

FJC Staff Paper

CERTIFYING QUESTIONS OF STATE LAW:
EXPERIENCE OF FEDERAL JUDGES

Federal Judicial Center



CERTIFYING QUESTIONS OF STATE LAW:
EXPERIENCE OF FEDERAL JUDGES

By Carroll Seron

Federal Judicial Center
January 1983

This paper is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

Cite as C. Seron, Certifying Questions of State Law:
Experience of Federal Judges (Federal Judicial Center 1983).

FJC-SP-83-1

TABLE OF CONTENTS

SUMMARY	v
I. INTRODUCTION	1
II. METHODOLOGY	4
III. FINDINGS	6
Appendix A: States with Certification Procedures by Circuit and Year of Adoption	19
Appendix B: List of Sampled Cases	25
Appendix C: Questionnaire Used in the Study	29
Appendix D: Supplemental Data (Tables 5 through 9)	35

LIST OF TABLES

1.	Number and Percentage of Answers to Certified Questions by State	7
2.	Number and Percentage of Certified Questions by Basis of Jurisdiction	7
3.	Factors Given "Great Weight" by the Sample of Forty-nine Judges	13
4.	Time Flow of Sample Cases by Procedural Phase (N = 48)	16
5.	Weight Given by Judges to Factors in the Decision to Certify a Question (Absolute Frequencies for Forty-nine Cases)	37
6.	Weight Given by Judges to Factors in the Decision to Certify a Question (Relative Frequencies for Forty-nine Cases)	38
7.	Absolute Frequencies by Months Elapsed per Phase of Certification Process (N = 48)	39
8.	Relative Frequencies by Months Elapsed per Phase of Certification Process (N = 48)	40
9.	Percentage of Cases by Time Interval and Phase of Certification Process (N = 48)	41

SUMMARY

This paper reports the findings of a survey of district and appellate judges concerning their experience with the procedure for certification of questions of state law to high state courts. Forty-nine judges responded to a survey about their experience in cases in which questions had been certified to a state supreme court within the last three years.

The study found that, overall, the procedure for certification of questions of state law receives positive ratings from these judges. Although certification requires time for implementation, the state's answer often resolves the dispute underlying the case. Moreover, most judges suggested that the disadvantage of possible delay is outweighed by the procedure's advantages, specifically that an accurate answer from the appropriate tribunal avoids further litigation and that relations between state and federal courts are improved.

We also asked respondents to rate the weight of various factors in the decision to certify a question. The findings show that of the factors presented, judges consider the following to be most important: (1) the strength of a state's interest in the area of law under dispute, (2) the closeness of fit between the question raised in the case and questions of state law, (3) the degree to which the question requires the construction of a new

or previously unconstued state statute, (4) the need to avoid inconsistency with later state court decisions, and (5) the judge's past experience with the usefulness of a state court's answer.

I. INTRODUCTION

At the request of the judges of the Ninth Circuit, the Research Division of the Federal Judicial Center undertook a study of the certification of questions of state law to high state courts. The inquiry sought to answer the following questions: From the standpoint of judges, has the procedure for certifying questions of law to state supreme courts, as developed in some districts and circuits, been effective? What are its advantages? What are its disadvantages? Do its advantages outweigh whatever disadvantages it may have?

Certification is a procedure for ascertaining definitive answers to state law questions, with clearly defined parameters, that arise in federal courts. Certification was first introduced in 1945 when the Florida legislature enacted a statutory procedure that allowed the Supreme Court of the United States and the federal courts of appeals to certify questions of state law to the Florida Supreme Court for decision under circumstances in which the state law question was "determinative" of the case and there were "no controlling precedents" from state court decisions. Although the procedure was vigorously used by the Fifth Circuit in cases affecting Florida law, it did not play an important role in the federal courts generally until 1974, when the Supreme Court ruled that the certification procedure could be

used in a diversity case that raised no constitutional issues.¹

In response to encouragement by the Court to expand the use of this procedure, other states have taken steps to introduce a similar certification procedure. We identified twenty-five jurisdictions (twenty-four states and the Commonwealth of Puerto Rico) that presently allow certification in some form. Of these twenty-five jurisdictions, the states of the old Fifth Circuit, with the exception of Texas, have taken the lead in this area. (See appendix A for a list of the jurisdictions that have enacted certification procedures.) Generally, states have adopted procedures based on the Uniform Certification of Questions of Law Act,² although there are, of course, some variations.

There is also some difference among state supreme courts regarding which courts they will accept a question from. All states that have adopted the procedure will respond to a question certified by the United States Supreme Court or the United States courts of appeals. Twenty of the twenty-five jurisdictions also permit certification from district courts, and eight will accept a certification procedure from the highest or an intermediate appellate court of another state.

Although growing use of the certification procedure has fostered its acceptance, including promulgation of the Uniform Certification of Questions of Law Act by the Commission on Uniform

1. Lehman Bros. v. Schein, 416 U.S. 386 (1974).

2. 12 U.L.A. 52 (1975). (The act was first proposed in 1967.)

State Laws, the procedure has engendered some debate.³ This report enters the debate only insofar as systematic information about judicial experience with the procedure may be illuminating and helpful.

The remainder of this report is divided into two parts. In chapter 2, we describe the methodology employed to gather information from judges about their experiences with and perceptions of certification. In chapter 3, we present the findings of our survey of judges who participated in cases involving certification.

3. Brown, Certification--Federalism in Action, 7 Cum. L. Rev. 455 (1977); McKusick, Certification: A Procedure for Cooperation between State and Federal Courts, 16 M.L. Rev. 33 (1964); Mattis, Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts, 23 U. Miami L. Rev. 717 (1969); Roth, Certified Questions from the Federal Courts: Review and Re-proposal, 34 U. Miami L. Rev. 1 (1979).

II. METHODOLOGY

This study primarily entailed two steps: (1) identifying judges who had experience with certification procedures and (2) inquiring about that experience.

Step 1

Using LEXIS, we located federal cases in which a certified question of state law had been answered by a state tribunal. Information obtained for each case included (1) style of case, (2) docket number, (3) date of filing, (4) date of certification, (5) state court that answered the question, (6) date of termination, (7) date opinion was published, and (8) the Federal Register citation.⁴ For cases with published opinions, we used the Federal Reporter citation to ascertain the names of the judges who participated in a case; for other cases, we identified judges with the help of clerks of court.

To keep the inquiry manageable and current, we limited the survey to those judges who had participated in forty-nine cases⁵

4. We gratefully acknowledge the assistance of Norman Vance, conference attorney for the United States Court of Appeals for the Ninth Circuit, in providing these data. In addition, Mr. Vance provided a list of jurisdictional citations for the various states that have adopted the certification procedure (see appendix A).

5. One case was excluded from certain calculations because of an incomplete record; however, the judges who participated in that case were included in the survey.

decided within the last three years and for which certified questions had been answered.⁶ (See appendix B for a list of these cases.) Sixty-four district and appellate judges from twelve district or circuit courts had participated in the forty-nine selected cases. We did not, it should be noted, limit the sample to those judges who had written the opinions for the selected cases. Rather, we surveyed all judges who had sat on the cases under study.

Step 2

A questionnaire (see appendix C) sent to the sixty-four judges produced forty-nine responses, for a return rate of 76.5 percent. In each instance, we asked the judge to respond to the questionnaire in light of the specific case(s) in which he or she had participated. The questionnaire asked for subjective, impressionistic, and qualitative recollections as well as more objective, comparable, and quantifiable responses.

We also collected data on the cases themselves, including background data such as the basis of jurisdiction, the state court that received the certified question, and median time periods for the various phases of the case. Together, the findings of this study provide a useful and balanced picture of the viability of this procedure as described by judges across the districts and circuits.

6. We have seen no data that would identify cases, if any, in which state courts have declined to answer certified questions.

III. FINDINGS

The findings of this study are reported in three sections: (1) general background data, (2) judges' responses regarding their experience with the certification procedure, and (3) data on time intervals from filing to termination for the sampled cases.

Background Data

Table 1 shows the distribution by state of answers to certified questions. The greatest activity occurred in the old Fifth Circuit, with Florida (ten cases) and Georgia (seven cases) providing the largest numbers of answers. Florida, the first state to adopt the certification procedure, remains, it appears, the most frequent recipient of requests.

Table 2, which shows the basis of jurisdiction for the studied cases, discloses that the majority of cases with certified questions were based on diversity. Of the forty-eight cases, thirty-one, or 64.6 percent, were diversity cases. In 1974, the Supreme Court held in Lehman Brothers v. Schein⁷ that federal courts have the discretion to certify unclear issues of state law in routine diversity cases that raise no constitutional issues; the decision went on to support enthusiastically the use of the

7. 416 U.S. 386 (1974).

certification procedure because of its time savings and its encouragement of cooperative state-federal court relations.

TABLE 1
NUMBER AND PERCENTAGE OF ANSWERS
TO CERTIFIED QUESTIONS BY STATE

<u>State</u>	<u>Number</u>	<u>Percentage</u>
Alabama	4	8.3
Colorado	2	4.2
Florida	10	20.8
Georgia	7	14.6
Iowa	1	2.1
Kansas	3	6.3
Louisiana	5	10.4
Maryland	2	4.2
Massachusetts	2	4.2
Oklahoma	5	10.4
Rhode Island	5	10.4
Washington	1	2.1
West Virginia	<u>1</u>	<u>2.1</u>
Total	48	100.0

TABLE 2
NUMBER AND PERCENTAGE OF CERTIFIED
QUESTIONS BY BASIS OF JURISDICTION

<u>Basis of Jurisdiction</u>	<u>Number</u>	<u>Percentage</u>
Bankruptcy	1	2.1
Diversity	31	64.6
Federal question	13	27.1
U.S. case	<u>3</u>	<u>6.3</u>
Total	48	100.0

Judges' Responses

In reviewing the findings presented below, one should keep in mind that most judges' responses are based on experience with more than one certification procedure. Seventeen judges, or 35 percent of the respondents, had used certification procedures twice within the last three years. The number of experiences per individual ranged from 1 to 11 cases during the period, with a median of 2.18 cases per judge. Although the group of judges surveyed is relatively small, their responses show that the procedure is not infrequent in the respective districts and circuits. There is no reason to believe that the procedure could not be used throughout the state and federal court systems wherever state practice permits it.

In most instances, certification procedures were initiated after argument and by the court. Thirty-four judges, or 70 percent of the respondents, reported that certification procedures were invoked after oral argument, and thirty-two judges, or 65 percent, reported that the court suggested the procedure as an option for resolving a state issue in dispute.⁸

The reports of these judges echo prevailing practice; the procedures adopted by most federal courts reflect the sentiment

8. Detailed data on the responses to each of the questions are reported in appendix D. The tables in appendix D also report missing data, or instances in which a judge did not respond to a specific question. Note that the percentages reported in the text take these missing cases into account by reporting relative frequencies. However, the tables in the appendix also show adjusted frequencies, that is, percentages that exclude the missing cases for the respective indicator.

that judges are in the most appropriate position to determine when certification is a correct step. The centrality of the judge's role in the determination to certify a case is to be contrasted with the apparently hypothetical circumstance in which the parties propose this procedure.

The Fifth Circuit has developed an interesting procedure for balancing the determination process between judge and counsel to a case. Once the judges have decided to certify a question, counsel for both sides are asked to present a common statement outlining the question to be filed. Only if the parties cannot agree on the question will the judges act alone. Other districts and circuits, however, appear not to have established a policy of including counsel in the determination process.⁹

Moreover, many circuits and districts recognize that once certification of a question of state law has been deemed appropriate, the respective district or circuit court must accept the state's answer as authoritative. But certification of a state law question does not, of course, relieve the federal court of its responsibility for guaranteeing that state laws are not in violation of the United States Constitution. The answer to a state law question must, like that to any legal question, survive federal constitutional tests, and therefore, certification should not be used indiscriminately. One judge in the survey clearly underscored the importance of this distinction when he wrote,

9. 17 Wright, Miller, & Cooper, Federal Practice and Procedure § 4248 (1978).

The availability of a certification procedure should not result in certification when a U.S. Constitutional principle might be delayed in solution or result in abstention, as for instance in 5th Circuit states if they had had certification policies during the Racial Civil Rights Litigation from '56 to '65.

A Fifth Circuit decision also underscored this point: "We use much judgment, restraint, and discretion in certifying. We do not dictate."¹⁰ Once this crucial distinction has been responsibly addressed, however, then the certification procedure is most effective when the state's answer is considered to be authoritative. Again, the Fifth Circuit has taken the lead in this area and views the state's answer as binding.¹¹

In support of the view that the certification procedure, appropriately used, is a useful and effective mechanism for resolving state questions that arise in federal courts are the positive ratings given to the procedure by the judges surveyed. Twenty-one judges, or 43 percent of the sample, reported that the answer provided by the state supreme court resolved the case. Forty-one judges, or 84 percent, found the procedure to be "extremely useful," and thirty-seven judges, or 76 percent, gave certification a "very positive" rating.

Our survey also asked judges to provide general comments on the certification procedure; thirty-nine of the forty-nine respondents, or 80 percent, took time to elaborate, in some way, on

10. *Barnes v. Atl. & Pac. Light Ins. Co. of Am.*, 514 F.2d 704, 705 n.4.

11. See *Wright et al.*, supra note 9.

the questions raised in this study. Moreover, there is a consistency to the comments of these judges: Eighteen judges noted that the overall benefit of the procedure is that it provides an authoritative statement on the question in dispute, as contrasted with federal speculation on a future state pronouncement. Echoing the comments of many, one judge wrote, "[A certification] [c]an provide [a] definitive answer as to [a] question of state law where one is lacking. At best a federal decision would be definitive for the parties but only persuasive to others."

Five judges commented that the certification procedure provides a concrete mechanism for improving state-federal relations. As one judge wrote, "In addition to its own intrinsic benefits it builds a sense of proper relationship and respect between federal and state courts."

Two others suggested that the use of the procedure avoids future conflicts. Finally, one judge noted that the procedure gives state supreme courts the "first crack" at an issue, when they are the proper locale, thereby supporting an appropriate concept of federalism.

In those states with a certification procedure, the state court may reformulate the issue in dispute if it sees fit. The adoption of this procedure is the result of the various states' experience, and the importance of this discretion should not be overlooked.¹² In one of the first cases in which certification

12. See Wright et al., supra note 9.

was used,¹³ the Fifth Circuit learned seven years after the termination of the case that it had certified the wrong question. To ensure against the recurrence of this type of situation, all states, when adopting a certification procedure, have retained the discretion to rewrite the question. The discretion of states to reformulate the question if necessary not only enhances the benefits already noted for certification but also contributes to the high regard that exists for the procedure where it has been developed.

The survey also elicited information on other aspects of the certification procedure. We asked judges to rate the weight of various factors in the decision to certify a question of state law. Table 3 shows the absolute and relative frequencies for those factors that the sampled judges rated most important.¹⁴

An examination of table 3 shows that of the factors given "great weight," judges consider (1) the closeness of fit between the question raised in the case before them and questions of state law and (2) whether the question before them had received prior interpretation to be of primary importance in shaping their determination to certify a question. Judges appear to rely on the certification procedure when they need a state's guidance in an uncharted area of law. The findings suggest that judges use

13. *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969).

14. Other factors were included in the questionnaire, but did not emerge as important considerations in the opinion of the judges. Appendix D shows the complete findings for this question.

the procedure as it was originally intended, namely, to afford state courts a first opportunity to interpret their own laws, to avoid federal-state conflict, and to provide definitive precedent in both systems. The judges' criteria for deciding whether to certify a question of state law are clearly as advantageous to state courts as they are to federal courts, including the lawyers and litigants in both.

Substantiating the effectiveness of the procedure and at the same time underscoring the impact it may have, one judge described the steps leading up to a particular certification procedure. In the instance described, there was no case construing

TABLE 3
FACTORS GIVEN "GREAT WEIGHT" BY THE SAMPLE OF
FORTY-NINE JUDGES

Factor	Absolute Frequency	Relative Frequency
Question required construction of new or previously unconstrued state statute	29	59.2%
Closeness of question in case to question of state law	27	55.1%
Strength of state interest in area of law	23	46.9%
Avoiding inconsistency with later state court decisions	18	36.7%
Past experience with usefulness of state court answers	17	34.7%

the provision in dispute. Thus, the judge "decided the issue with a memorandum opinion." He writes, "Then, I discovered a district judge was permitted to certify a question, vacated my order, obtained the necessary forms from the Supreme Court of . . . , and sent the questions to that tribunal." He continues,

After full briefing and oral argument, the . . . Supreme Court decided the question. As you might have suspected, the . . . court's resolution of the issue was opposite to mine. Thus, had there been no certification procedure, the only case in the books upon which counsel and parties might rely for the interpretation of that provision of . . . law would have been a district court opinion from [another] district by a district judge who had never practiced in the . . . district courts nor sat as a judge in that state. Presumably, when the issue finally reached the . . . courts, that state's supreme court would have resolved it contrary to the district judge's resolution and the parties that had relied upon that federal court interpretation in the meantime would have acted contrary to law.

The description provided by this judge supports the overall findings of this report. In essence, certification of state law questions provides a procedure for avoiding uncertainty and conflict. Even if the state court had not differed with the judge quoted above, the issue would have remained open for some time, with substantial potential for wasted effort, time, and resources.

We also asked judges to rate their experience with obtaining necessary documents for certification from the respective parties. On this point, judges reported generally positive experiences. Twenty-five judges, or 51 percent, found it "very easy" and eight judges, or an additional 16.3 percent, found it "somewhat easy" to obtain the necessary papers.

Finally, judges were asked to rate the speed of certification, relative to the time they would have expected a case to take had the procedure not been invoked. Eighteen judges, or 37 percent, reported that cases involving certification were "somewhat slower," and seven judges, or 14 percent, reported that such cases were "much slower" than they would have expected, other things being equal. This point is underscored in additional comments of the respondents.

Time Intervals

The data shown in table 4 substantiate the judges' impressions that cases involving certification take longer to proceed through the courts than do typical cases, but the data also raise questions about the contribution of the certification procedure to total elapsed time.

The largest segment of elapsed time, a median of twenty-four months, occurs between filing and certification of the question to the state court. There is no apparent reason to believe that the time required to reach this point is substantially affected by the subsequent certification process. Obviously, preparation of the certified question requires some time, but most judges have indicated that this step is easily accomplished. We expect that over time the courts' experience with the procedure, such as that accumulated in the Fifth Circuit, will operate to keep this period at a minimum.

Although the time required to obtain the state court answer, a median of six months, is clearly a delay occasioned by

the certification process, that time must be set off against the time that would be required for the federal court to research and reach its own answer to the question certified to the state court. Thus any delay experienced while waiting for the state court answer must net out to substantially less than the period shown in table 4. The data do not permit us to estimate how substantial the difference may be. Again, experience with the process, in this instance on the part of state courts, will result in increasingly prompt responses.

The period between receipt of the state's answer and final disposition, a median of three months, is markedly shorter than other phases of the proceedings in these cases.

We conclude from these data (1) that although cases involving questions of unsettled state law require more time from filing to disposition than more typical cases, only a relatively small proportion of that time is directly attributable to use of

TABLE 4
TIME FLOW OF SAMPLE CASES BY PROCEDURAL PHASE
(N = 48)

Characteristic (in Months)	From Filing to Certifi- cation	From Certifi- cation to State's Answer	From State's Answer to Final Disposition	From Filing to Disposition
Median	24.25	6.36	3.2	38.5
Range				
Shortest	3	-1	-1	9
Longest	54	30	26	68

the certification procedure, and (2) that this delay should decrease with greater experience.

Finally, we note that obtaining a state court answer in appropriate cases may result in some economies of time. Judge John R. Brown has observed that the delay attending certification is more than compensated by subsequent expedition of other cases involving the same or related questions of state law. Other comments received in the survey corroborate that view.

Overall, the findings suggest that the extra time taken by certification does not outweigh the benefits of the procedure.

APPENDIX A

States with Certification Procedures
by Circuit and Year of Adoption

<u>Circuit</u>	<u>Effective Date</u>	<u>Jurisdictional Citation</u> ¹
<u>First</u>		
Maine	12/31/67	Me. R. Civ. P. 76B (West 1982)
	1/1/81	Me. Rev. Stat. Ann. tit. 4, § 57 (West Supp. 1981-1982)
Massachusetts	11/1/71	Mass. Sup. Jud. Ct. Gen. R. 1:03 (West 1982)
New Hampshire	3/28/82	N.H. Sup. Ct. R. 34 (Equity 1981)
Puerto Rico	9/1/75	P.R. Laws Ann. tit. 4, App. R. 27 (Equity 1978)
Rhode Island	4/24/74	R.I. Gen. Laws § 7, Sup. Ct. R. 6 (Bobbs-Merrill 1976)
<u>Fourth</u>		
Maryland	1973	Md. Cts. & Jud. Proc. Code Ann. §§ 12-601 to -609 (Michie 1980)
West Virginia	1976	W. Va. Code §§ 51-1A-1 to -12 (Michie 1981)
<u>Fifth</u>		
Louisiana	10/4/79	La. Sup. Ct. R. 72.1 (West Supp. 1982)
	1972	La. Rev. Stat. Ann. § 13-72.1 (West Supp. 1982)
Mississippi	1980	Miss. Sup. Ct. R. 46 (1977)
<u>Sixth</u>		
Kentucky	9/1/78	Ky. Sup. Ct. R. 76.37 (West Supp. 1981)

<u>Circuit</u>	<u>Effective Date</u>	<u>Jurisdictional Citation</u> ¹
<u>Seventh</u>		
Indiana	1971	Ind. Code Ann. § 33-2-4-1 (Bobbs-Merrill 1975) Ind. App. R. 15(O) (Bobbs-Merrill 1980)
<u>Eighth</u>		
Iowa	1/1/80	Iowa Code Ann. §§ 684A.1-11 (West Supp. 1982-1983)
Minnesota	8/1/73	Minn. Stat. Ann. § 480.061 (West Supp. 1982)
North Dakota	2/15/77	N.D. R. App. P. 47 (Smith Supp. 1981)
<u>Ninth</u>		
Hawaii	1/2/80	Hawaii Rev. Stat. § 602-5(2) (Supp. 1981)
Montana ²	11/14/69	Irion v. Glens Falls Ins. Co., 461 P.2d 199, 154 Mont. 156 (1969) Mont. Sup. Ct. R. 1 (unpublished)
Washington	6/10/65	Wash. Rev. Code Ann. §§ 2.60.010-900 (West Supp. 1982)
<u>Tenth</u>		
Colorado	6/24/76	Colo. App. R. 21.1 at 7B Colo. Rev. Stat. § 500 (Bradford-Robinson 1973)
Kansas	7/1/79	Kan. Stat. Ann. §§ 60-3201 to 3212 (Supp. 1981)
New Mexico ³	1975	N.M. Stat. Ann. § 34-2-8 (Michie 1981)
Oklahoma ⁴	7/1/73	Okla. Stat. Ann. tit. 20, §§ 1601-1612 (West Supp. 1981-1982)
Wyoming	8/1/78	Wyo. R. App. P. §§ 11.01-07 (Michie Supp. 1982)

<u>Circuit</u>	<u>Effective Date</u>	<u>Jurisdictional Citation</u> ¹
<u>Eleventh</u>		
Alabama	12/27/73	Ala. R. App. P. 18 (West 1982) Ala. Const. Art. VI, § 6.02(b)(3) (Michie 1977)
Florida	4/1/80	Fla. Const. Art. V, § 3(b)(6) (West Supp. 1982) Fla. App. R. 4.61 (West 1967)
Georgia	7/1/77	Ga. Code Ann. § 15-2-9 (Michie 1982)

¹The citation shown is the most current provision for certification within the respective jurisdiction.

²The Montana Supreme Court announced that it had the authority to answer certified questions. See the case citation.

³Adopted certification procedure in 1975, but the adoption was not approved by the National Conference of the Commission on Uniform State Laws.

⁴In the state of Oklahoma, the Court of Criminal Appeals may also answer questions of law certified to it by the United States Supreme Court, United States courts of appeals, United States district courts, or the highest appellate court or intermediate appellate court of any other state. Okla. Stat. Ann. tit. 20 § 1602.

APPENDIX B

List of Sampled Cases

First Circuit

78-1549 Siravo v. Great American Insurance Co.
79-1210 Eisner v. Hertz Corp.

Fourth Circuit

77-1217 United States v. Baldwin
77-1658 Goldstein v. Potomac Power Co.

Fifth Circuit

74-3670 Miree v. United States
75-2703 Phillips v. Inglehart
75-2965 Bornstein v. Citizens National of Orlando
75-3093 Wansor v. George Hantscho Co.
75-4019 Olson v. Shell Oil
75-4216 Blanchard v. Engine & Gas Compressor Services,
Inc.
75-4235 McClintock v. General Motors Acceptance Corp.
75-4445 Castlewood International Corp. v. Simon
75-4464 Miller v. Carson
76-1515 Cesary v. Second National Bank
76-1555 Mathis v. G.E. Corp.
76-2044 American Eastern Development Corp.
v. Everglass Mariana, Inc.
76-2213 Aetna Casualty v. Hertz Corp.
76-2287 Hale v. Ford Motor Credit Co.
76-2397 In re Cedars of Lebanon Hospital, Inc.
76-3001 Pokorney v. First Federal Savings & Loan
77-1628 Citizens Southern Factors, Inc. v. Small
Business Administration
77-2131 Baroco v. Araserv, Inc.
77-3023 Southern Guaranty Insurance Co. v. Pearce
78-2406 Adams v. Murphy
78-2479 Hollowell v. Jov
78-2708 Laubie v. Sonesta International
78-3615 Aretz v. United States
78-3704 Corley v. Milliken
79-1870 Wood v. Old Security Life Insurance Co.
79-3187 Curtis v. Allstate

Ninth Circuit

76-2042 Hart v. Peoples National Bank

Tenth Circuit

77-1906 United States v. Criterion Insurance Co.
77-1984 Producers Oil Co. v. Gore

APPENDIX C

Questionnaire Used in the Study

Judge _____

The questions on this questionnaire refer to your experience in the case(s) listed below. If more than one case is listed, please respond to the questions by thinking of the typical case in which you have used a procedure for certification of questions of state law. Space is provided at the end of the questionnaire for any additional comments you may have.

Docket No.	Case
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Is our listing of cases correct? If not, and you have been involved in other cases within the last three years in which a certification procedure was used, please correct the listing and complete the questionnaire. If you have never been involved in a case using a certification procedure, check the space below and accept our apology for any inconvenience our error may have caused you.

I did not participate in the above case(s). _____

1. Was the possibility of using certification in the above case(s) raised by a party's motion or by the court on its own motion?

party court varies from case to case

2. At what stage in the proceedings was the certification procedure invoked?

before the case or issue was briefed before the case or issue was argued after the case or issue was argued

3. Please rate the weight given each of the following factors in the decision to certify a question of state law:

	<u>great weight</u>	<u>some weight</u>	<u>little weight</u>	<u>not applicable</u>
A. Strength of state interest in area of law.	_____	_____	_____	_____
B. Need to apply law of nonforum state or (for appellate courts) fact that district court applied law of nonforum state.	_____	_____	_____	_____
C. Closeness of question of state law.	_____	_____	_____	_____
D. Availability of sources to determine state law, such as decisions in related areas.	_____	_____	_____	_____
E. Attractiveness as an alternative to complete abstention.	_____	_____	_____	_____
F. Question required construction of new or previously unconstructed state statute.	_____	_____	_____	_____
G. Competing lines of authority in decisions of lower appellate courts of state.	_____	_____	_____	_____
H. Split between states as to correct answer.	_____	_____	_____	_____
I. Concerns about forum shopping.	_____	_____	_____	_____
J. Avoiding inconsistency with later state court decisions.	_____	_____	_____	_____

- K. Identity of state to which question would be certified. _____
- L. Past experience with usefulness of state court answers. _____
- M. Extent to which disposition would be delayed while waiting for state court answer. _____
- N. Certification sought by parties. _____
- O. Other (please specify):

4. How difficult was it to obtain from the parties the necessary documents for certification?

very
difficult
somewhat
difficult
somewhat
easy
very
easy

5. Relative to what you would have expected for the case(s) if the certification procedure had not been used, was the disposition of the case(s) faster or slower?

much
faster
somewhat
faster
about
the same
somewhat
slower
much
slower

6. If the state answer did not completely resolve the case(s), what was the effect of the state answer on the remaining issues?

remaining issues
were made more
complicated
remaining issues
were made more
simple
remaining issues
were unaffected
state
answer
resolved
case

7. How would you rate the usefulness of the state court's answer?

extremely
useful
moderately
useful
minimally
useful
not
useful

8. What is your overall opinion of certification procedures?

<u>very</u> positive	<u>somewhat</u> positive	<u>neutral</u>	<u>somewhat</u> negative	<u>very</u> negative
-------------------------	-----------------------------	----------------	-----------------------------	-------------------------

9. In your experience, what is the major benefit of a certification procedure?

10. In your experience, what is the major drawback of a certification procedure?

11. If you would like to make any additional comments on your experience with procedures for certification of questions of state law, we would welcome them.

Thank you very much for your time and effort. Please return the questionnaire in the attached envelope.

APPENDIX D

Supplemental Data (Tables 5 through 9)

TABLE 5

WEIGHT GIVEN BY JUDGES TO FACTORS IN THE DECISION TO CERTIFY A QUESTION
(ABSOLUTE FREQUENCIES FOR FORTY-NINE CASES)

Weight	Strength of State Interest	Need to Apply Law of Non-Forum State	Closeness of Question of State Law	Availability of Sources of State Law	Attractiveness vs. Complete Abstention	Construction of New Statute	Competing Lines of Authority
Great weight (1)	23	0	27	12	4	29	9
Some weight (2)	8	6	8	8	5	5	5
Little weight (3)	6	7	2	10	14	1	8
Not applicable (4)	1	23	4	7	16	3	17
No answer (0)	11	13	8	12	10	11	10
Median weight	1.09	3.29	1.11	1.56	2.89	.97	2.56

Weight	Split between States	Concerns about Forum Shopping	Avoiding Inconsistency with Later Decisions	Identity of State of Certification	Experience w/ Usefulness of Court Answer	Extent of Disposition Delay	Certification Sought by Parties
Great weight (1)	3	1	18	1	17	1	0
Some weight (2)	7	2	11	3	8	18	11
Little weight (3)	11	12	7	18	7	19	10
Not applicable (4)	18	24	4	16	6	2	15
No answer (0)	10	10	9	11	11	9	13
Median weight	2.91	3.46	1.36	3.03	1.29	2.31	2.55

TABLE 6

WEIGHT GIVEN BY JUDGES TO FACTORS IN THE DECISION TO CERTIFY A QUESTION
(RELATIVE FREQUENCIES FOR FORTY-NINE CASES)

Weight	Strength of State Interest	Need to Apply Law of Non-Forum State	Closeness of Question of State Law	Availability of Sources of State Law	Attractiveness vs. Complete Abstention	Construction of New Statute	Competing Lines of Authority
Great weight (1)	46.94%	0.00%	55.10%	24.49%	8.16%	59.18%	18.37%
Some weight (2)	16.33	12.24	16.33	16.33	10.20	10.20	10.20
Little weight (3)	12.24	14.29	4.08	20.41	28.57	2.04	16.33
Not applicable (4)	2.04	46.94	8.16	14.29	32.65	6.12	34.69
No answer (0)	22.45%	26.53%	16.33%	24.49%	20.41%	22.45%	20.41%
Median weight	1.09	3.29	1.11	1.56	2.89	.97	2.56

Weight	Split between States	Concerns about Forum Shopping	Avoiding Inconsistency with Later Decisions	Identity of State of Certification	Experience w/ Usefulness of Court Answer	Extent of Disposition Delay	Certification Sought by Parties	∞
Great weight (1)	6.12%	2.04%	36.73%	2.04%	34.69%	2.04%	0.00%	
Some weight (2)	14.29	4.08	22.45	6.12	16.33	36.73	22.45	
Little weight (3)	22.45	24.49	14.29	36.73	14.29	38.78	20.41	
Not applicable (4)	36.73	48.98	8.16	32.65	12.24	4.08	30.61	
No answer (0)	20.41%	20.41%	18.37%	22.45%	22.45%	18.37%	26.53%	
Median weight	2.91	3.46	1.36	3.03	1.29	2.31	2.55	

TABLE 7

ABSOLUTE FREQUENCIES BY MONTHS ELAPSED PER PHASE
OF CERTIFICATION PROCESS (N = 48)

Months	Filing to Certification	Certification to State Answer	State Answer to Disposition	Filing to Disposition
0	0	3	7	0
1	0	2	4	0
2	0	4	6	0
3	1	1	10	0
4	2	5	6	0
5	0	3	1	0
6	0	7	4	0
7	1	3	3	0
8	2	4	1	0
9	1	1	2	1
10	0	3	2	1
11	0	2	0	0
12	3	2	0	0
13	1	1	0	1
14	3	1	0	0
15	3	0	0	2
16	0	2	0	0
18	1	1	1	0
19	0	1	0	1
20	1	0	0	0
21	0	0	0	2
22	1	0	0	2
23	1	0	0	0
24	4	0	0	1
25	2	0	0	3
26	3	0	1	0
27	2	0	0	0
28	0	1	0	0
29	1	0	0	0
30	1	1	0	1
31	1	0	0	2
33	2	0	0	0
34	1	0	0	2
35	2	0	0	2
36	1	0	0	2
38	1	0	0	1
39	2	0	0	2
40	1	0	0	1
41	0	0	0	1
42	1	0	0	3
44	0	0	0	1
45	0	0	0	3
46	0	0	0	2
48	1	0	0	1
50	0	0	0	2
52	0	0	0	2
53	0	0	0	2
54	1	0	0	0
57	0	0	0	1
64	0	0	0	1
65	0	0	0	1
68	0	0	0	1
Median	24.25	6.67	3.58	38.50

TABLE 8

RELATIVE FREQUENCIES BY MONTHS ELAPSED PER PHASE
OF CERTIFICATION PROCESS (N = 48)

Months	Filing to Certification	Certification to State Answer	State Answer to Disposition	Filing to Disposition
0	0.00%	6.25%	14.58%	0.00%
1	0.00	4.17	8.33	0.00
2	0.00	8.33	12.50	0.00
3	2.08	2.08	20.83	0.00
4	4.17	10.42	12.50	0.00
5	0.00	6.25	2.08	0.00
6	0.00	14.58	8.33	0.00
7	2.08	6.25	6.25	0.00
8	4.17	8.33	2.08	0.00
9	2.08	2.08	4.17	2.08
10	0.00	6.25	4.17	2.08
11	0.00	4.17	0.00	0.00
12	6.25	4.17	0.00	0.00
13	2.08	2.08	0.00	2.08
14	6.25	2.08	0.00	0.00
15	6.25	0.00	0.00	4.17
16	0.00	4.17	0.00	0.00
18	2.08	2.08	2.08	0.00
19	0.00	2.08	0.00	2.08
20	2.08	0.00	0.00	0.00
21	0.00	0.00	0.00	4.17
22	2.08	0.00	0.00	4.17
23	2.08	0.00	0.00	0.00
24	8.33	0.00	0.00	2.08
25	4.17	0.00	0.00	6.25
26	6.25	0.00	2.08	0.00
27	4.17	0.00	0.00	0.00
28	0.00	2.08	0.00	0.00
29	2.08	0.00	0.00	0.00
30	2.08	2.08	0.00	2.08
31	2.08	0.00	0.00	4.17
33	4.17	0.00	0.00	0.00
34	2.08	0.00	0.00	4.17
35	4.17	0.00	0.00	4.17
36	2.08	0.00	0.00	4.17
38	2.08	0.00	0.00	2.08
39	4.17	0.00	0.00	4.17
40	2.08	0.00	0.00	2.08
41	0.00	0.00	0.00	2.08
42	2.08	0.00	0.00	6.25
44	0.00	0.00	0.00	2.08
45	0.00	0.00	0.00	6.25
46	0.00	0.00	0.00	4.17
48	2.08	0.00	0.00	2.08
50	0.00	0.00	0.00	4.17
52	0.00	0.00	0.00	4.17
53	0.00	0.00	0.00	4.17
54	2.08	0.00	0.00	0.00
57	0.00	0.00	0.00	2.08
64	0.00	0.00	0.00	2.08
65	0.00	0.00	0.00	2.08
68	0.00%	0.00%	0.00%	2.08%
Median	24.25	6.36	3.20	38.50

TABLE 9

PERCENTAGE OF CASES BY TIME INTERVAL AND PHASE
OF CERTIFICATION PROCESS (N = 48)

Six-Month Interval	Filing to Certification	Certification to State Answer	State Answer to Disposition	Filing to Disposition
00-05	6.25%	37.50%	70.83%	0.00%
06-11	8.33	41.67	25.00	4.17
12-17	20.83	12.50	0.00	6.25
18-23	8.33	4.17	2.08	10.42
24-29	25.00	2.08	2.08	8.33
30-35	14.58	2.08	0.00	14.58
36-41	10.42	0.00	0.00	14.58
42-47	2.08	0.00	0.00	18.75
48-53	2.08	0.00	0.00	14.58
54-59	2.08	0.00	0.00	2.08
60-65	0.00	0.00	0.00	4.17
66-68	0.00%	0.00%	0.00%	2.08%
Median	24.25	6.67	3.58	38.50



Federal Judicial Center

Dolley Madison House
1520 H Street, N.W.
Washington, D.C. 20005
202/633-6011