erie* guesses in the context of nationwide insurance coverage litigation governed by state laws in the past. Part Two explains how the federal circuit courts' refusals to certify the novel state law issues to the controlling state supreme courts is also inconsistent with the spirit and purpose of the U.S. Supreme Court's abstention doctrine, which generally provides that federal courts should exercise their discretion to decline to adjudicate cases where novel or complex state law issues will be dispositive in the case. Part Three explores how the initial federal circuit court decisions are creating a "butterfly effect" in which other courts are reflexively adopting the holdings and reasoning—sound or unsound—of the initial federal circuit courts' decisions in a manner reminiscent of an echo chamber.[27] The Essay concludes that with so much at stake for so many businesses across the country, it would be better if courts with limited or no precedential authority in this area of the law—i.e., federal courts—would allow the state supreme courts to decide the issues in the first instance under their respective state's laws.

## I. The Federal Circuit Courts Are Repeating Federal Courts' Past Mistakes Regarding Nationwide Insurance Coverage Litigation Governed by State Laws in Refusing to Certify the Novel COVID-19 Business Interruption State Insurance Law Issues to State Supreme Courts

As the philosopher George Santayana famously stated over one hundred years ago, "Those who cannot remember the past are condemned to repeat it."[28] Federal circuit courts apparently have forgotten the past, and they are now repeating their mistakes by refusing to certify to state supreme courts the novel state law issues associated with COVID-19 business interruption insurance claims.

---

331, 333 (7th Cir. 2021) (applying Illinois law and acknowledging "[n]o decision of the Illinois Supreme Court has addressed the precise policy language before us," and then citing other recent federal court decisions to support its holding); Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450, 454, 456–57 (5th Cir. 2022) (applying Texas law and acknowledging "Texas law applies to this case. But the Texas Supreme Court has not interpreted the policy language at issue," and then citing other recent federal court decisions to support its holding).

27. *See* Christopher C. French, *The Butterfly Effect in Interpreting Insurance Policies*, 82 L. & CONTEMP. PROBS. 47, 52 (2019) (discussing how early court decisions on insurance issues results in subsequent courts adopting the same reasoning and holdings) [hereinafter French, *Butterfly Effect*].

28. GEORGE SANTAYANA, THE LIFE OF REASON 284 (Archibald Constable & Co., Ltd. 1910) (1905).

When insurance coverage issues regarding environment liabilities were widely litigated across the country in the late 1980s and 1990s, for example, federal courts made numerous *Erie* guesses regarding how state supreme courts would decide the novel state insurance law issues presented by such cases, and the federal courts were wrong many times.[29] Other examples of federal courts making incorrect *Erie* guesses regarding state insurance law issues include (1) whether construction defect claims are covered by commercial general liability policies, (2) the applicability of anticoncurrent causation exclusions contained in homeowners policies to hurricane claims, and (3) the enforceability of suit limitations clauses (which are akin to statutes of limitations) contained in policies.[30]

The federal circuit courts may or may not be getting their *Erie* guesses right in the COVID-19 business interruption insurance cases. Although getting the outcomes right is of paramount importance, of course, respecting the authority and jurisdiction of state courts and preserving judicial resources are also important. When thousands of cases involve the same policy language and present novel state law issues that will have far-reaching consequences for countless businesses across the country, federal courts should not be making *Erie* guesses when certification to state supreme courts would allow the controlling courts to address the issues first.

Federal courts are failing to heed history's lessons regarding state insurance law. Only time will tell whether the federal circuit courts' *Erie* guesses ultimately will be overturned by the controlling state supreme courts. If the federal circuit courts' *Erie* guesses are ultimately wrong, however, then the COVID-19 business interruption insurance cases decided by federal courts will have been a massive and unnecessary waste of the parties' and judiciary's resources.

---

29. Schwarcz, *supra* note 5 (manuscript at 18-19) (quoting Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 90 (2001)) ("[I]n the . . . litigation regarding CGL insurers' coverage obligations under CERCLA, federal caselaw initially favored insurers . . . . In subsequent years, however, state courts increasingly reached more pro-policyholder determinations . . . ."); John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. 455, 458–68 (2014) (discussing numerous examples of federal court making incorrect *Erie* guesses regarding state insurance law in several different contexts); *see also generally* Christopher C. French, *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, 19 U. PA. J. BUS. L. 101, 121–25 (2016) (discussing how most state supreme courts have concluded construction defects could be covered by commercial general liability policies after some earlier federal court decisions had concluded they were not); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673–74 (2003) ("[F]ederal courts have often ruled on issues of state law only to be 'corrected' subsequently by state high courts . . . .").

30. *See* Watkins, *supra* note 29, at 463–64, 467–68.

## II. The U.S. Supreme Court Precedents Regarding the Abstention Doctrine Counsel in Favor of Certification of the Novel COVID-19 Business Interruption State Insurance Law Issues to State Supreme Courts

The abstention doctrine, as established by United States Supreme Court precedents, also counsels in favor of federal courts deferring to state supreme courts regarding the disposition of cases that involve novel state law issues such as the COVID-19 business interruption insurance cases. One of the central tenants of the federal abstention doctrine is that federal courts should decline to hear cases pending in federal court if there is duplicative litigation pending in state court and novel state law issues will control the disposition of the litigation.[31] The abstention doctrine is based on principles of comity and judicial efficiency, as well as the avoidance of federal courts issuing rulings that subsequently may be overruled by state supreme court decisions.[32]

Although the federal abstention doctrine is not directly implicated in most of the COVID-19 business interruption cases because duplicative lawsuits have not been filed in state and federal court by the same parties, the issues being decided by the state and federal courts in the COVID-19 business interruption cases are the same because the policy language is similar or identical in many of the cases, and the same governmental shutdown orders caused the closures of the businesses due to COVID-19.[33] Thus, the rationale of, and goals sought to be achieved by, the abstention doctrine are equally applicable to the COVID-19 business interruption insurance cases because federal courts effectively have discretion to decline to decide the cases due to the availability of certification to the state supreme courts.[34] If one applies the reasoning behind (and justifications for) the abstention doctrine to the COVID-19 business interruption insurance cases, then the federal courts

31. *See, e.g.*, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663–64 (1978) (quoting Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)) ("Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed . . . where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties."); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (citing La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)) ("Abstention is also appropriate where there have been presented difficult questions of state law . . . of substantial public import whose importance transcends the result in the case then at bar."); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (stating federal courts should abstain from hearing cases where "an unnecessary ruling of a federal court [could be] supplanted by a controlling decision of a state court").

32. *See* sources cited *supra* note 29.

33. Compare, for example, Complaint at 4, 83, *JDS 1455, Inc. v. Society Insuran*ce, No. 1:20-cv02546 (N.D. Ill. Apr. 24, 2020), 2020 WL 1987238, alleging that an insurance contract covers loss of business income due to an Illinois government shutdown order, with *Black Rock Restaurants, LLC v. Society Insurance, Inc.*, 2021 WL 5193972, at *2–3, *6–7 (Ill. Cir. Ct.), analyzing the same contract language as applied to the same government shutdown order in state court.

34. *See* Lehman Bros. v. Schein, 416 U.S. 386, 390–91 (1974) ("[The] use [of the certification procedure] in a given case rests in the sound discretion of the federal court.").

should be certifying the novel legal issues in the cases to the state supreme courts for resolution instead of making *Erie* guesses in deciding the cases themselves.

## III. The Butterfly Effect of the Early Federal Circuit Court Decisions

An underappreciated aspect of the federal circuit courts' refusals to certify the novel state law issues in COVID-19 business interruption insurance cases to the controlling state supreme courts is the butterfly effect the federal courts' substantive decisions are having, and will continue to have, on other courts' decisions in COVID-19 business interruption insurance cases. Courts often rely on other courts' decisions on the same issues even if the other courts' decisions are non-precedential, so a butterfly or snowball effect is created by the initial court decisions.[35] This phenomenon is particularly dramatic with respect to insurance law because the policy language at issue in the cases is often similar or identical across the country because standardized language is used in insurance policies.[36] That is true with respect to the COVID-19 business interruption insurance cases as well because the policy language being interpreted in most of the cases is similar or identical.[37] So, how one court interprets the policy language becomes influential in how other courts will interpret the same policy language.[38]

This butterfly effect is already happening in COVID-19 business interruption cases because the early federal circuit court decisions have had a dramatic impact regarding how other courts subsequently have been considering the issues and deciding the cases.[39] Indeed, each of the federal circuit courts have reached the same conclusion—that COVID-19 business interruption claims are not covered by the business interruption insurance policies at issue—often citing the earlier decided federal circuit court cases and then adopting their reasoning.[40]

---

35. *See* French, *Butterfly Effect*, *supra* note 27, at 52.

36. *See id.*; *see also* Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1091 (2010) (describing the "hyperstandardization" of insurance policies); Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 125 (2007) ("[I]n some lines of insurance, all insurance companies provide identical coverage on the same take-it-or-leave-it basis.").

37. *See, e.g.*, Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327, 329 (7th Cir. 2021) (looking to identical policy language for multiple claimants even though one claimant operated a dental practice and another one operated a restaurant); Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co., 21 F.4th 704, 711–12 (10th Cir. 2021) (noting that the other federal circuit court decisions that have addressed COVID-19 business interruption insurance claims all involved "identical or nearly identical business income provisions").

38. *See* French, *Butterfly Effect*, *supra* note 27, at 52.

39. *See Sandy Point Dental, P.C.*, 20 F.4th at 331–32; *Goodwill Indus. of Cent. Okla., Inc.*, 21 F.4th at 710, 711–12.

40. *See id.*

This means the early federal circuit court decisions have an inordinate amount of weight regarding how other courts subsequently have been and will be interpreting the same policy language. This also means the butterfly effect is magnifying the impact of the early federal circuit court decisions on the overall direction of the COVID-19 business interruption insurance litigation across the country. This in turn means that if the early federal circuit court *Erie* guesses are incorrect or poorly reasoned, as some insurance law scholars have argued they are, then, due to the butterfly effect, the subsequent court decisions that adopt the federal circuits courts' reasoning and holdings will be equally flawed.[41]

## Conclusion

Federal circuit courts recalcitrantly have been refusing to certify to the controlling state supreme courts the novel state law issues presented by COVID-19 business interruption insurance cases for resolution because the federal courts believe the issues raised in the cases are simply contract interpretation issues that the federal courts can decide by applying the existing state laws. Yet, the cases unquestionably involve novel state law issues appropriate for certification because the policy language at issue has never been interpreted or applied to pandemic claims by any state supreme courts. The rationale and spirit of the abstention doctrine, as illuminated by U.S. Supreme Court precedents, similarly support federal courts' deferring to the state supreme courts when addressing the controlling state law issues instead of deciding the cases themselves.

The butterfly effect is magnifying the weight—and potentially erroneous impact—of the early-decided federal circuit court decisions on other courts' subsequent decisions. If the legal scholars who are critical of the early federal court decisions are correct that the federal courts incorrectly have decided some of the issues in the cases, then, due to the butterfly effect, those mistakes have been and will be repeated by other courts that are adopting the rationales and holdings of the earlier federal circuit court decisions.

When federal courts have made *Erie* guesses in the past regarding state insurance law issues in nationwide insurance coverage litigation instead of

41. *See* Knutsen & Stempel, *supra* note 6, at 239. Commenting on one flawed result, Professors Knutsen and Stempel write:

> According to well-established ground rules for insurance policy interpretation, if both policyholder and insurer have set forth reasonable constructions of a term, the term is ambiguous and questions of meaning should be resolved against the insurer that drafted the policy and in favor of the policyholder.
>
> . . . An early ruling favoring the insurer's implicit argument (that "loss" or "damage" requires structural change in property) effectively involved the court ruling as a matter of law that a definition of loss drawn from dictionaries is not reasonable—an absurd result.

*Id.*

certifying the issues to the relevant state supreme courts, many of the federal courts' *Erie* guesses subsequently were overruled by state supreme courts when the controlling state supreme courts eventually were presented with the issues for resolution. If the lessons of history are absorbed, then the mistakes of the past should not be repeated. Only time will tell if history is now repeating itself as federal circuit courts make *Erie* guesses instead of certifying the novel state law COVID-19 business interruption insurance issues to the respective state supreme courts.