DOES § 18.001 OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE APPLY IN FEDERAL COURT UNDER THE *ERIE* DOCTRINE AND THE FEDERAL RULES OF EVIDENCE?

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I. INTRODUCTION

Proving damages in a personal injury case can be difficult and expensive. Section 18.001 of the Texas Civil Practice and Remedies Code makes it less so. The statute allows plaintiffs to submit an affidavit attesting that the amount they were charged for a service (such as medical care) was reasonable and that the service was necessary.[1] If no controverting affidavit is filed and the jury finds for the plaintiff on those issues, the affidavit is considered sufficient evidence to support those findings.[2] Section 18.001 thus streamlines a process that might otherwise require costly experts and precious time during trial.

Although the provision has been in the Code since it was first enacted (and was the law even before then),[3] federal courts in Texas are split over whether Section 18.001 applies in federal court under the *Erie* doctrine.[4] The

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[1] TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b).

[2] *Id.*

[3] *See* Act of May 23, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3264 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 18.001) (codifying the Texas Civil Practice and Remedies Code with language in § 18.001 similar to what remains in the code today); Act of May 28, 1979, 66th Leg., R.S., ch. 721, § 1, sec. 1, 1979 Tex. Gen. Laws 1778, *repealed by* Act of May 23, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 18.001, 1985 Tex. Gen. Laws 3242, 3264 (enacting Article 3737h, the predecessor statute to § 18.001).

[4] *See* Grover v. Gov't Emps. Ins. Co., No. SA-18-CV-00850-FB, 2019 WL 2329321, at *1 (W.D. Tex. May 31, 2019) (acknowledging that "[f]ederal district courts are split" on the issue); Gorman v. ESA Mgmt., LLC, No. 3:17-CV-0792-D, 2018 WL 295793, at *1–2 (N.D. Tex. Jan. 4, 2018) (mem. op.) (collecting cases); *see also Federal Court Interpretation and Application of Civil Practice & Remedies Code Section 18.001*, NEXTMED REVIEWS, LLC (Mar. 25, 2020),

Erie doctrine requires federal courts sitting in diversity to apply substantive state law and federal procedural law.[5] In the last few years, divisions of the Northern and Southern Districts have held that Section 18.001 is "purely procedural" and thus inapplicable in federal court, while courts in the Eastern and Western Districts have held that Section 18.001 applies in federal court.[6] Ironically, although *Erie* was intended to discourage forum-shopping, this split will encourage it until the Fifth Circuit issues a decision on the problem.[7]

Another tangle in this problem is the role of Federal Rule of Evidence 302. The Rule states that, in civil cases, "state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision."[8] If Section 18.001 creates such a presumption, that presumption may apply in federal courts even if Section 18.001 does not otherwise pass muster under the typical *Erie* analysis.[9] This may a be a way for litigants to evade the stickier parts of *Erie* altogether and reap the benefits of § 18.001 in federal court.

The Fifth Circuit ought to resolve this split in a case that directly addresses the question. That said, this comment does not seek to authoritatively state which answer the Fifth Circuit should adopt. Rather, this comment argues that the reasoning the Fifth Circuit will employ to resolve the split matters more than the answer. As discussed below, a variety of strong and weak arguments about the *Erie* doctrine and Rule 302 have been employed in the District Courts to find Section 18.001 applicable or non-

https://nextmedreviews.com/blog-1 (follow article title hyperlink) (summarizing the split as of the published date).

[5] Gasperini v. Ctr. For Hums., Inc., 518 U.S. 415, 427 (1996) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

[6] Davila v. Kroger Tex., LP, No. 3:19-CV-2467-N, 2020 WL 2331079, at *3 (N.D. Tex. May 8, 2020) (holding that § 18.001 is procedural); Espinoza v. State Farm Mut. Auto. Ins. Co., No. 7:19-cv-00299, 2020 WL 4333558, at *7 (S.D. Tex. July 28, 2020) (holding that § 18.001 is procedural); Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 774 (E.D. Tex. 2021) (mem. op.) (holding that § 18.001 is substantive law, except for the statute's timing and notice requirements); *Grover*, 2019 WL 2329321, at *2 (holding that § 18.001 is applicable in federal diversity actions "despite its procedural nature").

[7] *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (describing the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws").

[8] FED. R. EVID. 302.

[9] *See* Bagley v. Dollar Tree Stores, Inc., No. 1:18-CV-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019) (finding that § 18.001 applies in federal court under Federal Rule of Evidence 302 even without analyzing the statute under *Erie*).

applicable in federal courts.[10] Some lines of reasoning have adhered closely to Fifth Circuit precedent while others seem to misinterpret *Erie* altogether.[11] By clarifying how *Erie* applies to Section 18.001, the Fifth Circuit can lay to rest various misconceptions that may do harm to the doctrine if left unchecked. So long as the Fifth Circuit's holding achieves that aim, the actual answer the court reaches will have a positive impact.

Part I has set forth the abstract and thesis of this comment. Part II gives an overview of Section 18.001 of the Texas Civil Practice & Remedies Code and how it applies in state court. Part III summarizes the difference between substantive and procedural law under the *Erie* doctrine and how it has been applied by the Fifth Circuit to Texas law. Part IV discusses how federal district courts in Texas have handled Section 18.001 and the analysis they have used to justify their holdings. Part V then discusses what lines of reasoning will be most consistent with Fifth Circuit precedent, and part VI concludes.

II. WHAT § 18.001 DOES FOR LITIGANTS IN TEXAS COURTS

Section 18.001 establishes a rule under which litigants may submit affidavits to prove the reasonableness of an amount charged for a service and the necessity of that service.[12] Section 18.001(b) states:

> Unless a controverting affidavit is served as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary. The affidavit is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action.[13]

Texas courts have sometimes described Section 18.001(b) as "an evidentiary statute" that allows litigants to accomplish three things: (1) admission, by affidavit, of evidence of reasonableness and necessity of charges that would otherwise be inadmissible hearsay; (2) the use of

[10] *See infra* at Part IV.

[11] *Id.*

[12] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b).

[13] *Id.*

otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) exclusion of evidence to the contrary, upon proper objection, in the absence of a properly filed controverting affidavit.[14] The final sentence of Section 18.001(b), addressing causation, is a recent addition that became effective on September 1, 2019, and its inclusion did not fundamentally change the function of the statute.[15]

Section 18.001(c) sets requirements for the affidavit to be admitted.[16] Affidavits submitted under Section 18.001(b) must be taken before an officer with authority to administer oaths and include an itemized statement of the service and charge.[17] Crucially, the affidavit can be made by either (A) the person who provided the service, or (B) the person in charge of records showing the service provided and charge made.[18] Traditionally, reasonableness and necessity of charges could only be proven by expert testimony.[19] Section 18.001, by contrast, allows custodians of records to prove those facts by affidavit, even if they are nonexperts who cannot testify at trial to prove the same facts by testimony.[20] Section 18.001 can thus cut the costs litigants might otherwise pay for expert witnesses and expedite trials.

[14] Wal-Mart Stores Tex., LLC v. Bishop, 553 S.W.3d 648, 671–72 (Tex. App.—Dallas 2018, pet. granted, judgm't vacated w.r.m.) (citing Hong v. Bennett, 209 S.W.3d 795, 800 (Tex. App.—Fort Worth 2006, no pet.)).

[15] Act of May 24, 2019, 86th Leg., R.S., H.B. 1693, § 1 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b)). Even before H.B. 1693, Texas appellate courts held that Section 18.001(b) affidavits did not address causation. *See* Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ) (holding that § 18.001 "does not address the issue of causation"), *abrogated by In re* Allstate Indem. Co., 622 S.W.3d 870 (Tex. 2021); *Hong*, 209 S.W.3d at 804 n.4 ("Section 18.001 does not address the issue of causation.") (citing Nat'l Freight Inc. v. Snyder, 191 S.W.3d 416, 425 (Tex. App.—Eastland 2006, no pet.). Legislative history suggests that the purpose of the bill was to clarify this point. *See* House Comm. on the Judiciary & Civ. Juris., Bill Analysis, Tex. C.S.H.B. 1693, 86th Leg., R.S. (2019) ("C.S.H.B. 1693 seeks to provide greater clarity by . . . clarifying the nature of findings supported by . . . affidavits [submitted under TEX. CIV. PRAC. & REM. CODE § 18.001].").

[16] TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(c).

[17] *Id.* at §§ 18.001(c)(1), (3).

[18] *Id.* at § 18.001(c)(2).

[19] Rahimi v. United States, 474 F. Supp. 2d 825, 826 (N.D. Tex. 2006) (citing Castillo v. Am. Garment Finishers Corp., 965 S.W.2d 646, 654 (Tex. App.—El Paso 1998, no pet.)).

[20] *See Castillo*, 965 S.W.2d at 654 (holding that Section 18.001 allows plaintiffs to use the statements of a non-expert custodian of records to prove reasonableness and necessity of medical expenses even if the same statements could not be used as testimonial evidence at trial).

Section 18.001(f) sets requirements for counteraffidavits.[21] It states:

> The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. *The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit*. The counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action.[22]

The admissibility standard for counteraffidavits is higher than that for the initial affidavit under Section 18.001(b).[23] While the initial affidavit may be made by a nonexpert custodian of records whose testimony would be inadmissible, counteraffidavits must be made by a person qualified to testify in contravention about matters contained in the initial affidavit.[24] Additionally, some courts have held that a nonmovant's failure to file a controverting affidavit creates a presumption that the movant's charges were reasonable.[25] Section 18.001 thus helps litigants trying to prove their damages while making it just as difficult, if not harder, for litigants who want to disprove or avoid damages.

Finally, Sections 18.001(d)–(e-1) and (h)–(i) merely set deadlines for the litigants to serve copies of their affidavits on the other parties.[26] At least one district court that has held Section 18.001(b) to apply in federal court also held that Section 18.001's deadlines are "clearly procedural" under *Erie* and thus inapplicable.[27] In any case, the submission of the affidavits themselves are the greater source of *Erie* doctrine litigation than the deadlines.[28] The

[21] TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(f).

[22] *Id.* (emphasis added).

[23] Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 774 (E.D. Tex. 2021) (mem. op.).

[24] Turner v. Peril, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied).

[25] Petrello v. Prucka, 415 S.W.3d 420, 431 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see also* Bagley v. Dollar Tree Stores, Inc., No. 1:18-CV-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019).

[26] TEX. CIV. PRAC. & REM. CODE ANN. §§ 18.001(d)–(e-1), (h), (i).

[27] *Peals*, 511 F. Supp. 3d at 781 (mem. op.).

[28] *See infra* section IV.

applicability of Section 18.001's deadline provisions in federal court is thus only discussed briefly in this comment.

III. THE DIFFERENCE BETWEEN SUBSTANTIVE AND PROCEDURAL LAW IN THE FIFTH CIRCUIT

To understand how federal district courts in Texas are analyzing Section 18.001 under the *Erie* doctrine, we first turn to the Fifth Circuit's governing case law. In general, the Fifth Circuit applies a two-step analysis to distinguish between substantive and procedural law under the *Erie* doctrine. First, the court will determine whether the state law in question directly conflicts or "collides" with a federal procedural or evidentiary rule validly promulgated under Congress's rulemaking authority.[29] State laws which conflict with valid Federal Rules generally do not apply in federal court.[30] If a direct conflict between the law and Federal Rules does not render the state law inapplicable, the court will then classify the statute as substantive or procedural law according to several "touchstones" of the *Erie* doctrine.[31]

A. Collisions Between Federal Rules and State Law under Hanna v. Plumer, Shady Grove, and Klocke v. Watson

In *Hanna v. Plumer*, the Supreme Court established that the *Erie* doctrine generally requires federal courts to follow federal procedural rules when federal rules and state law directly conflict and the federal rule is valid.[32] This rule stems from the nature of both the *Erie* doctrine and the Rules Enabling Act: "federal courts [sitting in diversity] are to apply state substantive law and federal procedural law."[33] Thus, when the *Hanna* Court had to choose between enforcing the federal procedural rule for service of process or a

[29] All Plaintiffs v. All Defendants, 645 F.3d 329, 333 (5th Cir. 2011).

[30] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010); *but see Peals*, 511 F. Supp. 3d at 775 ("But even where a conflict exists, federal courts have nevertheless applied state rules of evidence if they reflect a substantive state policy.") (collecting cases).

[31] *All Plaintiffs*, 645 F.3d at 335.

[32] *See* 380 U.S. 460, 473–74 (1965) (holding that Rule 4(d) controlled in a diversity action applying Massachusetts substantive law even though state law prescribed different procedures for summons); *see also* Burlington N.R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) (stating "*Hanna v. Plumer* . . . set forth the appropriate test for resolving conflicts between state law and the Federal Rules.").

[33] *Hanna*, 380 U.S. at 465.

conflicting state procedural rule, the choice was clear—the federal rule controlled.[34]

The Supreme Court most recently elaborated on this rule as a two-part framework in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*[35] When a state law and a federal rule appear to conflict, courts must first determine whether the federal rule "answers the question in dispute"—that is, whether the two rules "attempt[] to answer the same question . . . ."[36] If the federal rule answers the question in dispute, courts must determine whether the federal rule "exceeds statutory authorization or Congress's rulemaking power."[37] These questions are threshold issues that courts must resolve before applying a full-blown *Erie* analysis.[38] Because Federal Rules will almost certainly survive statutory challenges, the primary threshold to applying *Erie* is whether the state law in question conflicts with a federal rule.[39]

The Fifth Circuit's holding in *Klocke v. Watson* elaborated on the *Shady Grove* framework.[40] In *Klocke*, the Fifth Circuit held that the Texas Citizens Participation Act (TCPA), an anti-SLAPP statute,[41] was inapplicable in federal court because it directly conflicted with Federal Rules of Civil Procedure.[42] To reach this conclusion, the court drew from both *Shady Grove* and *Abbas v. Foreign Policy Group, LLC* and issued this rule: "[A] state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not found in the federal rules. The rules 'answer the same

[34] *Id.* at 473–74.

[35] *Shady Grove*, 559 U.S. at 398 (2010).

[36] *Id.* at 398–99.

[37] *Id.* at 398.

[38] *Id.* ("We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.").

[39] *See id.* at 407 ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us.").

[40] 936 F.3d 240, 249 (5th Cir. 2019).

[41] "SLAPP" is an acronym for "Strategic Litigation Against Public Participation." *Id.* at 242 n.1. Anti-SLAPP statutes are "designed to 'encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by the law.'" *Id.* at 244 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.002). Statutes like the TCPA attempt to achieve this by placing additional burdens on defamation plaintiffs beyond what is required for other common law causes of action. *See id.*

[42] *Id.* at 245–46.

question' when each specifies requirements for a case to proceed at the same stage of litigation."[43]

Under this rule, the TCPA's standards to defeat motions to dismiss and motions for summary judgment conflicted with Rules 12(b)(6) and 56(a).[44] Rule 12(b)(6) merely requires a plausible claim for relief and "requires no evidentiary support" to defeat a motion to dismiss.[45] Motions to dismiss under the TCPA, on the other hand, call for "judicial weighing of evidence," as the court must determine "by a preponderance of the evidence" whether a plaintiff's defamation action relates to the defendant's exercise of First Amendment rights.[46] Plaintiffs under the TCPA must also show "clear and specific evidence" that they can meet each element of their claim.[47] This exceeded even the plaintiff's burden to defeat a motion for summary judgment under Rule 56(a).[48] Because the burdens placed on plaintiffs under the TCPA to defeat a motion to dismiss exceeded those placed on plaintiffs under the Federal Rules, the TCPA imposed "additional requirements not found in the federal rules" and that did not apply in federal court under *Shady Grove*.[49]

The Fifth Circuit's analysis in *Klocke* suggests that a state statute conflicts with or answers the same question as a federal rule when the statute raises the bar, so to speak, beyond what federal rules require.[50] This adheres to the Supreme Court's holding in *Hanna*, in which the court held that a Massachusetts law requiring "in hand" service of process conflicted with and was superseded by Rule 4(d)(1)'s lesser requirements for valid service of process.[51] Yet *Klocke* does not clearly tell courts what to do when a state

[43] *Id.* at 245; *see also* Abbas v. Foreign Pol'y Grp., LLC, 738 F.3d 1328, 1334 (D.C. Cir. 2015) ("The D.C. Anti-SLAPP Act, in other words, conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial.").

[44] *Klocke*, 936 F.3d at 245–46.

[45] *Id.* (citing Ashcroft v. Iqbal, 566 U.S. 662, 678–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

[46] *Id.* at 246 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(b)(1)–(3)).

[47] *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)).

[48] *Id.*

[49] *Id.* at 245. The Fifth Circuit also held that Rules 12 and 56 were valid exercises of Congress's rulemaking authority under the Rules Enabling Act. *Id.* at 247–48. The court's analysis was brief and does not warrant extensive coverage here. *See id.*

[50] *See id.* at 245.

[51] *See* Hanna v. Plumer, 380 U.S. 460, 463–64 (1965).

statute sets a lower bar for litigants, as Section 18.001 perhaps does.[52] The *Klocke* decision also may not be immediately analogous to cases in which a state evidentiary statute may conflict with a federal evidentiary rule. Both limitations should be considered when analyzing whether Section 18.001 applies in federal court.

B. The Touchstones Analysis under All Plaintiffs v. All Defendants

When the conflicts analysis is not determinative, federal courts must "wade into *Erie*'s murky waters" and classify a state law as substantive or procedural.[53] The Supreme Court has issued several key decisions informing courts on how to make this distinction.[54] The Fifth Circuit applies a holistic analysis to the question and considers all the applicable "touchstone" cases.[55] No one case is solely determinative, nor any other touchstone case ignored.[56]

The touchstones analysis described and applied in *All Plaintiffs* is made up of several rules and factors that courts should apply to determine whether a law is substantive or procedural.[57] First is the "outcome determination" test from *Guaranty Trust Co. of New York. v. York*, under which courts consider whether application of state law would "significantly affect the result of a litigation."[58] Next, courts should consider "whether a state rule is 'bound up' with state-secured substantive rights and obligations" per the Supreme Court's holding in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[59] This consideration was later refined in *Hanna* when the Court articulated the "'twin aims' of *Erie*: 'discouragement of forum-shopping and avoidance of inequitable administration of the laws.'"[60] As applied in *All Plaintiffs*, these

[52] *See generally Klocke*, 936 F.3d at 245 ("[A] state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not found in the federal rules."); TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b); *see also infra* section V-A.

[53] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

[54] *See* All Plaintiffs v. All Defendants, 645 F.3d 329, 335 (5th Cir. 2011) (collecting cases).

[55] *See id.*

[56] *See id.* at 335–36.

[57] *See id.* at 335–36.

[58] *See id.* at 335 (quoting Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945)).

[59] *See id.* at 336 (citing Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535–58 (1958)).

[60] *See id.* (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

tests are not applied in any particular order.[61] Rather, all are considered together without disregarding any others.[62]

Such a broad, holistic analysis does not lend itself to clear answers, as the cases discussed below make clear. That said, it remains that any proper evaluation of Section 18.001 under *Erie* (assuming a conflict with federal rules does not render the statute inapplicable) should account for the rules from *Guaranty Trust*, *Byrd*, and *Hanna*.[63] This suggests that cases in which district courts applied a well-reasoned analysis of the touchstone cases to Section 18.001 ought to be given more weight in an eventual decision by the Fifth Circuit.

IV. HOW FEDERAL DISTRICT COURTS IN TEXAS ARE APPROACHING § 18.001

Texas federal district courts are more or less split in half. The Northern and Southern Districts have held that Section 18.001 does not apply in federal courts while the Eastern and Western Districts have held that it does.[64] The arguments for both positions have evolved in response to holdings from the Supreme Court of Texas and the Fifth Circuit.[65] This section aims to capture that evolution by highlighting cases that best encapsulate the arguments.

A. The Northern District: The Shift from Treating § 18.001 as Substantive to Treating it as Procedural

The Northern District's case law illustrates an evolution of Section 18.001's treatment under the *Erie* doctrine. The court initially held that the statute was substantive law on the grounds that it is "inextricably intertwined" with a plaintiff's substantive rights.[66] The same division of the

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] Davila v. Kroger Tex., LP, No. 3:19-CV-2467-N, 2020 WL 2331079, at *3 (N.D. Tex. May 8, 2020) (holding that Section 18.001 is procedural); Espinoza v. State Farm Mut. Auto. Ins. Co., No. 7:19-cv-00299, 2020 WL 4333558, at *7 (S.D. Tex. July 28, 2020) (holding that Section 18.001 is procedural); Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 774 (E.D. Tex. 2021) (mem. op.) (holding that Section 18.001 is substantive law, except for the statute's timing and notice requirements); Grover v. Gov't Emps. Ins. Co., No. SA-18-CV-00850-FB, 2019 WL 2329321, at *2 (W.D. Tex. May 31, 2019) (holding that Section 18.001 is applicable in federal diversity actions "despite its procedural nature").

[65] *See infra* Sections IV.A–IV.D.

[66] Rahimi v. United States, 474 F. Supp. 2d 825, 829 (N.D. Tex. 2006).

Northern District later changed course in response to new case law from the Supreme Court of Texas referring to Section 18.001 as "purely procedural."[67] Most recently, the Dallas Division held again that Section 18.001 is inapplicable in federal courts, but this time on the grounds that Section 18.001 conflicts with Federal Rule of Evidence 801.[68] The Northern District's changing reasoning and approach to Section 18.001's applicability encapsulates how district courts across Texas have responded to recent Fifth Circuit cases applying the substantive-procedural distinction in other contexts.

1. *Rahimi* – Interpreting Section 18.001 as Substantive Law

Rahimi, the plaintiff, sued the United States under the Federal Tort Claims Act for injuries she alleged were caused by a United States Postal Service vehicle.[69] Rahimi filed a motion to determine the applicability of Section 18.001 in federal court.[70] Rahimi argued that the statute was applicable while the United States argued that it would conflict with the Federal Rules of Evidence and was thus inapplicable under *Erie*.[71]

The court held that Section 18.001's procedure for establishing the reasonableness and necessity of past medical expenses by affidavit was applicable in federal court.[72] To reach this conclusion, the court analyzed the statute under the *Erie* doctrine. The court initially considered how the statute was characterized in state courts.[73] The Supreme Court of Texas had not yet characterized Section 18.001 as "procedural" or "substantive," and state

[67] Baird v. Shagdarsuren, No. 3:17-CV-2000-B, 2019 WL 2286084, at *2 (N.D. Tex. May 29, 2019).

[68] Davila v. Kroger Tex., LP, No. 3:19-CV-2467-N, 2020 WL 2331079, at *3 (N.D. Tex. May 8, 2020).

[69] *Rahimi*, 474 F. Supp. 2d at 828.

[70] *Id.*

[71] *Id.* Although the court was not sitting in diversity, the court cited *Straley v. United States*, 887 F. Supp. 728, 734 (D.N.J. 1995) for the proposition that *Erie* applies to FTCA claims. *Id.* There is some controversy about whether *Erie* actually does apply to FTCA claims. *See* Shields v. United States, 436 F. Supp. 3d 540, 543 n.3 (D. Conn. 2020) (refusing to give a holding on *Erie*'s applicability to FTCA claims). This issue is outside the scope of this comment. Regardless of *Erie*'s applicability to FTCA claims, the *Rahimi* court's application of *Erie* is informative for determining the applicability of Section 18.001 in federal court.

[72] *Rahimi*, 474 F. Supp. 2d at 829. The court further held that the procedure for controverting a plaintiff's affidavits and the statute's time limits were purely procedural. *Id.*

[73] *Id.* at 827–28.

appellate courts disagreed about whether the statute was merely an exception to the rule against hearsay.[74] The court suggested that it would defer to a characterization by the Supreme Court of Texas, but without one, it was appropriate to consider the twin aims of *Erie*.[75] Prevention of forum shopping was deemed irrelevant because the plaintiff's cause of action was based on the Federal Tort Claims Act (FTCA) and could thus only be brought in federal court.[76] Avoidance of inequitable administration of the law, on the other hand, was relevant and cut in favor of applying the statute.[77] The court observed that Section 18.001 provides a "means to avoid the significantly more expensive and time-consuming alternatives to proving damages which would otherwise be available . . . in a Texas state court."[78] Thus, the court reasoned that Section 18.001 is an evidentiary rule so bound up and intertwined with litigants' substantive rights that it was appropriate to apply it to avoid inequitable administration of the law.[79]

Although the court suggested that it would defer to state court characterizations, the mixed bag of pre-*Haygood* case law prevented the court from doing so.[80] This was likely for the better. As discussed above, the reasoning in recent Fifth Circuit case law on the applicability of state statutes in federal court has focused on the substance of state statutes, not the labels ascribed to them by state courts.[81] By instead focusing on equitable administration of the law under *Erie*, the reasoning of *Rahimi* squares more

[74] *Id.*

[75] *Id.* at 828.

[76] *Id.* Although this comment takes no position on the issue of *Erie*'s applicability to FTCA claims, it is noteworthy that the *Rahimi* court decided to only apply one of the two twin aims to determine Section 18.001's applicability. This approach suggests that the *Erie* analysis could come out differently depending on whether the court's jurisdiction is based on diversity or the FTCA. This is unlikely, as discouraging forum-shopping will almost always favor applying state law in federal court. Nonetheless, applying *Erie* differently depending on whether the case is heard in diversity or pursuant to the FTCA could make for the inconsistent application of *Erie* itself.

[77] *Id.* at 828–29.

[78] *Id.* at 829.

[79] *Id.*

[80] *Id.* at 827–28.

[81] *See* All Plaintiffs v. All Defendants, 645 F.3d 329, 336–37 (5th Cir. 2011) (considering the substance of the doctrine of cy pres under the touchstones of *Erie*); Klocke v. Watson, 936 F.3d 240, 245–46 (5th Cir. 2019) (analyzing the substance of the TCPA to determine that it conflicts with federal procedural rules).

clearly with the touchstones analysis the Fifth Circuit currently employs.[82] The reasoning of *Rahimi* may still be persuasive to the Fifth Circuit.

2. *Baird* – Interpreting Section 18.001 as Procedural Law in Deference to the Supreme Court of Texas

Baird, the plaintiff, was injured in a car accident by defendants who removed the case to federal court based on diversity jurisdiction.[83] Although *Rahimi* was already on the books, Baird filed a motion to determine the applicability of Section 18.001 in federal court.[84] The court held that Section 18.001 was inapplicable because the Supreme Court of Texas had described the statute as "purely procedural" in a pair of earlier decisions.[85] This holding was predicated on the basic rule that federal courts will look to "the final decisions of the state's highest courts" to identify state substantive law.[86]

Although this approach is reasonable at first glance, it diverges from the Fifth Circuit's recent cases and from the *Erie* doctrine itself. It is true that, under *Erie*, federal courts look to the final decisions of a state's highest court to identify state substantive rules of law.[87] The cases cited by the *Baird* court for this point support that proposition.[88] That principle and the cases cited for it, however, have nothing to do with the difference between substantive and procedural law.[89] The rule that federal courts look to the final decisions of

[82] *See supra* Section III-B.

[83] Baird v. Shagdarsuren, No. 3:17-CV-2000-B, 2019 WL 2286084, at *1 (N.D. Tex. May 29, 2019).

[84] *Id.*

[85] *Id.* at *2 (citing Haygood v. De Escabedo, 356 S.W.3d 390, 397 (Tex. 2011) and Gunn v. McCoy, 554 S.W.3d 645, 674 (Tex. 2018)).

[86] *Id.* at *1–2 (citing Shanks v. AlliedSignal, Inc., 169 F.3d 988, 993 (5th Cir. 1999) and Baker v. RR Brink Locking Sys., Inc., 721 F.3d 716, 717 (5th Cir. 2013)).

[87] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except 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. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

[88] *See Shanks*, 169 F.3d at 993 (making an "*Erie* guess" that the Supreme Court of Texas would find that National Transportation Safety Board accident investigations are quasi-judicial proceedings); *Baker*, 721 F.3d at 717–18 (making an "*Erie* guess" that the Supreme Court of Mississippi would hold that an emancipated minor "is entitled to protection under the Mississippi savings statute, under which the disability of infancy is not removed until a person reaches age twenty-one").

[89] *See Shanks*, 169 F.3d at 993 (stating that federal courts look to the decisions of a state's high court to determine that state's substantive law, but not addressing the distinction between

the state's highest courts is properly applied *after* a federal court has determined that the law is substantive, not to make that determination in the first place.[90] As discussed above, that distinction is made according to the touchstones analysis set forth in *All Plaintiffs*.[91] The cases cited by the *Baird* court to support its conclusion did not even consider whether the laws in question were procedural, let alone apply the touchstones analysis.[92]

State supreme courts can provide no guidance on the touchstones analysis because state courts have no occasion to apply the *Erie* doctrine. The Supreme Court of Texas's characterizations of Section 18.001 in both *Haygood* and *Gunn* were thus not based on whether the statute conflicted with other procedural or evidentiary rules, nor anything analogous to the Fifth Circuit's touchstones analysis.[93] Those characterizations were thus unrelated to the Supreme Court's tests for applicability under *Erie* and are unpersuasive.

3. *Davila* – Finding Section 18.001 Inapplicable in Federal Court because Section 18.001 Conflicts with the Federal Rules of Evidence

The Northern District most recently addressed the applicability of Section 18.001 in *Davila v. Kroger Texas, LP*.[94] Davila was injured on Kroger's property and sued in state court, and Kroger removed the case to federal court.[95] Davila attempted to file medical and billing record affidavits pursuant to Section 18.001, and Kroger moved to strike the affidavits on the grounds

substantive and procedural law for *Erie* Doctrine purposes); *Baker*, 721 F.3d at 717 (reiterating the same rule and not discussing the distinction between substantive and procedural law).

[90] *See* All Plaintiffs v. All Defendants, 645 F.3d 329, 333 (5th Cir. 2011) (quoting Burlington N.R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) (stating the two-step analysis for *Erie* issues, in which "[t]he initial step is to determine whether . . . the scope of [the Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law")).

[91] *Id.* at 335.

[92] *See Shanks*, 169 F.3d at 993 (stating that federal courts look to the decisions of a state's high court to determine that state's substantive law, but not addressing the distinction between substantive and procedural law for *Erie* Doctrine purposes); *Baker*, 721 F.3d at 717 (reiterating the same rule and not discussing the distinction between substantive and procedural law).

[93] *See* Haygood v. De Escabedo, 356 S.W.3d 390, 397 (Tex. 2011); Gunn v. McCoy, 554 S.W.3d 645, 674 (Tex. 2018).

[94] No. 3:19-CV-2467-N, 2020 WL 2331079, at *1 (N.D. Tex. May 8, 2020).

[95] *Id.*

that Section 18.001 was inapplicable under *Erie*.[96] The court held for Kroger and struck the affidavits.[97]

Although the court partially relied on the Supreme Court of Texas's characterization of Section 18.001 in *Gunn*, the Northern District primarily relied on *Klocke* and held that Section 18.001 conflicts with Federal Rule of Evidence 801.[98] Rule 801 defines "hearsay" as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[99] Affidavits filed pursuant to Section 18.001 plainly fall within this definition. They contain statements not made by testimony and which are offered as evidence of reasonableness and necessity of a litigant's expenses at trial.[100] The *Davila* court thus observed that Section 18.001 "makes admissible a form of evidence otherwise barred by Federal Rule of Evidence 801."[101] This meant that both the Federal Rules of Evidence were "sufficiently broad to control the issue before the court" (that is, whether to admit the affidavits as evidence), and the statute and the Rules conflicted.[102] Because Rule 801 is a valid Federal Rule of Evidence,[103] the conflict required the court to apply Rule 801 and render Section 18.001 inapplicable.[104]

The Northern District cases illustrate three things. First, they illustrate that Section 18.001 may be inapplicable in federal court because it conflicts with federal rule even if Section 18.001 is substantive law. In *Rahimi*, one of the two "twin aims" considerations, avoidance of inequitable administration of the law, favored characterizing Section 18.001 as substantive.[105] The other twin aim, preventing forum-shopping, would likely cut in favor of applying Section 18.001 as well. If the statute was applicable in both federal and state venues, the degree to which it encouraged parties to choose federal or state

[96] *Id.*

[97] *Id.* at *3.

[98] *See id.* at *1–2.

[99] FED. R. EVID. 801(c).

[100] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(c).

[101] *Davila*, No. 2020 WL 2331079, at *2. Technically, however, Federal Rule of Evidence 802 is the rule which prohibits hearsay, while Rule 801 merely defines it.

[102] *See id.* (citing Klocke v. Watson, 936 F.3d 240, 247 (5th Cir. 2019) ("[T]he test of whether a conflict between the Federal Rules and a state statute exists . . . is whether the Federal Rules in question are sufficiently broad to control the issue before the court.").

[103] *See id.* at *2 n.2 ("The Court holds that Federal Rule of Evidence is a valid procedural rule.").

[104] *Id.* at *3.

[105] *See* Rahimi v. United States, 474 F. Supp. 2d 825, 828–29 (N.D. Tex. 2006).

courts over each other would be eliminated. The conflicts analysis, however, suggests that Section 18.001 plainly contradicts the rule against hearsay.[106] If the conflict is sufficient to render the statute inapplicable at the first step of the analysis, then the twin aims do not even come into play.

Second, the cases suggest that federal district courts in Texas may be misunderstanding *Erie*'s substantive-procedural distinction and the role that state courts play in it. While *Erie* does require federal courts to apply the rulings of the state's highest court, it does not require federal courts to defer to the labels a state court affixes to its law.[107] Should the Fifth Circuit take up a case to determine whether Section 18.001 is substantive or procedural, it would be a good opportunity explain this explicitly.

Third and finally, Northern District cases suggest that Section 18.001's applicability is being litigated frequently enough to warrant a clear answer to this issue. The cases discussed above are not comprehensive—the Northern District (and others) have considered this issue time and again.[108] A clear holding from the Fifth Circuit would put this issue to rest.

B. The Eastern District: A Stalwart for Section 18.001 as Substantive Law

In contrast to the Northern District, the Eastern District of Texas has consistently held that Section 18.001 is applicable in federal courts sitting in diversity.[109] Two cases, *Bagley* and *Peals*, illustrate how the Eastern District has found this way under both the touchstones analysis and the conflicts analysis.[110] *Bagley* further illustrates that Federal Rule of Evidence 302 may

[106] *See Davila*, No. 2020 WL 2331079, at *2.

[107] *See supra* Part IV.A.2.

[108] *See generally* Grover v. Gov't Emps. Ins. Co., No. SA-18-CV-00850-FB, 2019 WL 2329321, at *1 (W.D. Tex. May 31, 2019) (acknowledging that "[f]ederal district courts are split" on the issue); *see also Federal Court Interpretation and Application of Civil Practice & Remedies Code Section 18.001*, NEXTMED REVIEWS, LLC (Mar. 25, 2020), https://nextmedreviews.com/blog-1 (follow article title hyperlink) (summarizing the split as of the published date); Gorman v. ESA Mgmt. LLC, No. CV 3:17-CV-0792-D, 2018 WL 295793, at *1 (N.D. Tex. Jan. 4, 2018) (holding that Section 18.001 is substantive); Holland v. United States, No. 3:14-CV-3780-L, 2016 WL 11605952, at *1 (N.D. Tex. July 21, 2016) (holding that Section 18.001 is procedural just two years earlier).

[109] *See* Bagley v. Dollar Tree Stores, Inc., No. 1:18-CV-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019); Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 781 (E.D. Tex. 2021) (mem. op.).

[110] *Bagley*, 2019 WL 6492585, at *7 (applying the "touchstones" of *Erie* to find Section 18.001 substantive); *Peals*, 511 F. Supp. 3d at 775 (applying the *Klocke* conflicts analysis and finding Section 18.001 applicable in federal court).

require Section 18.001 to be applied in federal court even if the typical two-step *Erie* analysis does not call for it.

1. *Bagley* – Applying Fifth Circuit Precedent to Find that Section 18.001 is Substantive Law Applicable in Federal Court

Bagley was a slip-and-fall case in which Virginia Bagley, the plaintiff, filed a motion for the court to determine the applicability of Section 18.001 in federal court.[111] Bagley sought to submit affidavits attesting to the reasonableness and necessity of her medical expenses while Dollar Tree, the defendant, argued that Section 18.001 was procedural law inapplicable in federal courts and that the affidavits thus could not be submitted.[112] The court held that the statute was applicable in federal court and allowed Bagley to submit the affidavits.[113]

The court's decision was based primarily on two rationales, both well-founded in Fifth Circuit precedent. First, the court interpreted Section 18.001 as creating a rebuttable presumption in favor of the reasonableness and necessity of the filing litigant's service expenses.[114] The court observed that Section 18.001(e) states that "[a] party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record."[115] The requirement that the controverting party must file a counteraffidavit, along with Section 18.001(b)'s language that the original affidavit is "sufficient evidence to support a finding of fact," suggested to the court that Section 18.001 affidavits create a presumption.[116] The court also observed that the legislature rejected a bill that would have amended Section 18.001(b) to explicitly state that "[t]he affidavit does not create a presumption that the amount charged was reasonable or that the service was necessary."[117] The fact that the legislature believed this language might need to be included but chose not to

[111] *Bagley*, 2019 WL 6492585, at *1.

[112] *Id.* at *5.

[113] *Id.* at *7.

[114] *Id.* at *6.

[115] *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(e). The court ignored the deadline provisions following the quoted statutory language, but this does not change the meaning of the quoted language.

[116] *Bagley*, 2019 WL 6492585, at *6.

[117] *Id.* (citing Tex. H.B. 2301, 85th Leg., R.S. (2017)).

add it suggested that the natural reading of the statute was that properly submitted affidavits created a presumption.[118]

If Section 18.001 creates a presumption, the court reasoned, the statute may be applicable under Federal Rule of Evidence 302 and the Fifth Circuit's holding in *Foradori v. Harris*.[119] Rule 302 states that "[i]n a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision."[120] In *Foradori*, the Fifth Circuit held that a Mississippi statute permitting a plaintiff to introduce his medical bills through his own testimony was applicable in federal court under Rule 302 because the Mississippi Supreme Court had held that the statute created a rebuttable presumption that the expenses were reasonable and necessary.[121] Although the Supreme Court of Texas had not ruled on whether Section 18.001 creates a presumption as to reasonableness and necessity, the court was satisfied with its reasoning that the statute did create a presumption and was thus applicable under Rule 302.[122]

The court's second rationale for finding Section 18.001 applicable was that it was a substantive rule of law under the typical *Erie* analysis.[123] The court asserted that "failure to apply Section 18.001 would significantly affect the results of this and future litigation" because "the costs of retaining, deposing, and litigating the qualifications of experts would render it impracticable for many injured parties to litigate in federal court."[124] Similar parties in state court, on the other hand, would be able to litigate those claims by using Section 18.001.[125] This reasoning was sufficient for the court to conclude that Section 18.001 was so "bound up" in substantive state-secured rights that it had to be applied and that application of the statute in federal court would discourage forum-shopping and avoid inequitable administration of the law.[126] Furthermore, the court asserted that this conclusion was consistent with *Homoki v. Conversion Servs., Inc.*, in which the Fifth Circuit

[118] *Id.*

[119] *Id.* (citing FED. R. EVID. 302; Foradori v. Harris, 523 F.3d 477, 516–19 (5th Cir. 2008)).

[120] FED. R. EVID. 302.

[121] *Foradori*, 523 F.3d at 518–19.

[122] *See Bagley*, 2019 WL 6492585, at *6.

[123] *Id.* The *Bagley* court recognized that valid federal rules control over conflicting state law. *Id.* The court nonetheless skipped the conflicts analysis because Dollar Tree did not identify any federal rule in conflict with Section 18.001. *Id.*

[124] *Id.* at *7.

[125] *Id.*

[126] *Id.*

held that "state law governs what damages are available for a given claim and the manner in which those damages must be proven."[127]

Although the *Bagley* court's reasoning was brief, it was at least grounded in Fifth Circuit precedent and grappled with the correct *Erie* doctrine tests for distinguishing substantive and procedural law. For those reasons alone, it ought to have more persuasive value than *Baird*.

2. *Peals* – Doubling Down on the Substantive Approach, but Acknowledging a Conflict between Section 18.001 and Federal Rules

Peals was another slip-and-fall case in which the plaintiff, Peals, sought to use Section 18.001 affidavits to prove the reasonableness and necessity of his medical expenses.[128] Defendant QuikTrip argued that Section 18.001 was inapplicable in federal court and, in the alternative, if it was applicable, that Peals failed to meet the statute's timing and notice requirements.[129] The court held that Section 18.001's provisions permitting the use of affidavits were applicable in federal court, but that the deadline and notice provisions were procedural and thus inapplicable.[130]

a. The Conflicts Analysis

The court conceded that Section 18.001 and Federal Rule of Evidence 802 conflict but held that this conflict was not enough to render Section 18.001 inapplicable in federal court.[131] The court asserted that "even where a conflict exists, federal courts have nevertheless applied state rules of evidence if they reflect a substantive state policy."[132] The court cited a series of federal cases which ostensibly supported this proposition, then proceeded with a full *Erie* analysis.[133]

The Eastern District's attempt to avoid the conflicts rule from *Klocke* is less convincing here than it was in *Bagley*. Only one of the cases cited to justify skipping to the full *Erie* analysis, *Foradori*, came from the Fifth

[127] *Id.* at *5 (citing Homoki v. Conversion Servs., Inc., 717 F.3d 388, 398 (5th Cir. 2013)).

[128] Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 772 (E.D. Tex. 2021) (mem. op.).

[129] *Id.*

[130] *Id.* at 781.

[131] *Id.* at 774–75.

[132] *Id.* at 775.

[133] *Id.*

Circuit.[134] Although *Foradori* was characterized by the *Peals* court as a case about a state statute in conflict with Rule 801, the statute was found applicable in *Foradori* on the grounds that another Federal Rule of Evidence, Rule 302, required it.[135] The *Foradori* decision thus suggests that Section 18.001 may get around the conflicts problem if the statute creates presumptions, as the *Bagley* court found.[136] The *Peals* court, however, did not even consider the presumptions rationale for applicability, so *Foradori* was inapposite.[137]

The other cases cited are even less helpful. Only two of them, *Carota v. Johns Manville Corp.* and *Blanke v. Alexander*, squarely addressed conflicts between a state law and federal rules.[138] Both applied rules formulated by their own circuits, not by the Supreme Court.[139] The cases also conflated the issue of whether a state law conflicted with a Federal Rule and how the state law should be characterized.[140] The Supreme Court has since cautioned that the conflicts analysis is distinct from the substantive-procedural distinction and must be applied first to avoid unnecessarily wading into the *Erie* doctrine.[141] The Fifth Circuit has taken that guidance to heart and held that it will not apply a state law or rule that "answers the same question" and thus conflicts with, "a Federal Rule."[142] The *Peals* court's analysis of the conflict between Section 18.001 and Rule 802 does not take these developments into account and is thus unpersuasive.

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[134] *See id.*

[135] *See* Foradori v. Harris, 523 F.3d 477, 519 (5th Cir. 2008).

[136] *See* Bagley v. Dollar Tree Stores, Inc., No. 1:18-CV-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019).

[137] *See generally Peals*, 511 F. Supp. 3d 770.

[138] *See* Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir. 1990); Blanke v. Alexander, 152 F.3d 1224 (10th Cir. 1998).

[139] *Carota*, 893 F.2d at 450 ("[T]he state rule need not always displace the federal rule, unless application of the federal rule 'impinges on some substantive state policy embodied in the state rule[.]'") (quoting Ricciardi v. Child.'s Hosp. Med. Ctr., 811 F.2d 18, 21 (1st Cir. 1987); *Blanke*, 152 F.3d at 1231 ("[W]hen there is a conflict between Federal Rule of Evidence 407 excluding evidence of subsequent remedial measures, except where offered for specified limited purposes, and a contrary state rule repudiating the rule of exclusion, the state rule controls[.]") (citing Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984)).

[140] *See Carota*, 893 F.2d at 450; *Blanke*, 152 F.3d at 1231.

[141] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

[142] *See* Klocke v. Watson, 936 F.3d 240, 244–45 (5th Cir. 2019).

b. The Touchstones Analysis

The *Peals* court's analysis of the *Erie* touchstones mirrored the analysis in *Bagley*. The *Peals* court relied on the cost-saving effect of Section 18.001's procedure for proving reasonableness and necessity of medical expenses to argue that not applying it in federal court would encourage forum shopping and result in the inequitable administration of the law.[143] The court further cited other Fifth Circuit case law to support the proposition that a statute related to a party's state-created right to prove damages efficiently, such as Section 18.001, is "bound up" in the party's substantive rights.[144] This portion of the court's opinion was thus well-founded in Fifth Circuit case law.

*c. Texas Supreme Court Precedents and an "*Erie *guess"*

Similar to the *Baird* court, the Eastern District in *Peals* considered how the Supreme Court of Texas characterized Section 18.001.[145] Unlike the Northern District in *Baird*, though, the Eastern District recognized that the label "purely procedural," as applied in *Haygood*, was not enough to make the statute procedural under the *Erie* doctrine.[146] Rather, the Supreme Court of Texas's recognition of Section 18.001's value to plaintiffs in "streamlin[ing] the proof of reasonableness and necessity of medical expenses" suggested that Section 18.001 is substantive because of its relationship to proving damages.[147] The Eastern District similarly found that the language in *Gunn* supported finding that Section 18.001 is substantive because the *Gunn* court expanded the methods by which plaintiffs could prove damages under the statute.[148] This portion of the opinion thus served as a rebuttal to the arguments made in *Baird*.

The *Peals* court erred, however, by attempting to make an *Erie* guess about whether the Supreme Court of Texas would hold Section 18.001 to be substantive or procedural law.[149] As discussed above, state courts cannot decide whether a given state law is substantive or procedural under the *Erie* doctrine.[150] The application of the *Erie* doctrine is a matter of federal law and

[143] Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 779 (E.D. Tex. 2021) (mem. op.).

[144] *Id.*

[145] *Id.* at 775.

[146] *Id.* at 777 (citing Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945)).

[147] *Id.* (quoting Haygood v. De Escabedo, 356 S.W.3d 390, 397 (Tex. 2011)).

[148] *Id.* at 778.

[149] *Id.*

[150] *See supra* at Part IV.A.2.

thus cannot be decided by state courts. By trying to decide this issue as one that can be resolved by a state high court decision, the *Peals* court gave state courts undue deference on a matter of purely federal law.

C. The Southern District: Holding that Section 18.001 Conflicts with Procedural Rules 43(a), 26(a)(2), and Evidentiary Rule 702

While most other federal district court cases considering conflicts between Section 18.001 and Federal Rules were preoccupied with Federal Rules of Evidence 801 and 802, the Southern District of Texas recognized that Section 18.001 may conflict with two Federal Rules of Civil Procedure.[151] In *Espinoza*, Judge Alvarez concurred with other judges in the Southern District that Section 18.001 "directly conflicts" with Rules 801 and 802 because it "makes admissible a form of evidence otherwise barred by" the federal rules against hearsay.[152] However, Judge Alvarez also pointed out that Rule 43(a) requires that "a witness's testimony . . . be taken in open court, not by affidavit, 'unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.'"[153] Because Section 18.001 permits a litigant to use non-testimonial evidence (affidavits) to prove what Rule 43(a) would otherwise require to be proven by testimony, the court found that the rule and the statute conflicted.[154] Section 18.001's deadline provisions also conflicted with the deadlines in Rule 26(a)(2), which meant those provisions must also conflict.[155] Finally, the court held that Section 18.001 directly collided with Federal Rule of Evidence 702. Rule 702 requires that reasonableness and necessity of medical expenses be proven by testimony of an expert witness

[151] Espinoza v. State Farm Mut. Auto. Ins. Co., No. 7:19-cv-00299, 2020 WL 4333558, at *6 (S.D. Tex. July 28, 2020). It is worth noting that United States District Judge Alvarez commended attorney Glenn G. Romero for being "the first to raise [the] direct collision argument in federal court." *Id.* at *5 n.63. While Mr. Romero certainly deserves credit for making an effective argument, he was not the first to make it. The first time the collision argument was made was in *Rahimi* by Stephen Fahey, Assistant United States Attorney. *See* Def.'s Br. in Resp. to Pl.'s Mot. To Determine Applicability of Tex. Civ. Prac. & Rem. Code Section 18.001, at 3, Oct. 18, 2006. Mr. Fahey did not succeed, but ought to be commended for seeing this argument years before the Supreme Court spelled out the importance of collisions between state law and Federal Rules in the *Shady Grove* decision.

[152] *Espinoza*, 2020 WL 4333558, at *6.

[153] *Id.* (quoting FED. R. CIV. P. 43(a)).

[154] *Id.*

[155] *Id.*

while Section 18.001 does not impose those qualifications.[156] The court thus found that this was yet another conflict between Section 18.001 and valid Federal Rules, rendering Section 18.001 inapplicable in federal courts.[157]

D. The Western District: Applying Section 18.001 as Substantive Law

The Western District has held that Section 18.001 is substantive law and thus applicable in federal court under *Erie*.[158] The court has reached this conclusion based on the *Erie* touchstones analysis and on the grounds that other federal district courts have reached this conclusion in "well-reasoned decisions."[159] The Western District has also rejected the Supreme Court of Texas's characterization from *Haygood*.[160]

V. REACHING THE BEST RESULT FOR THE RIGHT REASONS

How the Fifth Circuit resolves this question will likely depend on four questions. First, how much weight will judges on the Fifth Circuit give to holdings that Section 18.001 conflicts with valid federal rules? Second, how much deference will the judges believe is due to the Supreme Court of Texas's labeling Section 18.001 as "purely procedural"? Third, if the Fifth Circuit applies the touchstones analysis laid out in *All Plaintiffs*, how will Section 18.001 fare under it? Fourth and finally, what role does Federal Rule of Evidence 302 play, and will the Fifth Circuit follow the *Bagley* court's reasoning?

A. Does Section 18.001 Conflict with Federal Rules?

Every federal district court in Texas that has considered the issue now agrees that Section 18.001 directly conflicts with a valid Federal Rule.[161] There is a consensus that the statute primarily conflicts with Rules 801 and 802 because Section 18.001 functions as a hearsay exception that the Federal

[156] *Id.*

[157] *Id.* at *7.

[158] Cruzata v. Wal-Mart Stores Tex., LLC, No. EP–13–CV–00331–FM, 2015 WL 1980719, at *6 (W.D. Tex. May 1, 2015); Grover v. Gov't Emps. Ins. Co., No. SA-18-CV-00850-FB, 2019 WL 2329321, at *2 (W.D. Tex. May 31, 2019).

[159] *Grover*, 2019 WL 2329321, at *2.

[160] *Id.*

[161] *Supra* Part IV.A–C.

Rules do not already permit.[162] *Espinoza* suggests that, even if Section 18.001 was not a hearsay exception, it would still conflict with other valid rules.[163] However, if the *Peals* court was correct, these conflicts may not prevent the Fifth Circuit from finding Section 18.001 to be applicable in federal court.

The Fifth Circuit is unlikely to agree with the Eastern District's analysis in *Peals*. As discussed above, the holding in *Peals* diverged from the underlying reasoning for the Fifth Circuit's holding in *Klocke*.[164] The *Klocke* court expressly adopted Scalia's framing from *Shady Grove* that the conflicts analysis serves in part to prevent federal courts from "wad[ing] into *Erie*'s murky waters" when it is unnecessary to do so.[165] If the Fifth Circuit held that direct conflicts between federal rules and state law were not a barrier to the full-blown *Erie* analysis, the reasoning of *Klocke* itself would be undermined because the *Klocke* court ended the analysis after concluding that the TCPA conflicted with Rules 12(b)(6) and 56(a).[166]

However, Section 18.001 may not conflict with Federal Rules at all under the definition created in *Klocke*. The Fifth Circuit held that "a state rule conflicts with a federal procedural rule when it imposes *additional procedural requirements* not found in the federal rules" and that "rules 'answer the same question' when each specifies requirements for a case to proceed at the same stage of litigation."[167] This holding suggests that the Fifth Circuit was concerned about state laws which require more from litigants than the Federal Rules, as the TCPA did by increasing the burden for defamation plaintiffs.[168] It thus made sense for the Court to render the TCPA rule inapplicable in federal court.

Section 18.001, by contrast, does the opposite—it creates an additional exception to evidentiary and procedural rules which makes it easier for plaintiffs to proceed with claims.[169] As discussed above, Section 18.001 can

[162] *Supra* Part IV.A.3, IV.B.2.a, IV.C.

[163] Espinoza v. State Farm Mut. Auto. Ins. Co., No. 7:19-cv-00299, 2020 WL 4333558, at *6 (S.D. Tex. July 28, 2020).

[164] *Supra* at Part IV.B.2.a.

[165] Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010)).

[166] *See id.* at 246–48 (holding that the TCPA was inapplicable in federal court because it conflicts with valid federal rules, without considering whether it is substantive or procedural in nature).

[167] *Id.* at 245 (emphasis added).

[168] *Id.* at 246.

[169] *See supra* Part IV.B.

eliminate the need to prove a specific factual issue by expert testimony.[170] A defendant's failure to file a counteraffidavit arguably creates a presumption in favor of the plaintiff on that fact.[171] Whereas the TCPA raised the burden on the plaintiff, Section 18.001 effectively reduces the plaintiff's evidentiary burden. Section 18.001 thus does not impose "additional procedural requirements" in the way that the TCPA does. The Fifth Circuit thus ought to consider the argument that Section 18.001 does not conflict with the Federal Rules at all.

The Fifth Circuit thus has three choices for how to resolve the conflicts analysis for Section 18.001. The most likely possibility is that the court applies *Klocke* strictly and finds that Section 18.001 conflicts with Federal Rules of Evidence 801 and 802 and that the conflict makes the statute inapplicable in federal court. The court may also follow the Eastern District's reasoning and create broad exceptions to the rule that state laws that conflict with federal rules are inapplicable in federal courts. Finally, the court could find that Section 18.001 does not conflict with Federal Rules at all because Section 18.001 lowers the standard that litigants must meet, and the *Klocke* rule only applies to state laws which raise procedural or evidentiary requirements for litigants.

B. "Deference" to the Supreme Court of Texas and "Erie Guesses"

As discussed above, Federal District Courts in Texas have given credence to the idea that a state's highest court may decide whether a state law is substantive or procedural under the *Erie* doctrine.[172] This has led to somewhat haphazard use of the phrase "*Erie* guess," with at least one Federal District Court attempting to make an *Erie* guess about whether the Supreme Court of Texas would hold Section 18.001 to be substantive or procedural.[173] Both practices—giving undue deference to a state's highest court on a matter of

[170] *See* Wal-Mart Stores Tex., LLC v. Bishop, 553 S.W.3d 658, 671–72 (Tex. App.—Dallas 2018, pet. granted, judgm't vacated w.r.m.) (citing Hong v. Bennett, 209 S.W.3d 795, 800 (Tex. App.—Fort Worth 2006, no pet.)); *see also supra* at Part II.

[171] Petrello v. Prucka, 415 S.W.3d 420, 431 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Unless a controverting affidavit is filed, an affidavit as to the amount of an attorney's fees is presumed reasonable."); Hunsucker v. Fustok, 238 S.W.3d 421, 432 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (finding that Section 18.001 "provides that, unless a controverting affidavit is filed, an affidavit as to the amount of attorney's fees will be presumed reasonable").

[172] *Supra* Part IV.A.2–3.

[173] *See* Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 779 (E.D. Tex. 2021) (mem. op.).

federal law and making "*Erie* guesses" about how that court would do so—ought to be halted.

The argument that this issue has been resolved by the Supreme Court of Texas should be unpersuasive to judges on the Fifth Circuit. The *Erie* doctrine requires federal courts to apply "state substantive law as stated in the final decision of the state's highest court."[174] That rule says nothing about how federal courts should determine whether a state law is substantive in the first place. Supreme Court decisions suggest that this determination is based on the underlying purpose and substance of the state law in question.[175] Whether the law conflicts with federal rules, how it affects the parties, whether it is "bound up" in substantive rights, and whether application of the law will effectuate the "twin aims" of *Erie*—all of these considerations go beyond the label a state court might apply to a law. The analysis in cases like *Baird* should thus not be persuasive or useful to the Fifth Circuit in answering this question.

The cases in which "*Erie* guesses" are attempted get the issue wrong for similar reasons. An *Erie* guess would require a state's highest court to be able to consider the question in the first place. State courts have no occasion to apply the conflicts or touchstones analyses that are relevant to *Erie* because *Erie* only applies in federal courts. Unless and until the Supreme Court of Texas adopts a substantive-procedural distinction that mirrors the Fifth Circuit's two-step *Erie* analysis, the Fifth Circuit should disregard the "procedural" label that the Supreme Court of Texas has applied to Section 18.001 and clarify that it is impossible to make *Erie* guesses about the substantive-procedural distinction.

C. Section 18.001 Under the Erie *Touchstones*

Should the court overcome potential conflicts between Section 18.001 and federal rules, and if it dodges mistakenly deferring to the Supreme Court of Texas's characterization of Section 18.001, there is a strong case that Section 18.001 is substantive law under the touchstones of *Erie*. Every federal district court in Texas that has reached the touchstones analysis has held that Section 18.001 constitutes substantive law, and those cases provide valuable insight.[176]

[174] Baker v. RR Brink Locking Sys., Inc. 721 F.3d 716, 717 (5th Cir. 2013).

[175] *See supra* Part III.

[176] *See supra* Part IV.B, C.

The outcome determination test of *Guaranty Trust Co. of New York. v. York* favors characterizing Section 18.001 as substantive law.[177] Section 18.001 affidavits will likely matter most in cases where the damages award will be small. The smaller the likely award, the more significant the costs associated with certifying an expert witness to prove reasonableness and necessity of expenses.[178] This, in turn, can affect whether the case is settled for much less than it is worth or even whether the case goes to court at all. The reality of litigation costs can also determine whether other corners are cut, which result in a win or loss at trial.

Similar reasoning applies to the "twin aims" of *Erie*. The disparity between how likely low-damage plaintiffs are to go to trial and prove their case when they can use the affidavits and how likely they are to succeed when they cannot use the affidavits is significant. If federal courts do not apply Section 18.001, defendants in these cases will have an incentive to seek out federal court while plaintiffs will seek state court. Results between the two venues will also be inequitable. Plaintiffs who are injured by non-diverse defendants will have a much greater chance of being made whole than those injured by diverse defendants. Both twin aims—forum shopping and inequitable administration of the law—thus favor applying Section 18.001 in federal courts.

Finally, Section 18.001 is at least arguably "bound up" in state-secured substantive rights because affidavits filed pursuant to the statute go directly to the damages a plaintiff can prove and be awarded.[179] Thus, if a plaintiff can get the court past the conflicts analysis, they will likely be able to apply Section 18.001 in federal court.

D. Federal Rule of Evidence 302 as a Backdoor to Bypass Erie

Thus far, only the *Bagley* court has seriously considered whether Federal Rule of Evidence 302 makes Section 18.001 applicable in federal court.[180] The Rule 302 rationale requires that (1) Section 18.001 creates a

[177] *See* 326 U.S. 99 (1945).

[178] *See* House Comm. on Judiciary, Bill Analysis, Tex. H.B. 540, 66th Leg., R.S. (1979) (finding that Art. 3737h, the statutory predecessor to Texas Civil Practice and Remedies Code Section 18.001, would solve the problem that "parties incur additional expense by calling upon expert witnesses to prove the necessity and reasonableness of charges made" and that this "also makes law suits [sic] more expensive").

[179] *See* Peals v. QuikTrip Corp., 511 F. Supp. 3d 770, 780–81 (E.D. Tex. 2021) (mem. op.).

[180] *See supra* Part IV.B.1.

"presumption," as that term is applied under the Rule; and (2) Rule 302 actually calls for that presumption to be applied in federal court.[181] We must thus determine what a presumption is for Rule 302 purposes in the Fifth Circuit and how such presumptions interact with the two-step *Erie* analysis.

1. Section 18.001 May Create Presumption Under Rule 302

Federal Rules of Evidence 301 and 302 each discuss "presumptions," but neither defines the term.[182] According to Wright & Miller, federal courts generally take one of three approaches to defining a "presumption" for Rule 302 purposes.[183] Some courts tend to define a "presumption" as a rule that has the effect described in Rule 301—that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," but "the burden of persuasion . . . remains on the party who originally had it."[184] Other courts tend to defer to state court characterizations of the state rule or determine their own definition of "presumption" in light of Congressional policy considerations.[185] The approach taken by the Fifth Circuit will likely determine whether Section 18.001 creates a "presumption" for Rule 302 purposes.

Although Wright & Miller suggest that the Fifth Circuit defines "presumption" for itself in light of Congressional policy,[186] the Fifth Circuit's holding in *Foradori* suggests that the court looks to how state courts characterize state law rules.[187] This approach tracks with the *Erie* doctrine. While state courts are not fit to determine whether a state law is substantive or procedural for *Erie* purposes, they are well-suited to determine whether

[181] *Cf.* Davila v. Kroger Tex., LP, No. 3:19-CV-2467-N, 2020 WL 2331079, at *3 (N.D. Tex. May 8, 2020) (holding that Section 18.001 does not apply in federal court as a state law presumption under Federal Rule 302 because, according to the court, Section 18.001 is "not substantive law providing a presumption regarding the damages element of a state negligence claim").

[182] *See* FED. R. EVID. 301, 302.

[183] 21B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 5136 (2d ed. 2021) (describing three ways in which federal courts tend to define a "presumption" under Rule 302).

[184] *Id.*; FED. R. EVID. 301.

[185] WRIGHT & MILLER, *supra* note 183, at § 5136.

[186] *See id.* at § 5136, n.10 (citing Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1047 (5th Cir. 1990)).

[187] Foradori v. Harris, 523 F.3d 477, 519 (5th Cir. 2008) (applying cases from the Supreme Court of Mississippi to determine that Miss. Code Ann. § 41-9-119 gives rise to a presumption under Rule 302).

their own state's laws give rise to presumptions. Both the *Erie* doctrine and Rule 302 aim to give meaning to state court interpretations of state laws, particularly regarding presumptions.[188] The decision as to Section 18.001 will thus likely be determined according to what state courts have held as to whether the statute gives rise to a presumption.

The Supreme Court of Texas has never held whether Section 18.001 gives rise to a presumption.[189] The *Bagley* court, however, still deferred to Texas state court precedent to answer the question.[190] The *Bagley* court relied on two opinions, *Simonds v. Stanolind Oil & Gas Co.*[191] and *In re Lipsky*,[192] to assert that 18.001(b) effectively creates a rebuttable presumption as defined by Texas law.[193] In *Simonds*, the Texas Commission of Appeals of the Texas Supreme Court held that "[e]vidence which, uncontradicted and unexplained, would be *prima facie* evidence of a fact becomes insufficient to raise an issue of fact when the other facts in evidence conclusively prove that the fact sought to be shown by the *prima facie evidence* **or presumption** of fact does not exist."[194] The Supreme Court of Texas later held in *In re Lipsky* that *prima facie* evidence is "evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted."[195] Taking these cases together, the *Bagley* court concluded that Section 18.001(b) and (e) constitute a rule under which submission of the initial affidavit creates *prima facie* evidence, or a presumption, in favor of reasonableness and necessity of medical expenses.[196] Section 18.001(e) confirms this by creating a means for rebutting that presumption with the submission of a controverting affidavit.[197]

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[188] *See* FED. R. EVID. 302, advisory committee note to 1972 proposed rules.

[189] Bagley v. Dollar Tree Stores, Inc., No. 1:18-VC-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019).

[190] *See id.*

[191] 136 S.W.2d 207, 209 (Tex. [Comm'n Op.] 1940). Although technically *Simonds* is an opinion of the Texas Commission of Appeals of the Texas Supreme Court, not the Supreme Court of Texas, the opinion was adopted by the Supreme Court of Texas and thus carries the same precedential value as an opinion issued by the Supreme Court of Texas. *See* Nat'l Bank of Com. v. Williams, 84 S.W.2d 691, 692 (Tex. 1935).

[192] 460 S.W.3d 579, 590 (Tex. 2015).

[193] *See Bagley*, 2019 WL 6492585, at *6.

[194] *Simonds*, 136 S.W.2d at 209 (emphasis added).

[195] *In re Lipsky*, 460 S.W.3d at 590.

[196] *Bagley*, 2019 WL 6492585, at *6.

[197] *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(e).

This interpretation is further supported by House Bill 2301 from 2017.[198] If passed, H.B. 2301 would have changed the language of Section 18.001 to state that affidavits may merely be "admitted as evidence," not "sufficient evidence to support a finding of fact by judge or jury."[199] The bill further would have amended the law to expressly state that "[t]he affidavit does not create a presumption that the amount charged was reasonable or that the service was necessary."[200] The bill does not conclusively prove the meaning of Section 18.001, but it does suggest that the legislature believed the language of the statute gave rise to a presumption. That language is still in the statute today.

The Fifth Circuit's holding in *Foradori v. Harris* is consistent with this approach and result. In *Foradori*, the Fifth Circuit deferred to the Supreme Court of Mississippi's characterization of a state law as creating "*prima facie* evidence and a rebuttable presumption that expenses were necessary and reasonable" to conclude that a state law created a presumption for Rule 302 purposes.[201] This suggests that the Fifth Circuit would similarly defer to the Supreme Court of Texas as to whether Section 18.001 creates a presumption. The Fifth Circuit's decision to then apply the Mississippi statute in federal court suggests that the similar Texas statute should also be applied in federal court.[202] Although the Supreme Court of Texas has not held one way or the other on whether Section 18.001 gives rise to a presumption, the reasoning in *Bagley* suggests that this would be the most natural reading of the statute.[203]

2. Rule 302 and the *Erie* Doctrine

If Section 18.001 creates a presumption for Rule 302 purposes, what does that mean for the statute's applicability under *Erie*? Does Rule 302 create a "shortcut" around the two-step analysis and automatically make the state law rule applicable, or does Rule 302 merely inform the two-step analysis? If it creates a shortcut, finding that Section 18.001 creates a presumption is the end of the discussion. If, however, Rule 302 merely informs the two-step *Erie*

[198] Tex. H.B. 2301, 85th Leg., R.S. (2017).

[199] *Id.*

[200] *Id.*

[201] Foradori v. Harris, 523 F.3d 477, 517–18 (5th Cir. 2008).

[202] *See id.* at 519.

[203] Bagley v. Dollar Tree Stores, Inc., No. 1:18-VC-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019).

analysis, some state law rules which create presumptions may be inapplicable in federal court despite Rule 302, and Section 18.001 may be one such inapplicable state law rule.

Foradori and *Bagley* suggest, but do not explicitly state, that the Fifth Circuit effectively applies Rule 302 as a shortcut around typical *Erie* considerations if the underlying state law presumption goes to an element of the plaintiff's claim.[204] In *Foradori*, the Fifth Circuit observed that the plaintiff's incurrence of medical expenses was "a fact which [was] an element of his claim, to which the law of Mississippi supplies the rule of decision."[205] Citing Wright & Miller Section 5136, the Fifth Circuit thus held that the Mississippi statute creating a presumption that those expenses were reasonable and necessary applied in federal court under Rule 302.[206] This approach follows from the Advisory Committee Note appended to Rule 302.[207] The note acknowledges the role of *Erie* in the application of state law to diversity cases, even stating that not "all presumptions in diversity cases are governed by state law."[208] But the Advisory Committee also observed that, in cases where state law presumptions were applied in federal court, "the burden of proof question had to do with a substantive element of the claim or defense."[209] Thus, "[a]pplication of the state law is called for only when the presumption operates upon such an element."[210] The Fifth Circuit thus followed the approach called for by the Advisory Committee in *Foradori*. Upon finding that the Mississippi statute, and the presumption following from it, acted on an element of the plaintiff's claim, no further *Erie* doctrine analysis was necessary—Rule 302 required that the statute be applied in federal court.[211]

The holding in *Bagley* mirrored the *Foradori* approach. Although the *Bagley* court acknowledged the *Erie*-based discussion other Texas federal district courts were having about Section 18.001, the *Bagley* court shifted the conversation to Rule 302 and found that the Rule required Section 18.001 to

[204] *See generally Foradori*, 523 F.3d at 519; *Bagley*, 2019 WL 6492585, at *6.

[205] *Foradori*, 523 F.3d at 519.

[206] *Id.*

[207] *See* FED. R. EVID. 302, advisory committee's note to 1972 proposed rules.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Foradori*, 523 F.3d at 519.

be applied in federal court before even considering *Erie*.[212] Like the Mississippi statute in *Foradori*, Section 18.001 acts on an element of the plaintiff's claim because plaintiffs must prove that their expenses were reasonable and necessary to include those expenses in damages.[213] And, having found that Section 18.001 creates a presumption about that element, the *Bagley* court concluded that Rule 302 requires both Section 18.001 and the effect of its presumption to be applied in federal court.[214] Both *Bagley* and *Foradori* thus suggest that the typical *Erie* analysis that has been applied to Section 18.001 can be sidestepped if Section 18.001 creates a presumption about an element of the plaintiff's claim.

Foradori and *Bagley* suggest that the way forward on this issue is not simply through *Erie*, but around it. If the Fifth Circuit is to decide whether Section 18.001 applies in federal court, then it must contend with the Rule 302 argument for applicability. Indeed, federal district courts everywhere may benefit from a careful analysis of how Rule 302 interacts with *Erie* issues, even if the immediate result is just to consider how the Rule and the doctrine apply to Section 18.001.

E. What's the Right Answer?

The ultimate answer the Fifth Circuit reaches on this issue may be less important than the reasoning the court will use to get there. Federal district courts have shown that different conclusions can be reached, but the most consistent thread through courts' interpretations of Section 18.001 under *Erie* has been misunderstanding *Erie* itself. It could well be that Section 18.001 is "purely procedural" and thus inapplicable, but it would be a mistake to hold that way just because the Supreme Court of Texas used the phrase "purely procedural" to describe the statute. It could also be that Section 18.001 is substantive, but it would be just as incorrect to hold that way based on an erroneous "*Erie* guess" about something outside the scope of state law. The Supreme Court and the Fifth Circuit have elaborated on the necessary analysis. If *Erie* is determinative of the issue, it must be applied according to those precedents.

The reality is that Section 18.001 likely sits in the middle between the two poles of substantive and procedural law. Categorizing it for *Erie* purposes

[212] Bagley v. Dollar Tree Stores, Inc., No. 1:18-VC-580, 2019 WL 6492585, at *6 (E.D. Tex. Dec. 2, 2019).

[213] *Id.*

[214] *Id.*

will be a line-drawing exercise in which either result would be reasonable. As with most close cases, most of the value from it will come from the court's elaboration of an elusive doctrine, explaining what kinds of arguments do or do not make sense under it. So long as the Fifth Circuit takes a reasonable path—explaining why there is or is not a conflict between the statute and federal rules, how the law squares with the touchstones of *Erie*, and the role of Rule 302—its destination will be correct.

VI. CONCLUSION

Whether Section 18.001 of the Texas Civil Practice and Remedies Code is substantive or procedural law under the *Erie* doctrine likely matters less than the reasoning courts use to find the answer. Advocates seeking to use or avoid Section 18.001 affidavits in federal court should carefully argue the conflicts and touchstones cases, as well as Rule 302, to guide the court to a proper answer. In an appropriate case, it will be incumbent on the Fifth Circuit to properly apply its relevant precedents—*Klocke*, *All Plaintiffs*, and cases interpreting Rule 302—to this problem to achieve uniformity of the law throughout Texas federal courts and to clarify the proper application of the *Erie* doctrine.