CERTIFYING STATE LAW QUESTIONS TO THE CONNECTICUT SUPREME COURT

By Erick Sandler and John Cerreta

Erick Sandler is a partner at Day Pitney LLP in Hartford and is a member of its commercial litigation department and head of the firm’s appellate practice group. Attorney Sandler is a member of the CBA Appellate Advocacy Section Executive Committee, Litigation Section Executive Committee, Federal Practice Section, and Young Lawyers Section.

John Cerreta is an associate at Day Pitney LLP in Hartford and is a member of its commercial litigation department and the firm’s appellate practice group. Attorney Cerreta is a member of the CBA Appellate Advocacy Section, Litigation Section, Federal Practice Section, and Young Lawyers Section.
A significant portion of the federal courts’ workload consists of deciding questions of state law. Diversity cases make up fully 30 percent of the federal civil docket,1 and even federal-question cases tend to feature at least one supplemental state law claim or raise other state law issues.2 Federal courts usually will not have binding state precedent on the precise questions presented,3 so federal courts must venture their best “Erie guess as to how” the state’s highest court might rule if faced with the question.4

While state law issues are clearly within the federal courts’ jurisdiction and competence,5 judges of both the second circuit and the District of Connecticut have, at times, expressed discomfort at the prospect of “attempting to predict how the Connecticut Supreme Court would rule” on important questions of Connecticut law.6 In the correct circumstances, these courts elect to forego the usual “Erie guess” in favor of certifying the state law question to the Connecticut Supreme Court. The purpose of this article is to provide a basic overview of the certification process for the Connecticut practitioner, including the factors that local federal courts consider in deciding whether to certify, and the process by which the Connecticut Supreme Court accepts and decides certified questions.

I. Background on the Certification Process

The practice of certifying important and unsettled questions of state law to a state high court is now well established. More than 50 years ago, the US Supreme Court endorsed certification as a more efficient and direct alternative to the Pullman7 abstention doctrine, which directs federal courts to abstain from deciding constitutional claims so that state courts can first consider potentially determinative state law issues.8 In the years since, certification has come to occupy much of the “territory once dominated” by the traditional Pullman rule.9 At the same time, certification has also gained general acceptance as a tool for resolving all manner of unsettled state law issues that arise in federal cases.10 When utilized properly, certification may “save time, energy, and resources” for both state and federal courts, while providing an opportunity for courts to work together toward a more “cooperative judicial federalism.”11

Connecticut, for its part, first enacted its certification statute in 1985, see Conn. Pub. Acts No. 85-111, and has since updated the law to conform to the 1995 version of the Uniform Certification of Questions of Law Act, see Conn. Gen. Stat. § 51-199b.12 The statute authorizes the state Supreme Court to accept a certified question “if the answer may be determinative of an issue” pending before the certifying court, and “if there is no controlling Connecticut authority on point.”13 The Practice Book specifies that the question presented in a certification request “should be such as will be determinative of the case.”14 The state Supreme Court is authorized to receive certified questions from all federal trial and appellate courts, as well as from “the highest court of another state” or of a Native American tribe.15

Although the Connecticut Supreme Court can accept questions from a wide range of courts, in practice, more than 90 percent of its certified-questions docket come from the local federal courts—the Court of Appeals for the Second Circuit and the District of Connecticut.16 As between the two, the District of Connecticut has sent a slightly greater number of certified questions to the state Supreme Court. The second circuit, however, is itself a frequent issuer of certified questions, especially to the New York Court of Appeals.17

A party wishing to seek certification in either the second circuit or the District of Connecticut may do so by motion.18 There are no explicit time limits on such requests, but judges in the District of Connecticut have occasionally denied certification motions on timeliness grounds, particularly when the circumstances suggest that the moving party may be sandbagging the court by seeking certification for the first time upon receipt of an unfavorable decision.19 Even if no party moves for certification, a court may still elect to certify a question on its own motion.20 The thinking is that, because certification touches on interests in comity and federalism that extend beyond the parties, courts may appropriately seek certification even where no party makes a request.21

II. The Factors That Federal Courts Consider in Deciding Whether to Certify

Certification is undoubtedly a valuable tool in the right circumstances, but as a practical matter courts considering whether to employ the device must take a discriminating approach. Every year, federal courts in the second circuit “must... decide scores” of Connecticut law questions that have never before “reached the Connecticut Supreme Court.”22 It simply would be infeasible to order certification in all or even many of these cases. The Connecticut Supreme Court is busy enough working through a full docket of cases from its own court system—burying it in certified questions from federal courts would only serve to undermine the basic goal of saving “time, energy, and resources” through the use of certification procedures.23 Federal courts faced with questions of Connecticut law thus “resort to certification only sparingly,”24 lest certification become a “device for shifting the burdens” of the federal courts “to those whose burdens are at least as great.”25

A. The core considerations: clarity of existing law, importance, and capacity to resolve the litigation.

In seeking to identify the best candidates for certification, both the second circuit and the District of Connecticut tend to focus on three core factors: the clarity of existing state law, the importance of
the issue, and whether an answer to the certified question may determine the outcome of the pending federal case.\textsuperscript{26}

1. Uncertainty under existing state law. Perhaps the most basic consideration, fundamental to any certification request, is whether the question at issue is unsettled under current state law.\textsuperscript{27} This requires more than just the absence of on-point state precedent dictating the outcome. Federal courts have a duty to “interpret ambiguous state statutes” and decide questions of state common law, “even in the absence of controlling state authority.”\textsuperscript{28} Certification is properly reserved for cases where the question is not just unresolved by precedent, but is also difficult to resolve. In other words, existing precedent must “provide insufficient guidance” to permit a reliable prediction under Erie.\textsuperscript{29}

So, for example, certification may not be warranted if the question at issue implicates a “well developed” line of Connecticut precedent covering analogous circumstances.\textsuperscript{30} Certification may also not be warranted for questions that require little more than application of existing law to new facts.\textsuperscript{31} To be a candidate for certification, the relevant law should be unclear and inscrutable. A split between Connecticut trial court decisions is a strong indicator that certification may be in order;\textsuperscript{32} as is a conflict between the courts of other jurisdictions.\textsuperscript{33} The fact that Connecticut courts have offered “no guidance” on an issue one way or the other can also provide grounds for certification,\textsuperscript{34} although in that instance a consistent trend in out-of-jurisdiction case law may prompt the court not to certify if it feels “reasonably certain that the Supreme Court of Connecticut would” follow the prevailing view.\textsuperscript{35}

The same basic principle also applies to certification in Pullman-type cases, where “a narrowing construction of state law” may “avoid the federal question.”\textsuperscript{36} Certification is proper in these circumstances if the challenged statute is “readily susceptible to the proffered narrowing construction.”\textsuperscript{37} If, however, the statute is clear, then there is no reason to ask a “state court if it would care...to rewrite a statute” in order to save it.\textsuperscript{38}

2. Importance. Certification is also appropriately limited to “important” questions that “Connecticut has a strong interest” in resolving through its own court system.\textsuperscript{39} This is a broad standard that may encompass any number of substantive legal issues, but one area that seems to come up again and again in the cases is insurance law. “Insurance is an important industry in Connecticut,”\textsuperscript{40} and the “preeminence” of the Connecticut Supreme Court “in the field of insurance law” is widely recognized.\textsuperscript{41} This makes the “case for certification to the Connecticut Supreme Court...especially compelling” in “insurance disputes.”\textsuperscript{42} And, at least in recent years, nearly half of the Connecticut Supreme Court’s decisions in response to certified questions have involved some issue related to insurance law.\textsuperscript{43}

Insurance aside, local federal courts have also identified numerous other substantive issues—from child protection,\textsuperscript{44} to personal injury,\textsuperscript{45} to commercial paper\textsuperscript{46}—that may be of sufficient importance to warrant certification to the Connecticut Supreme Court. Generally, if the case involves statutory interpretation, then certification may be in order where the provision is “one part of a detailed administrative scheme,” or where ambiguous statutory language makes it necessary to assess the purposes and “public policy goals” underlying the statute.\textsuperscript{47} Tort and contract cases may also be good candidates for certification if they “implicate important values in the evolution” of Connecticut common law.\textsuperscript{48} Questions related to the state Constitution are of undoubted importance as well, and they too may warrant certification where the provision at issue “provides an individual with more protection than” does an analogous right under the Federal Constitution.\textsuperscript{49}

State law questions related to jurisdiction and procedure tend to be weaker candidates for certification. As the second circuit has explained, the certification process is “best used for obtaining an authoritative state law ruling that affects the merits of a federal law suit.”\textsuperscript{50} Questions relating to Connecticut procedural law—for example, state “service of process” rules, see Fed. R. Civ. P. 4(e)(1)—are routinely litigated in federal courts and “implicate no complicated or unique[] state policy questions.”\textsuperscript{51} In addition, federal courts have also recognized that, if the federal-question claims in a case have been dismissed and the remaining supplemental claims present difficult state law issues, the “better course” may be to allow those issues to “run their orderly course in the state courts by declining to exercise supplemental jurisdiction over them.”\textsuperscript{52}

Another useful indicator of “importance” is whether the issue is “likely to recur.”\textsuperscript{53} Frequently recurring issues will necessarily have a significant impact beyond the particular litigation in which the certified question arises, and they will often be appropriate for certification to Connecticut’s highest court.\textsuperscript{54}

3. Effect on the outcome. In addition to being “unsettled and...significant,” a certified question should also be crucial to the outcome of the case.\textsuperscript{55} This requirement is necessary to avoid wasteful litigation of certified questions. When a federal court certifies a question to the Connecticut Supreme Court, a full round of briefing and oral argument must be completed,\textsuperscript{56} followed by the internal deliberations and preparation of opinions within the Court. All of this comes at significant cost to both the litigants and the state judicial system. It also can result in delay of the pending litigation for a year-and-a-half or more.\textsuperscript{57}

The federal courts should avoid imposing this work on the state judiciary merely to get an answer to a question that is academic, hypothetical, or not important to the case. Rather, to justify the substantial burdens and costs that certification imposes, the answer to the certified question must at least have a meaningful effect on “the outcome [of] the [federal] case.”\textsuperscript{58}

B. Other considerations that may counsel against certification.

A question of state law that is unsettled, important, and outcome-determinative will normally be a good candidate for certification.\textsuperscript{59} Even in these cases, however, other factors may still counsel against a certification order.

1. Avoiding undue delay. As noted above, litigating a certified question before the Connecticut Supreme Court may result in substantial delay; in some cases, these “costs and delays” will be reason enough
to deny certification.\textsuperscript{60}

Judge Stefan Underhill’s decision in Izzarelli v. R.J. Reynolds Tobacco Co.,\textsuperscript{61} illustrates the point. There, the court faced the unsettled question of how to measure “punitive damages in product liability cases.” In the usual course, the court certified “important” and “undecided issue of state law” to the Connecticut Supreme Court.\textsuperscript{62} But in Izzarelli, the case was already more than “ten years old,” and the court had previously ruled on “other questions of state law” that might eventually have to “be certified on appeal.” Given that history, the court determined that certification at “th[at] stage” of the litigation was “unnecessary,” “inefficient,” and would result in needless “delay.”\textsuperscript{63} The court denied certification.

The second circuit has also declined to certify questions based on concerns about delay. In Morenz v. Wilson-Coker, the court recognized that the defendant’s request for certification was “not without merit”; nonetheless, the court declined to certify an unsettled state law issue because the age and health of the “82 year[ ] old” plaintiff made “time” an “important consideration.”\textsuperscript{64}

\textbf{2. Special considerations for district courts.} Finally, it is worth mentioning that, unlike an appellate court, a federal district court may face special challenges that make resort to the certification process more difficult and more cumbersome.

Procedurally, every certified question submitted to the Connecticut Supreme Court must be accompanied by a “finding or stipulation” that sets “forth all facts relevant to answering the questions certified.”\textsuperscript{65} This requirement can create a substantial roadblock for the district judge who wishes to certify a question in the early stages of litigation, when the facts remain disputed and the court has made no findings. In order to deal with this complication, some Connecticut federal judges—led by the late Judge Mark Kravitzy—adopted the practice of “certify[ing] questions to the Connecticut Supreme Court only when the parties agreed to “stipulate to the facts and questions of law.”\textsuperscript{66} Other judges in other districts have adopted a similar rule.\textsuperscript{67}

Even Judge Kravitzy, however, departed from this preferred practice by certifying a question in a case where the parties’ inability to cooperate was overcome by the importance of the issue at hand and a lack of a meaningful disagreement about the underlying facts.\textsuperscript{68}

\textbf{III. The Connecticut Supreme Court’s Responses to Certified Questions}

All questions presented by way of certification must be specific and phrased so as to require a yes-or-no answer, whenever possible.\textsuperscript{69} Once the Connecticut Supreme Court receives the certification request, the appellate clerk will notify the parties, who then have ten days from the date the notice is mailed to “file” any “objections to [its] acceptance.”\textsuperscript{70} The Supreme Court has no obligation to accept a certification request, and an initial acceptance is only “preliminary” because it does not prevent the Court from “rejecting the certification if it should later appear to have been improvidently ordered.”\textsuperscript{71} As a practical matter, the Court has rejected certification requests only on very rare occasions,\textsuperscript{72} and it appears that no certification request has been rejected for over a decade.\textsuperscript{73} The Connecticut Supreme Court’s reticence in this area may be motivated by a desire to maintain a spirit of “cooperative judicial federalism.”\textsuperscript{74} Rejecting a federal court’s certification request is, as Circuit Judge Alex Kozinski colorfully put it, kind of like “telling us we’re out to lunch.”\textsuperscript{75} And some second circuit judges have not taken kindly to this sort of rejection. In one famous incident from the late 80’s, Second Circuit Judge Irving Kaufman is said to have responded to a rejected certification request by calling Chief Judge Sol Wachtler of the New York Court of Appeals to let him know, “in most agitated fashion,…that the case would be decided by the second circuit and that he didn’t need the New York Court of Appeals.”\textsuperscript{76}

There is no record of any justice of the Connecticut Supreme Court being on the receiving end of an angry phone call from a disappointed circuit judge.

After the Supreme Court accepts certification, the standard rules governing briefing and argument apply, with the plaintiff in the certifying court deemed the appellant and the defendant deemed the appellee.\textsuperscript{77} The Supreme Court has discretion to “reformulate” or restate the certified questions as it deems appropriate,\textsuperscript{78} and the Court has, on occasion, done just that so as to avoid “deciding…broader question[s]” that were best left for another day.\textsuperscript{79} Once the Court’s opinion is complete and released, the appellate clerk transmits the Court’s response to the “certifying court,” and the litigation then continues on “with the benefit” of the Supreme Court’s answers.\textsuperscript{80}

\textbf{Notes}

The authors would like to thank Tekhara Kimber, who was until recently a summer apprentice at Day Pitney, for her invaluable research assistance.

3. Id. at 1422.
16. Since the year 2000, the Connecticut Supreme Court has written 23 published opinions responding to certified questions. Thirteen of those opinions respond to questions from the District of Connecticut: Ballov v. Law Offices Howard Lee Schiff PC, 304 Conn. 348 (2012); Rollins v. People’s United Bank, 256 Conn. 17 (2009); Sealed v. Sealed, 332 F.3d 51 (2d Cir. 2003).


17. Through the first eight months of 2013, the second circuit has issued certified questions to the New York Court of Appeals six times.

The frequency with which the second circuit certifies questions to the New York Court of Appeals may be due in part to the fact that New York’s high court does not accept certified questions from federal district courts. N.Y. Const. art. VI, § 3(b)(9); See, e.g., Nicholson v. Scoppetta, 344 F.3d 154, 168 (2d Cir. 2003) (“On appeal, we now have available to us an additional option not open to the District Court: We may certify questions of New York state law to the New York Court of Appeals.”).
Connecticut Lawyer the question second circuit recently certified to the prescient. On appeal in “be certified on appeal” proved to be “other questions of state law” might need Id. Supp. 2d 324 (D. Conn. 2010).


61. See Conn. Performing Arts Found., Inc. v. Brown, 801 E2d 566, 568 (2d Cir. 1986) (noting Supreme Court’s rejection of second circuit’s certification request); Blevio v. Aetna Casualty & Sur. Co., 39 E3d 1, 2-3 (1st Cir. 1994) (noting Connecticut Supreme Court’s rejection of District of Massachusetts’ certification request); Altman v. Motion Water Sports, Inc., 722 F. Supp. 2d 234, 245 (D. Conn. 2010) (discussing a 1998 case in which the district court was left to decide a state law issue on its own “faute de mieux” after the Supreme Court “revers[ed]” its decision accepting... certification” with a “delphic” and “entirely useless” reference to an earlier precedent).

73. Wesley W. Horton & Kenneth J. Bartschi, Connecticut Pract., Rules of Appellate Procedure § 82-1 (2012-2013 ed.) (“From 2001 to 2011, federal courts certified 25 cases to the Connecticut Supreme Court. Three were withdrawn and the other 22 were accepted by the Supreme Court.”).

74. Lehman Bros., 416 U.S. at 390-91.


79. Fraser v. United States, 236 Conn. 625, 630 (1996) (“Common law prudent counsels that we should refrain from deciding the broader question.”).


You have Done Everything Your Client Expected.

Attorneys reporting a malpractice claim routinely comment that they knew they should have never agreed to represent that particular client.

A break down in client relations accounts for 11% of alleged errors* leading to malpractice claims. A simple method to avoid client relation errors is to make certain your retainer letter clearly identifies the client, the scope of your representation, how the expenses and fees will be handled, and what is expected of both the lawyer and the client.

At Minnesota Lawyers Mutual we don’t just sell you a policy. We work hard to give you the tools and knowledge necessary to reduce your risk of a malpractice claim. We invite you to give us a call at 800-422-1370 or go online at www.mlmins.com and find out for yourself what we mean when we say, “Protecting your practice is our policy.”


800.422.1370 MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY www.mlmins.com PROTECTING YOUR PRACTICE IS OUR POLICY.™