UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

25th Annual Conference on State and Federal Appeals

June 4 – 5, 2015, Four Seasons Hotel
Austin, Texas

Certification and the Quest for Certainty: A Primer on Certified Questions to The Texas Supreme Court

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Certification and the Quest for Certainty: A Primer on Certified Questions to the Texas Supreme Court[1]

The Texas Rules of Appellate Procedure limit consideration of certified questions from federal appellate courts to circumstances in which "the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent." *See* Tex. R. App. P. 58.1 The Texas Supreme Court may decline to answer the questions certified to it, and its only purpose in answering the question "is to obviate the need for [federal appellate courts] to venture into 'the always-dangerous undertaking of predicting what Texas courts would hold if the issue were squarely presented to them.'" *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 797, 798 n.9 (Tex. 1992) (citing *Stephens v. State Farm Mut. Auto. Ins. Co*., 508 F.2d 1363, 1366 (5th Cir. 1975). By answering certified questions for appellate courts that are *Erie*-bound to apply Texas law, the Court "avoid[s] the potential that the federal courts will guess wrongly on unsettled issues, thus contributing to, rather than ameliorating confusion about the state of Texas law." *Id*. This sort of "cooperative effort" is clearly "in the best interests of an orderly development of [the Court's] own unique jurisprudence, and to the bar, as well as in the best interests of the litigants . . . ." *Id.*

This paper examines the certification process from a historical and constitutional perspective, as well as from a practical perspective, with the hope of providing some insight into the Court's certification practice. Part I of this paper addresses the Court's constitutional and statutory authority to consider questions certified from federal appellate courts. Part II briefly examines the nuts and bolts of the certification process. Part III of this paper provides a short synopsis of the thirty-four cases that have been certified to the Court. Finally, Part IV concludes with some observations about the substantive areas of Texas law from which these cases are derived.

I. Constitutional/Statutory Authority

In general, certification is the process by which federal courts get answers to questions of state law. The primary basis in history and theory for the practice of certifying questions is that it furthers the goals of federalism.[2] The United States Supreme Court has favored certification as a

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[1]Authored by David L. Plaut and presented by Catherine L. Hanna, Hanna & Plaut, LLP at the 2015 University of Texas State and Federal Appellate Seminar with apologies to Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918) ("[c]ertitude is not the test of certainty. We have been cocksure of many things that were not so."). The authors gratefully acknowledge the research and assistance of Jeff Glass in connection with this paper.

[2] There is considerable debate in the literature on the relative merits of certification. *Compare* Bruce M. Seyla, *Certified Madness: Ask a Silly Question*, 29 SUFFOLK U.L. REV. 677 (1995) (emphasizing the limits of certification) *with* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PENN. L. REV. 1459, 1544–63 (1997) (arguing for more frequent certifications). One argument often made against certification is the burden it allegedly places on state courts. *See, e.g., McCarthy v. Olin Corp*., 119 F.3d 148, 153 (2d Cir. 1997) ("Certification should not be used as 'a device for shifting the burdens of this Court to those whose burdens are at least as great.'" (quoting *Dorman v. Satti*, 862 F.2d 432, 434–35 (2d Cir.1988)). That burden tends to be balanced

mechanism that helps to "build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974). Certification reduces the friction that "inevitably occurs when federal courts usurp state prerogatives by resolving open issues of state law without the participation of the state judiciary." Seyla, *Certified Madness*, 29 SUFFOLK U.L. REV. at 679 Thus, certification promotes federalist ideals by reducing the tension between the state and federal judicial systems. *Id.*

As anyone familiar with federal removal practice is aware, federal courts decide state-law questions routinely just as state judges often decide federal-law questions as a matter of course. When there is clear precedent, this inter-jurisdictional sleuthing is not particularly challenging. However, in cases where precedent is either unclear or non-existent, federal courts must make an *Erie*-guess regarding what the state's highest court would decide if it were presented with the question at issue. "Certification, unlike abstention, does not require a federal court to surrender its jurisdiction or force the parties into state court for a full round of litigation there. Instead, certification merely permits a state's highest court to decide a question of law." Challener, Deborah J., *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L. J. 847, 884 (2007). Certification is certainly an option when determining the parameters of state law is perceived to be particularly difficult. In our view, the likelihood of certification is driven by several factors, including the complexity of the issue, the breadth of its potential impacts on litigants and others, and the degree to which the issue has been addressed by other courts.

Texas is a relative newcomer to the inter-jurisdictional certification process, which originated with an act of the Florida Legislature in 1945, Fla. Stat. § 25.031, and has now been adopted in some form in at least forty states. Chief Justice Thomas R. Phillips, *Certification of Questions of Law by Federal to State Courts*, Judicial Conference of the United States, Federal–State Jurisdiction Committee 1 (Jan. 16, 1992) (manuscript on file with the Supreme Court of Texas). The Texas Supreme Court's constitutional authority to answer questions of state law certified by federal appellate courts is of relatively recent vintage. In 1985, Texas voters approved an amendment to the state constitution that became Article V, section 3-c. *Id.* at 687. The amendment became effective January 1, 1986, and the Supreme Court thereafter promulgated an implementing rule as authorized by the constitution. *See id*. (citing former Tex. R. App. P. 14 now Tex. R. App. P. 58 addressing "Certification of Questions of Law by United States Courts"). The first case certified to the Texas Supreme Court arrived in 1988. *See Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988). The Fifth Circuit, on the other hand, has had more extensive experience with certification than any other court, state or federal. See 17A C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE & PROCEDURE § 4248 at 176 (1988). Many of the practices and procedures relating to certification now in common use were first developed by that court. *Id.*

The certification procedure insures proper deference to state court interpretation "of the unique law of each state." *Amberboy*, 831 S.W.2d at 799. To some extent, each time a question is certified to a state court, the federal court is fulfilling its obligation under the federal system to respect a state's laws. *Id.* Texas, like other states, has emphasized the "independent vitality" of the Texas Constitution and the Court's "power and duty to protect the additional state guaranteed

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by the concomitant relief on judicial and other resources that may result from definitive determination of an important state law issue, avoiding a great deal of lower court litigation.

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First appeared as part of the conference materials for the
25th Annual Conference on State and Federal Appeals session
"The State of Certified Questions in the Fifth Circuit"