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Federal Court Certification of State Law Questions: Lessons from Other Circuits

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I. Introduction

Certification of questions to state supreme courts dates back to 1945 when the first state enacted a certification procedure allowing the state's high court to accept and decide questions of state law necessary to the decision of lawsuits pending in federal appellate courts. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1545 (1997); *see Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

Since then, every state (except North Carolina[1]) has adopted a certification procedure permitting its state's highest court to accept certified questions from the U.S. Supreme Court and from federal appellate courts. Some states also permit certified questions from federal district courts or from other state supreme courts.[2]

The U.S. Supreme Court has long recognized that certification "allows a federal court faced with a novel statelaw question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). The Supreme Court's vision is that, "in the long run," doing so not only "save[s] time, energy, and resources, [but also] helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

"Although the Supreme Court has endorsed the use of certification procedures when available, it has never established definitive standards for certification." John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 Conn. Ins. L.J. 455, 479 (2015). Indeed, the U.S. Supreme Court has addressed the standard governing the certification decision only in *Lehman*, and, even then, its comments were limited to novel and unsettled state law questions, expressing the view that, because of "the novelty of the

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[1] Connor Shaull, *An Erie Silence: Erie Guesses and Their Effects on State Courts, Common Law, and Jurisdictional Federalism*, 104 Minn. L. Rev. 1133, 1153 (2019) (referencing a North Carolina bill proposing to adopt a certification procedure).

[2] "[S]even of the ten largest states—California, Texas, Florida, New York, Pennsylvania, Illinois, Georgia—'chose the narrowest scope for certification.' That is, such states prohibit certified questions from particular courts, including other state courts, federal district courts, and even some federal appellate courts." Shaull, *supra* note 1, at 1154 (footnotes omitted).

question and the great unsettlement of [state] law," certification "would seem particularly appropriate." *Lehman Bros.*, 416 U.S. at 391.

Because of the widespread adoption of certification, all the federal circuits have addressed the standards for certification. Yet, there remains no national uniformity on the standard for certification.

The lack of uniformity among the circuits was the subject of three separate opinions issued in connection with the Sixth Circuit's denial of rehearing en banc in 2019, *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992 (6th Cir. 2019) (on the denial of rehearing en banc), and a petition for writ of certiorari arising out of that case that asked the United States Supreme Court to clarify and define certification standard and to address the constitutional-federalism principles that underlie *Erie*. *See Lindenberg*, 912 F.3d at 364 (panel opinion).

Although that case had vehicle issues that may have led the Supreme Court to deny cert in December, an examination of certification's origins and its relation to federalism principles, intersovereign comity, and abstention doctrines illuminates the perspectives that animate and constrain use of certification. The approaches used by the varying circuits also inform possible additional bases on which to seek or resist certification.

II. ORIGINS

A. Federal courts have a duty to exercise jurisdiction that Congress vests in them and a duty to ascertain and apply state law when it supplies the rule of decision.

There's a push and pull that underlies the certification decision. The analysis starts with the grant of jurisdiction to federal courts over matters even when state law supplies the rule of decision. Federal courts have jurisdiction to decide matters of state law in diversity cases, a power that emanates from Article III and which Congress has codified in 28 U.S.C. § 1332. It is an "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989).

Not only do federal courts have jurisdiction over certain state law matters, but they also have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Supreme Court has also said that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Thus, when diversity jurisdiction is properly invoked, federal courts have a "duty . . . to decide questions of state law whenever necessary to the rendition of a judgment." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943); *see Burgess v. Seligman*, 107 U.S. 20, 33 (1883)

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