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Amendment of Rule I, Rules of the Montana Supreme Court: The Problem of Determining Unsettled Questions of Montana Law in Federal Court (Lewis v. Mid-Century Ins. Co., 24 St. Rep. 859)

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RECENT DECISIONS

AMENDMENT OF RULE I, RULES OF THE MONTANA SUPREME COURT: THE PROBLEM OF DETERMINING UNSETTLED QUESTIONS OF MONTANA LAW IN FEDERAL COURT. In a state court action, plaintiff recovered a judgment against an insured tortfeasor for wrongful death. In a subsequent federal district court action based on diversity of citizenship, plaintiff (to whom the insured had assigned all of his insurance rights) sought to recover from Mid-Century Insurance Company the amount of the judgment. The federal district court, after briefly summarizing an agreed statement of facts, set forth several decisive questions of Montana statutory law which were undecided by the Supreme Court of Montana.[1] The federal court judge, acting pursuant to the recently adopted Rule 1 of the Montana Supreme Court,[2] certified that the questions of Montana law were controlling in the federal litigation, that the adjudication of them by the Montana Supreme Court would materially advance ultimate termination of the federal litigation, and ordered the plaintiff to commence a declaratory judgment action in the Montana Supreme Court. Further proceedings in the federal court action were stayed, pending either a determination of the questions by the Montana Supreme Court or a refusal by that court to entertain jurisdiction. *Lewis v. Mid-Century Ins. Co.*, 24 St. Rep. 859 (1967).

The recently adopted Supreme Court Rule and its first application in the *Lewis* case, undoubtedly raised a few eyebrows and a number of questions among Montana attorneys. This article will explore the nature of that rule and possible difficulties with its constitutionality and utilization.

In Montana, with its relatively low volume of litigation, there is often substantial ground for difference of opinion as to the status of Montana law in a specific area. Federal courts are frequently called upon to adjudicate questions of Montana law. In federal actions based on diversity of citizenship, for example, questions of state law almost always arise.[3] Questions of Montana law might be involved not only in diversity actions before the U.S. District Court for the District of Montana, but also before federal district courts of about one hundred other districts.

In addition, actions in which federal jurisdiction is based on a federal

[1]The five questions certified involved the impact of the Montana Motor Vehicle Responsibility Law (REVISED CODES OF MONTANA, 1947, § 53-438) upon the terms of a standard form of an automobile liability policy.

[2]Rule I was amended on January 31, 1967. This amendment adopted a unique procedure whereby state questions pending in a federal court might be answered by the Montana Supreme Court under specified conditions.

[3]See, *e.g.*, Fegles Const. Co. v. McLaughlin Const. Co., 205 F.2d 637 (9th Cir. 1953); Stokes v. Reeves, 245 F.2d 700 (9th Cir. 1957); Duffy v. Lipsman-Fulkerson & Co., 200 F.Supp. 71 (D. Mont. 1961); White v. Husky Oil Co., 266 F.Supp. 239 (D. Mont. 1967).

question might sometimes raise questions of Montana law. For example, in a suit to enjoin the enforcement of a state statute on the ground that it violates the Federal Constitution, questions of construction and application of that statute are likely to be raised.[4]

Finally, issues of state law are often involved in bankruptcy proceedings which raise questions concerning the validity or priority of claims, the validity of security, or the ownership of property.[5]

In the above situations, the Rule of *Erie Railroad v. Tompkins*[6] requires a federal court to apply the pertinent state law. If a particular question of local law has not been decided by the state supreme court, the practioner often resorts to dicta from state court cases, Attorney General opinions, or decisions from other jurisdictions in an attempt to ascertain how the state supreme court would decide the question.

In a number of cases,[7] federal courts have applied the doctrine of "abstention" and refused to speculate as to the posture of the applicable state law. When this occurs the federal action is usually stayed or dismissed while the parties resort to state courts to secure a determination of the ambiguous or unsettled questions of local law.[8] This article will not attempt to suggest the proper scope for this developing and somewhat vaguely defined abstention doctrine.[9] It is sufficient to recognize that whenever ambiguous questions of state law arise in federal litigation, there is a possibility that the federal court will abstain.

At the present time, it seems unlikely that Congress will abolish diversity jurisdiction or forbid the use of abstention. Questions of state law will continue to arise in federal litigation.[10] Consequently, it is not surpris-

[4]See, *e.g.*, Columbia Building & Loan Ass'n v. Grange, 77 F. 798 (C.C. Mont. 1896); Springfield Fire & Marine Ins. Co. v. Holmes, 32 F.Supp. 964 (D. Mont. 1940).

[5]See, *e.g.*, Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940). UNIFORM COMMERCIAL CODES § 9-108, comment 1, states: "The determination of when a transfer is for antecedent debt is largely left by the Bankruptcy Act to state law."

[6]304 U. S. 64 (1938).

[7]See *e.g.*, B-W Acceptance Corporation v. Torgerson, 234 F.Supp. 214 (D. Mont. 1964); White v. Husky Oil Company, 266 F.Supp. 239 (D. Mont. 1967).

[8]*Id.* 234 F.Supp. at 217, 266 F.Supp. at 244.

[9]In White v. Husky Oil Company, *supra* note 7 at 241, a Montana federal district court indicated: "No uniform rules have been enunciated by the courts for determining when this doctrine is applicable, and the commentators, as well as the courts, are not incomplete agreement." On the abstention doctrine generally, *see*: Gowen & Izler, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEXAS L. REV. 194 (1964); Kurland, Toward a Co. Operative Judicial Federalism, 24 F.R.D. 481 (1959); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM L. REV. 749 (1959); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Federal Abstention and Its Relation to the Erie Doctrine*, 38 TEMP. L. Q. 72 (1964); Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226 (1959); Note, *The Abstention Doctrine: A Problem of Federalism*, 17 VAND. L. REV. 1246 (1964); Note, *Abstention and Certification in Diversity Suit: "Perfection of Means and Confusion of Goals,"* 73 YALE L. J. 850 (1964).

[10]Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine*, 16 MIAMI L. R. 413, 433 (1962).

ing that attorneys and judges alike have been seeking procedures for rapidly and equitably adjudicating state law issues when a federal court remits the parties to state court for that purpose.

Prior to the adoption of the Montana Rule, three states had enacted a procedure by which federal courts could certify pertinent and unsettled questions of state law directly to the state supreme court.[11] In January of 1967, the following amendment to the Rules of the Montana Supreme Court was adopted:

> Whenever in an action pending in a United States court it shall appear that there is a controlling question of Montana law as to which there is a substantial ground for difference of opinion, a party to such action may institute suit in the Montana Supreme Court for a declaratory judgment or decree, and, if the judge of the United States court wherein the action is pending shall certify that the question upon which adjudication is sought is controlling in the federal litigation and the adjudication by the Montana Supreme Court will materially advance ultimate termination of the federal litigation, a declaratory judgment or decree may be rendered. Rendition of the declaratory judgment or decree is discretionary with the Montana Supreme Court, and it may refuse to render such a judgment or decree if it appears that there is another ground for determination of the case pending in the United States court, or if the question for adjudication is not clearly briefed or argued.

The Montana Rule should be distinguished from "certification" procedures utilized in other states. Under the Florida certification rule,[12] the state supreme court does not acquire jurisdiction to decide a controversy previously before the federal court. The decision of the state supreme court has no res judicata or stare decisis effect. Only an "advisory opinion" is rendered to the federal judiciary.[13] The Second Tentative Draft of the Uniform Certification of Questions of Law Rule seems to contemplate a procedure similar to that employed in Florida.[14]

[11]Under the Florida and Hawaii procedures, questions can be certified only from a federal appellate court. Under the Maine rule, any federal court may certify questions to the state supreme court. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 4, 1966), p. 109.

[12]FLA. STAT. § 25.031 (1961). Pursuant to this statute, the Florida Supreme Court adopted FLA. APPELLATE RULE 4.61 (1961). The Florida Rule states in part: "When it shall appear to the Supreme Court of the United States, or to any of the Court of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law." FLA. APP. R. 4.61(a)

[13]Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine*, 16 MIAMI L. REV. 413, 432. WRIGHT, THE FEDERAL COURTS, 176 (1963).

[14]Section 1 of the proposed Uniform Rule states: "The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court in this State, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there is involved in any proceeding before it a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which there is no controlling precedent in the decisions of the Supreme Court of this State." UNIFORM CERTIFICATION OF QUESTIONS OF LAW RULE (Tent. Draft No. 2, 1967) p. 1.

On its face, the express language of the Maine Rule ostensibly incorporates a "certification" procedure resembling that of Florida's and the Uniform Rule.[15] The Maine Rule, however, has been construed as contemplating a declaratory judgment as distinguished from an advisory opinion. As the Supreme Judicial Court announced:

> We are satisfied that more will be involved than the mere rendering of a purely advisory opinion. . . . Parties are before the court and are provided with the opportunity for presentation of briefs and oral argument customary upon appeal. The certification will make it apparent that there is a genuine live controversy between the parties pending in the federal court, a controversy based upon an existing factual situation which will be determined by our response to questions. Such response will be in the nature of a declaratory judgment. This court will treat the judgment which it renders on legal issues tendered in certification proceedings as having the force of decided case law within the courts of this state and as constituting res adjudicata as between the same parties in any subsequent action brought in our courts.[16]

Apparently, the Maine Rule was interpreted as calling for a declaratory judgment to insure that participation in the procedure by the Supreme Judicial Court would constitute a constitutional exercise of judicial power.[17] The express "declaratory judgment" language of the Montana Rule corresponds rather closely to the interpretation given the Maine Rule. As indicated below, this express language in the Montana Rule was probably adopted in an attempt to satisfy constitutional requirements.

CONSTITUTIONALITY OF RULE I

It is probable that the constitutionality of the Montana Rule will be challenged. To be upheld, the Rule I procedure must satisfy both federal and state constitutional mandates. On the federal level, it might be argued that Rule I violates the U.S. Constitution by permitting federal courts to delegate judicial power to a body other than a court established under article III.[18] Moreover, Rule I must not violate federal justiciability requirements. In this regard, it is established that the U.S. Constitution

[15]The Maine Rule provides in pertinent part: "When it shall appear to the Supreme Court of the United States, or to any court of appeals or district court of the United States, that there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may certify any such question of law of this State to the Supreme Judicial Court for instructions concerning such questions of state law, which certificate the Supreme Judicial Court sitting as a law court may, by written opinion, answer." 4 M.R.S.A. Sec. 57.

[16]*In re* Richards, 223 A.2d 827, 832 (Me., 1966).

[17]*Ibid.*

[18]The federal judicial power may not be extended beyond the grant of article III of the Constitution. Keller v. Potomac Elec. Power Co., 261 U. S. 428 (1923). It might be suggested that this postulate has been undermined by O'Donoghue v. United States, 289 U. S. 516 (1933) (courts of the District of Columbia held to be constituted under article III) and by National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U. S. 582 (1949) (diversity jurisdiction held to include litigation between citizens of a state and a citizen of the District of Columbia).

restricts federal judicial power to cases and controversies.[19] A justiciable case or controversy must be one that is definite and concrete, touching the legal relations of parties having adverse legal interests, as distinguished from an opinion advising what the law would be on a hypothetical state of facts.[20] In short, a federal court may not constitutionally render an advisory opinion because such would violate justiciability requirements.[21] Consequently, if Rule I contemplates a mere advisory opinion, it would be arguably unconstitutional for a federal court to incorporate such opinion into a final adjudication of the parties' rights.

On the state level, justiciability requirements must also be satisfied. Although eleven states permit advisory opinions,[22] Montana has adopted the federal court position and held that the cases and controversies before the Supreme Court must be "real controversies" and not mere requests for advisory opinions.[23]

It would be difficult to convincingly argue, however, that Rule I contemplates an advisory opinion and thus violates state and federal justiciability requirements. An advisory opinion is one which lacks responsiveness to particular parties and does not directly affect the parties' rights because it is unessential to the disposition of the case. Thus, an advisory opinion is neither binding upon the parties nor determinative of an actual dispute.[24] The Montana Rule expressly requires that a "party to such action" institute the suit for a declaratory judgment in the state Supreme Court. This provision insures a genuine controversy between adverse parties. Furthermore, the state court decision under Rule I would be responsive to a precisely posed question presented in actual litigation. In addition, the decision of the Montana Supreme Court will constitute an actual judgment having res judicata and stare decisis effect when the parties return to federal court. Although the "case or controversy" principle requires an adversary-type presentation of the relevant issues in dispute, the Rule satisfies this requirement by providing that the Supreme Court may refuse to render a judgment if "the question is not adequately briefed or argued."

Article VIII, section 2 of the Montana Constitution provides that the Supreme Court "shall have appellate jurisdiction only." Article VIII, section 3 indicates that this appellate jurisdiction "shall extend to all cases at law and in equity" and that the Supreme Court shall have discretionary power to determine such "original and remedial writs as may

[19]Public Service Commission of Utah v. Wycoff Co., 344 U. S. 237 (1952); Glidden Co. v. Zdanok, 370 U. S. 530 (1962); Muskrat v. U. S., 219 U. S. 346 (1911).

[20]Aetna Life Ins. Co. of Hartford, Conn., v. Haworth, 300 U. S. 227, 240 (1937).

[21]WRIGHT, THE FEDERAL COURTS § 12, at 34 (1963). See, *e.g.*, McGrath v. Kristensen, 340 U. S. 162 (1950); Muskrat v. United States, 219 U. S. 346 (1911).

[22]Note, 40 TEXAS L. REV. 1041, 1045 (1962); Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. 1 (1959).

[23]MONT. CONST. art. VIII, § 3; Chovanak v. Matthews, 120 Mont. 520, 525-26; 188 P.2d 582, 584 (1948).

[24]HART AND WESCHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 77-79 (1953).

be necessary or proper to the complete exercise of its appellate jurisdiction." It can certainly be argued that the Rule I procedure is unconstitutional because it is not in aid of the appellate jurisdiction of the Montana Supreme Court and is not otherwise within its jurisdiction. A constitutional basis for the Rule, however, might be grounded upon an analogy to the apparent original jurisdiction of the Montana Supreme Court under the Declaratory Judgment Act.[25] The Supreme Court has held that where the importance and urgency of questions presented in a proceeding under that Act are apparent, the Supreme Court may accept original jurisdiction as "necessary and proper" to the complete exercise of its appellate jurisdiction.[26] Rule I, however, goes a step beyond holdings under the Declaratory Judgment Act in that it contemplates the acceptance of original jurisdiction from a United States court over which the Montana Supreme Court has no appellate jurisdiction. On the other hand, it might be suggested that the Supreme Court will accept original jurisdiction under Rule I to avoid the necessity of determining a particular question in future state court litigation.

It appears doubtful that decisions upholding the constitutionality of certification procedures in other states represent sound precedent in Montana. The Supreme Court of Florida, for example, sustained their certification rule on the basis that the Florida constitution does not restrict the powers of its Supreme Court.[27] The Supreme Judicial Court of Maine, in upholding the constitionality of their certification procedure, also implied that the Maine Constitution does not limit the jurisdiction of their state Supreme Court.[28] Neither Florida nor Maine has the problem of a limiting constitutional provision such as Article VIII, section 2 of the Montana Constitution. Moreover, it is at least arguable that the entirety of the Montana Constitution is a grant, rather than a limitation, of state power.[29]

Some of the "reasoning" in support of the constitutionality of Rule I is rather conjectural. In the final analysis, however, the Supreme Court would probably sustain the Rule's constitutionality on the basis of its holdings that it has original jurisdiction in certain declaratory judgment actions. As a practical consideration, it seems highly unlikely that the present Supreme Court will declare its own rule unconstitutional.

[25]REVISED CODES OF MONTANA, 1947, § 93-8901.

[26]Gullickson v. Mitchell, 113 Mont. 359, 364, 126 P.2d 1106 (1942); State ex. rel. Schultz-Lindsay v. Bd. of Equalization, 145 Mont. 380, 402-403, 403 P.2d 635 (1965).

[27]The Florida court announced: "(T)here is no constitutional provision which either expresses or implies that the jurisdiction of the Supreme Court of Florida is limited to express grants of power conferred upon it by the constitution . . . " Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735, 742-3 (Fla. 1961).

[28]Supra note 16. Article VI, section 1 of the Maine Constitution states: "The judicial power of this state shall be vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish." Section 3 provides: "The justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives."

[29]Note, *What is the Nature of the Montana Constitution?* 15 MONT. L. REV. 93 (1954).

UTILIZATION OF THE RULE

Rule I may be invoked in a federal court proceeding "whenever" it appears there is a "controlling question" of Montana law if the other requisites are also satisfied. It is conceivable, therefore, that the Rule could be properly employed at any stage of a federal court proceeding where a decisive ruling, order, motion, objection or instruction is predicated on ambiguous local law. It is possible, for example, that motions to dismiss, for a separate trial, for a directed verdict, or for a summary judgment might involve controlling questions of Montana law. In addition, objections to evidence or to jury instructions could present an opportunity to utilize the new procedure.

The Rule makes it clear, however, that before the procedure is to be employed, it must appear that:

1. the question is one of Montana law,
2. this question is controlling in the federal litigation,
3. there is substantial ground for difference of opinion as to the resolution of the question,
4. the adjudication by the Montana Supreme Court will materially advance ultimate termination of the federal litigation.

It is instructive to recognize that the language of Rule I resembles that of 28 U.S.C. 1292(b) involving interlocutory decisions and appeals.[30] Thus, an analysis of cases decided under that section should be helpful to counsel when determining what requisites are essential before the procedure in Rule I can be employed.

Section 1292 (b) was intended primarily as a means of expediting litigation by permitting an authoritative determination, during the early stages of litigation, of legal questions which, if decided in favor of one party, would end the lawsuit.[31] It has been held, however, that the questions brought on interlocutory appeal need not be dispositive of the lawsuit in order to be regarded as "controlling."[32] On the other hand, the fact that the case involves an important legal question is insufficient to justify application of the provision.[33] In addition, the mere fact that there are no cases interpreting the language of a statute does not necessarily create "substantial ground for difference of opinion," as would justify an interlocutory appeal under 1292(b).[34] The phrase "substantial ground for

[30]Section 1292(b) provides that: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . "

[31]U. S. v. Woodbury, 263 F.2d 784 (9th Cir. 1959).

[32]*Ibid.*

[33]Bobolakis v. Compania Panamena Maritima San Gerassimo, 168 F.Supp. 236 (D.C.N.Y. 1958).

[34]Barrett v. Burt, 250 F.Supp. 904 (D. C. Iowa 1966).

difference of opinion'' in the federal rule has been interpreted as synonymous with "substantial likelihood that the appellant's position will prevail.''[35] In short, the provisions of section 1292(b), and presumably the provisions of Rule I, are to be used only in extraordinary cases where the decision might avoid protracted and expensive litigation, not merely to provide a means of adjudicating difficult issues in hard cases.[36] In applying the standards of Rule I it would seem desirable that the courts involved weigh the asserted need for immediate authoritative determination of the proposed questions against the established policy of discouraging piecemeal litigation.[37]

At the present time, the precise interpretation and permissible utilization of the Montana Rule remain uncertain. Whether the Montana court will regard decisions under section 1292(b) as authoritative is equally problematical. One difficulty, however, will most certainly confront many attorneys seeking to invoke this new procedure: the question must be certified to the Montana Supreme Court in the context of a satisfactory factual setting. Consequently, a party wishing to avail himself of the Rule should make his factual record in the federal court proceeding. This is essential for several reasons. Constitutionally, the Montana Supreme Court could not properly adjudicate a question in the absence of a suitable factual setting. Such decision would be merely "advisory" or "abstract" in nature.[38] In addition, a statement of the fundamental facts on which the question of law arises is essential if a party is to adequately demonstrate that the question in dispute is ''controlling,'' and that its adjudication by the Montana Supreme Court would ''materially advance ultimate termination of the federal litigation.''[39] Moreover, to require the state court to make its own findings of fact would not only fail to preserve the quality of federal fact finding but would also do violence to the theory that the Rule affords a speedy and inexpensive method of resolving unsettled questions of state law.

The necessity of posing a disputed legal question in the context of facts found by the federal court will undoubtedly cause practical difficulty. This problem could become especially acute in a jury trial, when a party seeks to utilize Rule I to adjudicate an interlocutory ruling or order. At this intermediate stage of the trial, no facts have yet been found by the jury. Perhaps the disputed order or ruling, however, could be submitted to the Montana Supreme Court on an agreed statement of facts.[40]

Insuring a satisfactory factual setting for the questions to be certi-

[35]Seven-Up Co. v. O-So Grape Co. 179 F.Supp. 167 (D. C. Ill. 1959).
[36]U. S. Rubber Co. v. Wright, 359 F.2d 784 (9th Cir. 1966).
[37]*In re* Heddendorf, 263 F.2d 887 (1st Cir. 1959).
[38]*See supra* note 23 and 29.
[39]It appears Rule I makes this demonstration essential as a condition precedent to invoking the procedure.
[40]*See infra* notes 42 and 44.

fied could also cause practical difficulty if the federal court abstains at the outset of the litigation before any findings of fact have been made.[41] This common federal court practice is certainly not prohibited by the new Montana Rule. In the instant case, it was fortunate that the parties commenced suit in federal court on an agreed statement of facts.[42] It will be consequently possible for the questions to be adjudicated by the Montana Supreme Court in a concrete factual setting. In the case of *In re Richards*,[43] however, the Supreme Judicial Court of Maine refused to answer questions certified from a federal court because the facts were unsettled and the court's decision as to the applicable Maine law would not be determinative of the cause. As the court indicated:

> . . . the record is not yet in proper posture for our consideration . . . the facts have been neither agreed upon nor found by the court. Although the certification contains a "statement of facts" showing "the nature of the case and the circumstances out of which such questions of law of the State of Maine arise," this "statement" is not and does not purport to be the definitive finding by the court as to what the facts are.[44]

The problem of providing the Montana Supreme Court with a definitive factual contex for questions certified under Rule I is probably not insurmountable. Because abstention itself represents a federal court deference to state political authority, there is reason to believe that those federal judges inclined to abstain would be willing to retain a case until the findings of fact necessary to invoke Rule I have been made. In addition to findings of fact, the federal judge's certificate might well include as much of the record as is necessary for a complete understanding of the questions to be answered in the declaratory judgment action.

Perhaps the greatest drawback to the abstention doctrine has been the resulting delay.[45] In some states, the parties would have to bring a declaratory judgment action in a lower state court having original jurisdiction and work their way up to the highest court.[46] Even before the adoption of Rule I, however, litigants could have theoretically petitioned directly to the Supreme Court of Montana for such a declaratory judgment.[47] Although the acceptance of original jurisdiction by the Montana

[41]Not only do federal courts often abstain at the outset of the litigation, but sometimes they do so on their own motion. See *e.g.*, White v. Husky Oil Company, 266 F.Supp. 239 (D. Mont. 1967); Louisiana Power & Light Co. v. City of Thibodaux, 360 U. S. 25 (1959).

[42]*Instant case* at 859.

[43]*Supra* note 16.

[44]*Id.* at 833.

[45]See, *e.g.*, Spector Motor Serv., Inc. v. McLaughlin, 323 U. S. 101 (1944). In situations where identical suits are pending in both state and federal court, however, abstention would not involve any shunting of litigants from federal to state court which would expose them to significant expense or delay. White v. Husky Oil Company, *supra* note 41 at 244.

[46]Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine*, 16 MIAMI L. REV. 413, 424 (1962).

[47]*See supra* note 26.

Supreme Court would have been entirely discretionary, it remains so under the new Rule. While Rule I undoubtedly represents an official manifestation of the Montana Supreme Court's willingness to clarify ambiguous state law under specified conditions, it is at least arguable that the new procedure will do little to reduce the delay resulting from federal court abstention.[48] It could have been stated in the Rule that the procedure was to be employed only when it would not cause undue delay in the disposition of a case. This is a restriction, however, seemingly implicit in the discretion of the federal and state courts as to when the Rule is to be utilized.

If Rule I does afford a speedier method of ascertaining state law, the very existence of that Rule might be a significant factor influencing a federal court's decision to abstain in order that the new procedure can be employed.[49] In short, the declaratory judgment procedure could conceivably become another, more pervasive, form of federal court abstention. With the acquiesence of the parties to the federal action and the federal judge, numerous questions might be certified to the state court even though the federal court would not have abstained prior to the adoption of Rule I. Although it might seem that Rule I could generate a prohibitive increase in the docket load of the Montana Supreme Court, this is highly unlikely in view of the discretion vested in that court to either accept or reject jurisdiction.

Even assuming Rule I proves workable and efficient, its utilization in diversity cases might be undesirable. On a theoretical level, the new procedure is a device for according respect to state legislative and judicial authority. Federal diversity jurisdiction, on the other hand, is a product of distrust of state judicial systems when out of state litigants are involved.[50] Consequently, it is arguable that the new declaratory judg-

[48]The Florida certification statute has apparently done little to solve the problem of delay. There was a four year delay, for example, between the time that the Supreme Court ordered certification of a question of state law to the Florida Supreme Court in Clay v. Sun Insurance Office, Ltd., 363 U. S. 207 (1960), and the final termination of the case in light of the Florida answers, Clay v. Sun Insurance Office, Ltd., 377 U. S. 179 (1964). In addition, there was a delay of over 18 months between the certification order in Green v. American Tobacco Co., 304 F.2d 70, 85-86 (5th Cir. 1962), and the disposition of the case required in the light of the Florida answers in Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963). Perhaps justice and economy are better served by having a prompt federal court answer to the state law question than by having the theoretically more perfect state court answer. As was stated in the dissenting opinion of Clay v. Sun Insurance Office, Ltd., 363 U. S. 207, 228 (1960): "The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation."

[49]Such a possibility was suggested by Justice Frankfurter in connection with the Florida certification procedure. Clay v. Sun Insurance Office, Ltd., 363 U. S. 207, 212 (1960).

[50]This traditional explanation for the creation of diversity jurisdiction might still be a danger. See, Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U.PA. L. REV. 179 (1929); Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U. L. REV. 407 (1956). In a society considerably more mobile than that of 1789, however, it is difficult to comprehend how prejudice against a litigant, merely because he is a citizen of a different state, is a significant factor.

ment procedure and federal diversity jurisdiction rest on diametrically opposed policies. The conclusion might be drawn, therefore, that application of Rule I negates the policy basis for diversity jurisdiction. Because the federal court will presumably find the relevant facts before Rule I is employed, the above conclusion rests on a questionable assumption that the state court will express its bias in formulating a substantive rule of law unfavorable to an out of state litigant. If that assumption be granted, however, it might be cogently argued that state court bias against out of state litigants can most easily find expression in those cases wherein there is "substantial ground for difference of opinion" as to the posture of Montana law. Because the new procedure can be employed only in such cases, a conclusion that application of Rule I largely repudiates the rational supporting diversity jurisdiction might be tenable.

It might be further suggested that *Erie* lends little support for the use of Rule I since the *Erie* rule requires only that the federal courts not create a federal common law and recognizes a federal court duty to decide the case before it.[51] It has been held that this federal court duty to decide obtains no matter how vague or ambiguous the state law might be. It exists even though the state courts have never adjudicated the question involved.[52]

It can be convincingly argued, however, that the advantages of Rule I outweigh possible disadvantages. The new procedure certainly saves federal judges from being placed in the unfortunate position of having to make a prediction concerning the probable status of Montana law which could subsequently be proved wrong by the Montana Supreme Court.[53] Rule I will permit the parties to obtain an authoritative answer to ambiguous questions of state law.[54] At the same time, questions of fact and issues of federal law can be adjudicated in federal court. Thus, the new Montana Rule achieves the objectives of abstention by pre-

[51]*Supra* note 6.

[52]Propper v. Clark, 337 U. S. 472 (1949); Estate of Spiegel v. Commissioner, 335 U. S. 701 (1949); Williams v. Green Bay & W.R.R., 326 U. S. 549 (1946); Markham v. Allen 326 U. S 490 (1946); Meredith v. Winter Haven, 320 U. S. 228 (1943); Cohens v. Virginia, 19 U. S (6 Wheat) 264 (1821).

[53]For several recent predictions by the Federal District Court for the District of Montana which could subsequently be proved erroneous by the Supreme Court of Montant, see, *e.g.*, Howard v. Sisters of Charity of Leavenworth, 193 F.Supp. 191 (D. Mont. 1961); Duffy v. Lipsman-Fulkerson & Co., 200 F.Supp. 71 (D. Mont. 1961); Dutton v. Hightower & Lubrect Const. Co., 214 F.Supp. 298 (D. Mont. 1963); Liberty Mut. Ins. Co. v. U. S. Fidelity & Guaranty Co., 232 F.Supp. 76 (D. Mont. 1964); Bullard v. Rhodes Pharmacal Co., 263 F.Supp. 79 (D. Mont. 1967). The unfortunate position of a federal court, when attempting to correctly ascertain an ambiguous question of state law, is accentuated by a recent study revealing that there is " . . . no underlying policy among the states to adopt the federal court's construction of state statutes or to adopt rulings on cases at common law simply because there was a federal court exercising diversity jurisdiction. Whenever the proper case presented itself in the state court and the state court felt compelled to construe the law differently from the federal court or to limit the application of the federal decision, this was done." Note, *The Effect of Diversity Jurisdiction on State Litigation*, 40 IND. L. J. 566, 584 (1962).

[54]Rule I will thus hopefully promote consistency of decisions between state and federal

venting federal invasion of the state legislative function and avoiding unnecessary federal-state friction. In addition, the Rule represents a more perfect attempt at cooperative judicial federalism since this concern for state sovereignty is implemented through a hopefully efficient and simple proceeding. Because the Rule contemplates that the declaratory judgment action will be instituted directly in the Montana Supreme Court, many of the delays incident to ordinary abstention orders can probably be avoided. Since the new Rule cannot be invoked without the concurrence of the federal court, the parties to the action, and the Montana Supreme Court, there is little danger it will be used except where the issue of state law is crucial to the case and the state court determination can be made without undue delay.[55]

CONCLUSION

The Montana Rule represents a unique experiment in cooperative federalism. It should serve as an aid to the federal courts in discharging their obligation under *Erie* to follow state law in diversity cases. While the Rule presents some constitutional complexities and practical perplexities, most of the objections neglect the existing problems of "absention" and of authoritatively determining state law in federal litigation. The new procedure represents a bold step forward in the solution of these problems. It is presently difficult to ascertain the variety of situations which may lend themselves to the Rule's application. To a large extent, this will be determined by the ingenuity of counsel and the cooperation of the federal and Montana courts.

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UNAUTHORIZED PRACTICE OF LAW — FIRST AND FOURTEENTH AMENDMENTS GIVE UNION THE RIGHT TO HIRE ATTORNEY ON SALARY TO REPRESENT WORKMEN'S COMPENSATION CLAIMS OF MEMBERS. The Illinois court enjoined the United Mine Workers of America from continuing a plan by which the union hired an attorney on a salary to represent members and their dependents in claims under the Illinois Workmen's Compensation Act. The union agreed not to interfere with the attorney. Members submitted forms to the attorney reporting the accident, and the full amount of any settlement was paid directly to the member or his dependents. *Held,*

court. It might be noted, however, that if there is no Montana law on a point in 1968, there is little chance of an abundance of state cases on this point in the future.

[55]On the other hand, from the express language of Rule I an argument might be made that after the certificate from the federal court has issued, the Montana Supreme Court has no discretion to refuse rendering a judgment unless there is another ground for determination of the case or if the question for adjudication is not clearly briefed or argued.