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ARTICLES

INTERACTIVE JUDICIAL FEDERALISM: CERTIFIED QUESTIONS IN NEW YORK

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INTRODUCTION

The Court of Appeals of the State of New York is one of forty-five state high courts empowered to accept inter-jurisdictional certified questions of state law.[1] New York's certification law, which became effective in 1986, enables the United States Supreme Court, federal courts of appeals and high courts of other states to send unsettled questions of New York law to the state Court of Appeals for authoritative resolution, thereby eliminating the need for those courts to speculate over the content of New York law necessary to resolve a pending case.[2] Although the procedure was little used at the outset, certification in New York has become an increasingly important tool for federal courts seeking to ascertain New York law where the Court of Appeals has not previously spoken.[3] In the variety of cases in which it has been used, New York's certification process has allowed federal courts to obtain prompt, definitive answers to open questions of New York law, while promoting the development of New York

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1. Alabama, New Jersey, North Carolina and Vermont are the only states that have not adopted certification procedures. Although Missouri's legislature has enacted a certification statute, the Missouri Supreme Court held that it violates that state's constitutional limits on the court's jurisdiction. Grantham v. Mo. Dep't of Corr., No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990). Appendix A provides a complete list of state certification laws.

2. N.Y. Const. art. VI, § 3(b), cl. 9; N.Y. Ct. R. § 500.17(a) (N.Y. Ct. App.) (McKinney 2000).

3. While New York's certification procedure may also be utilized by state appellate courts of last resort, no state court has yet invoked it, nor has the New York Court of Appeals certified a question to any other state court. To date, only the Second and Eleventh Circuit Courts of Appeals have certified questions to New York's high court. Thus, with state-state interaction still on the horizon, this article will focus on federal-state certification.

decisional law by the state Court of Appeals, the final arbiter of such matters.

This Article consists of three segments. The first part tells the story behind inter-jurisdictional certification, which emerged as a solution to our nation's long search for an effective method of resolving open state law questions in federal litigation. Part II discusses the somewhat briefer, but also arduous, efforts to implement the process in New York, a saga that should inspire all first-year law students. Finally, Part III describes and evaluates New York's experience with certification over the past fifteen years.

I. FEDERAL COURT DETERMINATION OF STATE LAW

Through much of American history, our nation has struggled to balance the relationship between the independent state and federal court systems in areas of overlapping jurisdiction.[4] Prior to 1938, federal courts could ignore state decisional law on general matters not "dependent upon local statutes or local usages of a fixed and permanent operation," even where state law provided the basis for a cause of action.[5] This is because in *Swift v. Tyson*,[6] the United States Supreme Court held that the Federal Rules of Decision Act[7] obligated federal courts to follow state law only to the extent found in constitutions, statutes and common law decisions relating to local matters.[8] Thus, federal courts were free to craft their own common law in other areas.[9]

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4. *See, e.g.*, George C. Pratt, *The State of New York's State-Federal Judicial Council*, 3 Touro L. Rev. 1, 1 (1986) (noting that "in practice our federal and state courts regularly experience friction at points of overlapping jurisdiction"); Jack B. Weinstein, *Coordination of State and Federal Judicial Systems*, 57 St. John's L. Rev. 1, 1 (1982) (describing the state and federal courts as "two independent systems whose interplay often perplexes the citizen as well as the theorist visualizing the law as an integrated whole").

5. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842).

6. *Id.*

7. The Act has survived virtually unchanged since the days of *Swift*, and now provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1994).

8. The local matters on which federal courts followed state common law under *Swift* fell into four broad categories: property, real estate, taxes and liens; water rights; municipal corporations; and matters of status, such as marital rights. *See Swift*, 41 U.S. at 18-19; 17 James W. Moore et al., *Moore's Federal Practice* § 124 App.01[3] (3d ed. 1997).

9. *See* 17 Moore, *supra* note 8, § 124.01[1], at 124-30 (Under *Swift v. Tyson*, "'state law' did not include state court decisions on matters of commercial and contract law or general jurisprudence, such as torts, conflicts of law, and damages."). The Court in *Swift* reasoned:

> In the ordinary use of language, it will hardly be contended [sic] that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws.... The laws of a state are

A. Erie *and its Progeny*

The Supreme Court hoped that *Swift* would result in a uniform national common law by eliminating state-to-state differences in the federal courts.[10] Experience in applying *Swift*, however, "revealed its defects, political and social."[11] Two such defects were especially troublesome. First, state courts and federal courts in the same jurisdiction frequently applied different common law rules, creating an environment ripe for forum shopping.[12] Second, "a new well of uncertainties" arose out of "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law,"[13] which determined whether federal courts were obligated to apply state law.

In its landmark decision *Erie Railroad Co. v. Tompkins*,[14] the Supreme Court overruled *Swift*, eliminated the federal general common law and held that, except in matters governed by the federal Constitution or acts of Congress, federal courts must apply the law of the state in which the court sits, in both local and general matters, regardless of whether the law is "declared by its Legislature in a statute or by its highest court."[15] Thus, where no federal statutory or constitutional claim is at issue,[16] federal courts must now apply state

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> more usually understood to mean the rules and enactments promulgated by the legislative authority thereof . . . .

41 U.S. at 18.

10. *See, e.g.*, Hewlett v. Schadel, 68 F.2d 502, 504 (4th Cir. 1934) ("To hold to the rule of *Swift v. Tyson* . . . will preserve a uniform body of law upon which those who do business in other states can depend, and which will inevitably have a unifying influence on the decisions of the state courts themselves.").

11. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

12. *See id.* at 74-75; Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 523-24 (1928) (describing how company reincorporated in a neighboring state in order to create diversity jurisdiction and circumvent Kentucky law); Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A.B.A. J. 609, 613 (1938):

> Perhaps the chief beneficiaries of the doctrine of *Swift v. Tyson* were corporations doing business in a number of states. Such corporations could claim to be citizens of the state of their charter alone, and so when sued could remove cases freely to the federal courts on the ground of diversity of citizenship. When a corporation was the plaintiff, it likewise had an advantage. A Delaware corporation suing a New York citizen with respect to a transaction in New York could bring suit there in either the federal or state court; even though diversity of citizenship existed, the defendant could not remove, being a citizen and resident of the state where suit was brought.

13. *Erie*, 304 U.S. at 74.

14. 304 U.S. 64 (1938).

15. *Id.* at 78.

16. Although diversity jurisdiction provides the most frequent occasion for federal court application of state law, a federal court must also apply state law in other situations, such as when supplemental jurisdiction exists, or when federal law incorporates state law. As the Second Circuit noted:

> [I]t is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law.

common law as well as statutory and constitutional law to resolve substantive issues.[17]

Although *Erie* eliminated a strong incentive for forum shopping and mooted the debate over which laws are general and which local,[18] it created another thorny problem: how should federal courts ascertain state law in cases where it is unclear? Identification of state law is easy only in the presence of an on-point statute or law "declared . . . by its highest court in a decision."[19] In all other circumstances, federal courts must act as "another court of the State"[20] and choose from a variety of sources, including high court dicta[21] and lower court rulings.[22] The situation is further complicated when these sources are

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> Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. Likewise, the Erie doctrine is inapplicable to claims or issues created and governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship.

Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) (citations omitted).

17. Federal courts still apply federal procedural rules. The seminal Supreme Court cases dealing with the distinction between substance and procedure in this context include *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958); and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

18. The Court in *Erie* also hinted that its decision served constitutional principles of federalism. *Erie*, 304 U.S. at 80 (noting that the *Swift* doctrine "invaded rights which in our opinion are reserved by the Constitution to the several States").

19. *Erie*, 304 U.S. at 78; *see also* William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 Seton Hall L. Rev. 491, 492 (1998) ("Locating the proper state rule of decision, even in well-developed areas of state law, can be a difficult task."). The Court in *Erie* did not address how to decide unsettled questions of state law, as the only question before the Court was whether state law governed, not the content of state law. *Erie*, 304 U.S. at 80.

20. *Guar. Trust*, 326 U.S. at 108.

21. Federal courts generally are obligated to consider dicta. *See* Rocky Mountain Fire & Cas. Co. v. Dairyland Ins. Co., 452 F.2d 603, 603-04 (9th Cir. 1971) ("A federal court exercising diversity jurisdiction is bound to follow the considered dicta as well as the holdings of state court decisions."); 1A James W. Moore & Brett A. Ringle, *Moore's Federal Practice* § 307[2], at 3068 (2d ed. 1996). This may not be the case, however, when dicta in a state supreme court opinion contradicts the actual holdings of intermediate appellate courts. *See, e.g.*, Nolan v. Transocean Air Lines, 209 F.2d 904, 907 (2d Cir. 1961) (reasserting a previous holding based on opinions of the California District Courts of Appeal over the dicta of the California Supreme Court, which the court characterized as "contrary to [California's] apparent legislative policy [and] overturn[ing], without citation, an unbroken line of decisions of intermediate appellate courts . . . consistent with that policy").

22. Federal courts must follow intermediate state court cases, unless there is reason to believe that the state's highest court would not follow them. Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) (citing West v. AT&T, 311 U.S. 223, 237-38 (1940)); Pentech Int'l, Inc. v. Wall St. Clearing Co., 983 F.2d 441, 445-46 (2d Cir. 1993) (same). Trial court opinions, by contrast, should be considered, but are not binding. *See, e.g.*, Craig v. Lake Asbestos of Que., Ltd., 843 F.2d 145, 152 n.6 (3d Cir. 1988) (stating that a New Jersey Superior Court decision, although not binding, was instructive); MGM Grand Hotel v. Imperial Glass Co., 533 F.2d 486, 489 n.5 (9th Cir.

in conflict, or when the vitality of older precedents is questioned by more recent pronouncements, creating uncertainty as to which should be followed.[23] Worse yet, there may be no relevant precedent at all, requiring the federal court to make an "informed prophecy" of how the state high court would rule.[24]

Although a federal court uses the same sources as a state high court to determine state law, the federal court's task is considerably harder: "Whereas the highest court of the state can 'quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,' a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide."[25] Matters are further complicated when a forum state's choice-of-law provisions[26] direct a federal court to apply the

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1976) (stating that an unpublished trial court opinion is not binding, but nonetheless may be persuasive). For a discussion of federal court deference to lower state court interpretations of unclear law, as well as deference to the interpretation of state law by other federal courts, see Craig A. Hoover, Note, *Deference to Federal Circuit Interpretations of Unsettled State Law:* Factors, Etc., Inc. v. Pro Arts, Inc., 1982 Duke L.J. 704.

23. *See, e.g.*, Liriano v. Hobart Corp., 132 F.3d 124 (2d Cir. 1998):

> [W]hen the state's highest court has cast doubt on the scope or continued validity of one of its earlier holdings, or when there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal . . . a party favored by the lower court decisions or by the weakened high court holding will seek federal jurisdiction with the knowledge that the federal courts, unlike the state's highest court, will feel virtually bound to follow these decisions.

Id. at 132.

24. Perez-Trujillo v. Volvo Car Corp. (Swed.), 137 F.3d 50, 55 (1st Cir. 1998) (quoting Rodriguez-Suris v. Montesinos, 123 F.3d 10, 13 (1st Cir. 1997)); *see also* Anderson v. Nissan Motor Co., 139 F.3d 599, 601 (8th Cir. 1998); Fioretti v. Mass. Gen. Life Ins. Co., 53 F.3d 1228, 1235 (11th Cir. 1995); Bank of N.Y. v. Amoco Oil Co., 35 F.3d 643, 650 (2d Cir. 1994); Moores v. Greenberg, 834 F.2d 1105, 1112 (1st Cir. 1987) (referring to federal courts' duty to make informed prophecy on state substantive law issues); John R. Brown, *Certification—Federalism in Action*, 7 Cumb. L. Rev. 455, 455 (1977) (noting that federal judges were often required to "trade [their] judicial robes for the garb of prophet"); *cf.* Yohannon v. Keene Corp., 924 F.2d 1255, 1264 (3d Cir. 1991):

> [A] federal court sitting in diversity must often take on the mantle of the soothsayers of old and predict what the supreme court of a particular state would do if it were presented with the issue that controls the case before the federal court. Such contemporary predictions are just as chancy a business as the divination of dreams that heathen kings of ancient biblical lands so often called upon their counselors to interpret in the stories of the Old Testament. Like them, in taking on the task, we hope that our prophecy will find favor in the eyes of the authority that may one day brand it true or false.

25. Henry J. Friendly, Federal Jurisdiction: A General View 142 (1973) (quoting J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 322 (1967)); *see also* Arthur L. Corbin, *The Common Law of the United States*, 47 Yale L.J. 1351, 1352 (1938) (noting that federal judges will be "limited in a way in which the [state] judges are not themselves limited").

26. A federal court sitting in diversity applies the forum state's choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

substantive law of another state, which may also be unclear. As Judge Henry J. Friendly observed in such a situation, "[o]ur principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."[27]

As a result, federal courts were often forced to make educated guesses about what law a state would apply, with less than satisfactory results.[28] Federal judges generally do not have as much experience with state law as their state counterparts, and because federal litigants cannot appeal federal prognostications of state law to the appropriate state high court,[29] losing federal litigants are left frustrated[30] and federal judges embarrassed[31] when state supreme courts later decide issues to the contrary. Incorrect predictions can also detract from the

27. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

28. As an inevitable result of their awkward role as seers, federal courts frequently are incorrect in forecasting state law. *See, e.g.*, Jerome I. Braun, *A Certification Rule for California*, 36 Santa Clara L. Rev. 935, 937-40 (1996) (discussing instances where judges have incorrectly guessed at what state law would be when ruled upon by the highest state court); John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 415 n.11 (1988) (listing cases in which state courts explicitly disagreed with federal courts' interpretations of state law); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1679-80 (1992) ("[T]he state courts have found fault with a not insignificant number of past '*Erie* guesses' made by the Third Circuit and our district courts.... It is not that Third Circuit judges are particularly poor prognosticators. All of the circuits have similar problems in predicting state law accurately." (footnote omitted)); Stella L. Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal for Federal Court Certification to the Pennsylvania Supreme Court*, 68 Temp. L. Rev. 725, 729-35 (1995) (examining the Third Circuit's incorrect predictions of state law).

29. *See* Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344, 345 (1963). The forecasts of state law are, however, reviewable de novo by federal appellate courts. Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991).

30. *See* Brown, *supra* note 24, at 456 (noting the "frustration for litigants when the rule of law [that federal courts] prescribe turns out to be a ticket for one ride only").

31. "It has been awkward—and, to some, not a little embarrassing—when our first guess turns out to be wrong and the state court makes the second and last guess by reversing our holding." Brown, *supra* note 24, at 455; *see also* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) ("In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is ... supplanted by a controlling decision of a state court."); Braun, *supra* note 28, at 937-39 (reviewing cases in which federal courts' predictions of state law were incorrect). Despite the difficulties of predicting state law, some have regarded the process as beneficial by allowing the state and federal court systems to be "cross-pollinated" as lawyers practicing in both sets of courts bring ideas from one to the other. *See* David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 324-26 (1977); Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 Ark. L. Rev. 305, 338-39 (1994).

role of the state high court in declaring the law of the state and hamper orderly development of the law.[32]

B. *Federal Court Abstention*

As the Supreme Court made clear, the difficulties created by *Erie* did not justify a federal court's declining "to exercise its jurisdiction to decide a case which is properly brought to it for decision."[33] The Court did, however, identify a number of circumstances in which it is appropriate for federal courts to abstain from deciding a controversy pending the resolution of open state law questions in state courts. In these situations, a federal court can "stay its hand until the courts of the State . . . have declared the law of the State . . . which is applicable to and controlling in the disposition of [the] appeals."[34] While abstaining, federal courts hold the case in abeyance, retain jurisdiction and direct the parties to proceed through state channels, usually by seeking a declaratory judgment from the state court on the open state law issue.[35]

The Supreme Court's first formal pronouncement of the abstention doctrine came in *Railroad Commission of Texas v. Pullman Co.*[36] In *Pullman*, the Court recognized that abstention may be appropriate where an uncertain question of state law may be resolved in a way that would eliminate the need to address a federal constitutional issue, or affect analysis of that issue. The Court subsequently announced that abstention was also appropriate in several other circumstances, such as when a federal determination would disrupt complex state regulatory schemes in situations where aggrieved parties were provided with "expeditious and adequate" state review,[37] and where

32. Uncertainty is created because a federal court decision involving issues of state law is binding on the parties to that litigation, but has no stare decisis effect on future state court litigants. *See* Brown, *supra* note 24, at 456; Note, *New York's Certification Procedure: Was it Worth the Wait?*, 63 St. John's L. Rev. 539, 542-43 (1989):

> [F]ederal courts [are placed] in the unenviable position of having to decide state law—absent a controlling decision of the highest state court—while lacking the authority to make the decision binding upon anyone but the instant litigants. Often, this inherent problem is then exacerbated when other federal courts or foreign state courts, ruling on similar issues, use the possibly incorrect holding of the first federal court as authority in their rulings on the same law. This domino effect continues until broken by a final decision in the highest court of the state whose law is in question.

33. Meredith v. Winter Haven, 320 U.S. 228, 234 (1943).

34. United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 484-85 (5th Cir. 1964) (en banc), *cert. denied*, 377 U.S. 935 (1964).

35. *See* Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. Rev. 888, 890 n.22 (1971).

36. 312 U.S. 496 (1941).

37. Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943).

the uncertain state law involves "a matter close to the political interests of a State."[38]

Although abstention allows federal courts to avoid forecasting state law, the Supreme Court cautioned that it is to be used sparingly.[39] Furthermore, abstention can be expensive for litigants. When a federal court abstains, the case effectively is transferred to a state's trial court, unless an appellate court has original jurisdiction. The parties must then take the case through the state's appellate courts, with the intention of litigating it through the court of last resort.[40] This obviously requires time and money.[41] The cost is even greater if the parties litigated the propriety of abstention in the federal system prior to the state action.[42] This delay may, in turn, discourage litigants from invoking federal jurisdiction where state questions are involved.[43] Thus, it soon became apparent that abstention was not an effective solution to the problem of federal courts seeking to ascertain state law.[44]

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38. La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959); *see also* Charles A. Wright, *The Law of Federal Courts*, § 52, at 329-30 (5th ed. 1994) (discussing abstention in cases involving issues of special interest to the state); 17A Charles A. Wright et al., *Federal Practice and Procedure* § 4241, at 13-14 (same).

39. *See* Meredith v. Winter Haven, 320 U.S. 228, 234-35 (1943).

40. Of course, there is no guarantee that the case will make its way to the state's highest court, and an abstaining federal court, therefore, may be forced to rely on a lower court's prediction of how the high court would rule. *See* Martha A. Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590, 604-05 (1977).

41. *See, e.g.*, Arizonans for Official English v. Ariz., 520 U.S. 43, 76 (1997) ("Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court."); England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 418 (1964) (noting the "delay and expense to which application of the abstention doctrine inevitably gives rise"); Levin, *supra* note 29, at 346-48 (discussing the cost and delay in bringing a second suit after abstention); Lillich & Mundy, *supra* note 35, at 890 ("This authoritative determination of state law . . . had an added price in terms of delay and cost to litigants."); John A. Scanelli, *The Case for Certification*, 12 Wm. & Mary L. Rev. 627, 632-34 (1971) (discussing the added cost and delay of bringing a second suit in state court); Memorandum and Recommendation of the N.Y. Law Revision Comm'n to the 1984 Legislature Relating to Certification of Questions of Law to the Court of Appeals, at 6 (1984) ("The expense and delay caused by proceeding through the lower state courts up to the highest state court to obtain a definitive resolution of state law can make such abstention an onerous burden on litigants.").

42. Levin, *supra* note 29, at 346.

43. *See id.* at 347; *see also* Comment, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 Yale L.J. 850, 866 (1964) (noting that if abstention were to be used regularly, opponents of the doctrine could "mount a convincing argument that federal judges would be reduced to little more than sterile monitors shuttling traffic between a dual system of courts at appropriate stages of the litigation. Litigants would, again, be discouraged from invoking the diversity jurisdiction as judges felt themselves under greater pressure to invoke the doctrine, and apparent congressional intent would be, to that extent, disserved.").

44. *See, e.g.*, Comm. on Federal Courts, N.Y. State Bar Ass'n, *The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*,

C. *The Birth of Certification*

Inter-jurisdictional certification allows a court to obtain authoritative answers to unsettled questions of state law directly from that state's highest court. Thus, as with abstention, certification saves federal courts from the awkwardness of predicting state law, and allows state high courts to articulate the law without the complication of potentially contradictory federal decisions on the issue. Unlike abstention, however, certification does not require litigating a new lawsuit through state appellate review. Instead, because the question is sent directly to the state's highest court, certification imposes neither the cost nor the delay of abstention.[45]

In 1945, acting with what the United States Supreme Court termed "rare foresight,"[46] the Florida legislature enacted a statute permitting federal courts to certify unresolved state law questions to the Florida Supreme Court.[47] Florida thus became the first state to offer this procedural mechanism in lieu of abstention in cases where federal courts were faced with open state law issues.[48] When the United

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reprinted in 122 F.R.D. 89, 106-07 (1988) (recommending cautious use of abstention and the need for federal courts to assess carefully whether abstaining "will have the practical effect of frustrating or unduly delaying the adjudication of federal claims"); Unif. Certification of Questions of Law Act of 1967, 12 U.L.A. 81, 82 (1996) (prefatory note) (commenting that abstention "has proved to be quite unsatisfactory"); Bassler & Potenza, *supra* note 19, at 493 (referring to abstention as "a rarely applied and awkward procedural device"); Field, *supra* note 40, at 605 (arguing that abstention is not worth the costs it imposes on litigants).

45. *E.g.*, *Arizonans for Official English*, 520 U.S. at 76 ("Certification procedure, in contrast [to abstention], allows a federal court faced with a novel state-law 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."); Tunick v. Safir, 209 F.3d 67, 79 (2d Cir. 2000) ("[T]he delay created by certification is almost never as great as that imposed by abstention.").

46. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960).

47. The Florida statute authorized the Florida Supreme Court to adopt rules for receiving certified questions from the United States Supreme Court and federal courts of appeals when a question of Florida state law was "determinative" and there were "no clear controlling precedents" from state court decisions. 1945 Fla. Laws, ch. 23098, § 1 (codified at Fla. Stat. § 25.031 (1998)).

48. There had been *intra*-jurisdictional certification of questions of law in the United States as far back as 1802, when Congress authorized the circuit courts to certify questions to the Supreme Court. *See* Act of April 29, 1802, ch. 31, § 6, 2 Stat. 156, 159-61. Justice Oliver Wendell Holmes commented that such certification is "a mode of disposing of cases in the least cumbersome and most expeditious way." Chi., Burlington & Quincy Ry. Co. v. Williams, 214 U.S. 492, 495-96 (1909) (Holmes, J., dissenting). The British had established inter-jurisdictional certification procedures in the British Law Ascertainment Act of 1859, 22 & 23 Vict., ch. 63 (Eng.) (relating to certification of questions of law to other dominions of Great Britain), and the Foreign Law Ascertainment Act of 1861, 24 & 25 Vict., ch. II (Eng.) (relating to certification of questions of law to foreign countries). These Acts were forerunners of certification laws in the United States. *See* Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal For Reform*, 18 J. Legis. 127, 131-33 (1992); M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 Wayne L. Rev. 273, 289-90 (1995).

States Supreme Court praised the statute fifteen years later,[49] however, the Florida Supreme Court had yet to implement it.[50]

Despite the apparent advantages of certification, the states were slow to act. By 1975 only fourteen states had adopted certification procedures.[51] This situation changed in the ensuing years, however, as courts and commentators continued to seek an effective alternative to abstention. One factor that promoted certification was the staunch support of the Supreme Court. After praising Florida's statute in *Clay v. Sun Insurance Office Ltd.*,[52] the Court gave the procedure a second pat on the back in the 1974 case *Lehman Bros. v. Schein*.[53] In that diversity suit filed in a New York federal court, it was clear that New York's choice of law rules made Florida law applicable, but the District Court and Court of Appeals disagreed on how Florida would resolve the open issue. The Supreme Court remanded the case to the federal Court of Appeals so that court could consider whether the controlling issue of Florida law should be certified to the Florida high court. While not suggesting that certification was obligatory, the Supreme Court noted that "in the long run [it] save[s] time, energy and resources and helps build a cooperative judicial federalism."[54]

Two years later, in *Bellotti v. Baird*,[55] the Court again boosted certification. At issue was a Massachusetts statute concerning parental consent before an unmarried woman under eighteen could have an abortion. A three-judge District Court had declared the statute unconstitutional and enjoined its operation. On direct appeal, the Supreme Court, noting that the statute had never been construed by the Supreme Judicial Court of Massachusetts—and that the state's

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49. A speech given by Professor Philip B. Kurland—a former law clerk to Justice Frankfurter, author of *Clay*—shortly before *Clay* was decided may have planted the seed for Supreme Court support of certification. In addressing the problems of abstention, Professor Kurland stated:

> Probably the best solution to the delay problem is the one tendered by the legislature of the State of Florida which has never been utilized.... The Florida statute authorizes its high court to receive questions of State law by certification from a federal appellate court.... With such a certified and authoritative answer, the federal courts could readily proceed to judgment.... Here again we could have a demonstration of cooperative judicial federalism which would justify those of us who think that the federal form of government has a contribution to make toward the preservation of justice in this country.

Philip B. Kurland, Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine, *reprinted in* 24 F.R.D. 481, 489-90 (1960) (Speech to the Conference of Chief Justices, Aug. 20, 1959, at Miami Beach, Florida); *see also* 17A Wright, *supra* note 38, § 4248, at 160-61 & n.8 (discussing Kurland's speech).

50. *See Clay*, 363 U.S. at 212 n.3; *In re* Fl. Appellate Rules, 127 So. 2d 444, 445 (Fla. 1961) (court rule implementing Florida's certification procedure).

51. Robbins, *supra* note 48, at 165.

52. 363 U.S. at 212.

53. 416 U.S. 386 (1974).

54. *Id.* at 390-91.

55. 428 U.S. 132 (1976).

Attorney General interpreted the statute in a way that would not create a "parental veto"—held that the District Court should have certified relevant issues of state law to the state's Supreme Judicial Court. The Supreme Court emphasized that the Massachusetts court's interpretation of the statute could "avoid or substantially modify the federal constitutional challenge to the statute," and that in the absence of an authoritative construction, it would be impossible to define the constitutional question with precision.[56] Furthermore, although the importance of speed in the resolution of the case weighed against abstention, the Court stated that the availability of the faster certification procedure "greatly simplifies the analysis."[57]

More recently, the Supreme Court reaffirmed its support for certification in *Arizonans for Official English v. Arizona*,[58] in which an Arizona state employee filed a federal constitutional challenge to a state constitutional provision that made English the state's official language. Arizona's Attorney General requested that both the District Court and Court of Appeals ask the Arizona Supreme Court the meaning of the provision, but the federal courts refused, instead construing it to prohibit use of any language but English by Arizona's government officials and declaring the provision unconstitutionally overbroad. The Supreme Court vacated the lower court judgments on the ground that the case had become moot after the plaintiff left her state job.[59] Because a limiting construction of the language provision may have rendered it constitutional, however, the Supreme Court also stated that the federal courts should have applied a "more cautious approach," reiterating its earlier assessment that "[t]hrough certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'"[60] The complexity of *Arizonans*, the Supreme Court suggested, "might have been avoided had the District Court, more than eight years ago, accepted the certification suggestion made by Arizona's Attorney General."[61]

The Supreme Court itself also has used state certification procedures. In *Fiore v. White*,[62] for example, petitioner owned and operated a hazardous waste disposal facility in Pennsylvania. He and the facility's manager, Scarpone, were jointly tried and convicted under a Pennsylvania statute prohibiting the operation of a hazardous waste storage, treatment or disposal facility without a "permit."[63] The

56. *Id.* at 148.
57. *Id.* at 151.
58. 520 U.S. 43 (1997).
59. *Id.* at 74-75.
60. *Id.* at 77 (citation omitted).
61. *Id.* at 79.
62. 120 S. Ct. 469 (1999).
63. *Id.* at 470-71; *see* Pa. Stat. Ann. tit. 35, § 6018.401(a) (Purdon 1993).

two co-defendants appealed separately to different appellate courts, and while Scarpone's appeal was successful on the ground that a valid "permit" existed, Fiore's conviction was affirmed. The Pennsylvania Supreme Court affirmed the decision in Scarpone's case, but refused to hear Fiore's. After seeking collateral relief in the state courts, Fiore filed a federal habeas corpus petition, claiming that the state produced no evidence to establish that he lacked a "permit" in operating the hazardous waste facility.[64]

The validity of Fiore's claim depended in part upon whether the Pennsylvania Supreme Court's interpretation of the statute in Scarpone's case was the same at the time of Fiore's trial. The District Court granted Fiore's petition, and the Third Circuit reversed. Instead of guessing whether the Pennsylvania Supreme Court's *Scarpone* decision applied retroactively—a question not addressed by the Pennsylvania courts—the United States Supreme Court simply invoked Pennsylvania's certification procedure to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case."[65]

Supreme Court support for certification has been widely echoed. In 1967, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Certification of Questions of Law Act.[66] The Act—promulgated at a time when only four states had certification procedures[67]—was modeled on the Florida rule,[68]

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64. *Fiore*, 120 S. Ct. at 471-72.

65. *Id.* at 473. The question certified was "Does the interpretation of Pa. Stat. Ann., tit. 35, § 6018.401(a) (Purdon 1993), set forth in *Commonwealth v. Scarpone*, 535 Pa. 273, 279, 634 A.2d 1109, 1112 (1993), state the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final?" *Id.* The question remains pending before the Pennsylvania high court.

For additional Supreme Court uses of certification, see Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395-97 (1988) (two questions certified to the Virginia Supreme Court regarding a state statute making it unlawful to display for a commercial purpose sexually explicit materials that could be seen and examined by juveniles); Elkins v. Moreno, 435 U.S. 647, 668-69 (1978) (question certified to the Court of Appeals of Maryland regarding whether certain non-immigrant aliens residing in Maryland are capable of becoming Maryland domiciliaries and thereby receiving certain benefits in applying to and paying tuition at the University of Maryland); Dresner v. City of Tallahassee, 375 U.S. 136, 136-39 (1963) (in order to determine whether it had jurisdiction, the Court certified two questions to the Supreme Court of Florida); and Aldrich v. Aldrich, 375 U.S. 75, 75-76 (1963) (the Court certified four questions to Florida's high court regarding alimony decrees and jurisdictional issues).

Earlier this year, the Supreme Court declined to certify a question regarding interpretation of Nebraska's partial-birth abortion statute to the Nebraska Supreme Court, as certification had not been sought by the Attorney General, the statute was not fairly susceptible to a narrowing construction, and the question would not have been determinative. *See* Stenberg v. Carhart, 120 S. Ct. 2597, 2616-17 (2000).

66. Unif. Certification of Questions of Law Act (1967), 12 U.L.A. 82 (1996). The Act was revised in July 1995. *See* Unif. Certification of Questions of Law [Act][Rule] (1995), 12 U.L.A. 67, 71 (1996).

67. The states were Florida, Maine, Washington and Hawaii. *See* Unif. Certification of Questions of Law Act (1967), 12 U.L.A. 82-83 (1996) (prefatory

allowing for certification of questions from the Supreme Court, circuit courts of appeals, district courts and appellate courts of other states.[69] In 1969, the American Law Institute chimed in with its support,[70] as did the American Bar Association in 1977.[71] In 1992, the National Conference on State-Federal Judicial Relationships suggested that certification could enhance judicial federalism,[72] and in 1995, the Committee on Long Range Planning of the United States Judicial Conference recommended that states without certification procedures adopt them.[73]

As support grew, so did the number of states to embrace the procedure. Today, forty-five states, the District of Columbia and Puerto Rico allow their high courts to answer questions about their

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note).

68. *Id.* at 82 n.2.

69. *Id.* at 86. Because of the inter-jurisdictional nature of certification, the National Conference of Commissioners on Uniform State Laws posited that it would "be eminently desirable that uniformity be achieved in this area." *Id.* at 83. The Conference predicted that "[u]niformity would make probable the greater use of certification," as attorneys and judges from around the country would be "faced not with an unfamiliar act, but rather with a carbon of the act of their own states." *Id.*

70. The ALI's proposal read:

> A court of the United States may certify to the highest court of a State a question of State law, if (1) the State has established a procedure by which its highest court may answer questions certified from such court of the United States; (2) the question of State law may be controlling in the action and cannot be satisfactorily determined in light of the State authorities; and (3) the court expressly finds that certification will not cause undue delay or be prejudicial to the parties.

American Law Institute, *Study of Jurisdiction Between State and Federal Courts, Official Draft* § 1371(e) (1969). According to the commentary accompanying this provision, "a large majority" of the ALI supported certification, as long as appropriate safeguards were developed "to prevent abuse of that device." *Id.* at 292 (commentary to subsection (e)).

71. "The rules of the highest state court should provide a procedure whereby a federal court may request an authoritative statement of state law applicable in a case pending in the requesting court. The state high court may, but need not, answer the request for certification." A.B.A., Jud. Admin. Div., *Standards Relating to Appellate Courts* § 3.33(c) (1977). The ABA again strongly endorsed certification in 1983, when its House of Delegates unanimously adopted a resolution encouraging the enactment of certification legislation in every state. *See* A.B.A., Special Committee on Coordination of Fed. Jud. Improvements, *Report to the House of Delegates* (1983); Letter from Robert D. Evans, Director, Governmental Affairs Group, American Bar Association, to Hon. Edward Griffith, Member of the New York Assembly (Mar. 21, 1983) (on file with authors) (noting unanimous ABA House of Delegates support for certification).

72. *See* William Schwarzer, "Letter to Our Readers," in *FJC Directions: Special State-Federal Issue (A Distillation of Ideas from the National Conference on State-Federal Judicial Relationships)* 1, 6 (1993).

73. Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 32-33 (Dec. 1995); *see also* Jona Goldschmidt, American Judicature Society, *Studies of the Justice System, Certification of Questions of Law: Federalism in Practice* 2 (1995) ("[I]t is hoped that dissemination of this report will improve and facilitate the certification procedure where it exists, and encourage its adoption where it does not.").

law posed by a court in another jurisdiction.[74] Thus, after a long search, inter-jurisdictional certification emerged as a promising solution to the problem of forecasting state law in federal litigation.

II. THE CERTIFICATION PROCEDURE IN NEW YORK

A. *Enactment of New York's Certification Law*

New York's adoption of a certification procedure is another tortuous tale. In 1965, five years after the United States Supreme Court breathed life into Florida's dormant certification statute,[75] New York's Law Revision Commission (the "Commission") began a study of the desirability of a constitutional amendment that would allow the state's high court to answer inter-jurisdictional certified questions of law.[76] After completing the study in 1966, the Commission decided not to pursue the still novel concept.[77]

1. Statutory and Constitutional History

As time progressed, however, the concept gained national prominence. By the early 1980s, a significant number of states had adopted certification statutes[78] and many commentators had voiced enthusiasm for the procedure.[79] This enthusiasm was shared by John

74. *See infra* Appendix A; *see also* Bassler & Potenza, *supra* note 19, at 495 n.18 (listing forty-five states, in addition to the District of Columbia and Puerto Rico, that have adopted a certification procedure); Goldschmidt, *supra* note 73, at 15-16 (listing the forty-three states that had a certification procedure as of that time); Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. Rev. 2123, 2129-30 (1999) (noting that North Carolina is only one of four states that have not enacted a certification procedure).

75. *See supra* notes 46-52 and accompanying text (discussing Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960)).

76. Letter from Michael J. Hutter, Executive Director, New York State Law Revision Commission, to Joseph W. Bellacosa, Clerk of the New York Court of Appeals (Nov. 1, 1983).

77. *Id.*; *see also* Memorandum of the Law Revision Comm'n Relating to Certification of Questions of Law to the Court of Appeals (1984), *reprinted in* 1984 N.Y. Laws 2975, 2975-76; 1969 Report of the N.Y. Law Revision Comm'n 17 (noting that the Commission had continued for further study its investigation into state legislation relating to federal court abstention). The 1966 study, entitled *Federal Courts: State Legislation Relating to Abstention When Points of Local Law Must Be Decided*, served as the basis of a law review article five years later. *See* Lillich & Mundy, *supra* note 35, at 888.

78. By 1984, twenty-four states and Puerto Rico had adopted a certification procedure. Memorandum of the Law Revision Comm'n, *supra* note 77, at 2977.

79. *See, e.g.*, Kurland, *supra* note 49 at 489-90 (1960) (commending Florida's certification statute); Wright, *Federal Courts* § 52 (4th ed. 1983) (discussing certification generally); Levin, *supra* note 29, at 348-50 (noting the simplicity and efficiency of inter-jurisdictional certification); Lillich & Mundy, *supra* note 35, at 899 ("Certification statutes and rules... have received the approval of most commentators who have analyzed them."); Allan D. Vestal, *The Certified Question of*

J. Halloran, Jr., who during the 1981-1982 school year was a first-year student at Albany Law School and part-time Legislative Assistant to Assemblyman Edward Griffith.[80] Halloran became interested in federalism while studying civil procedure, and independent research led him to material related to certification.[81] After learning that New York did not have such a procedure, Halloran took the idea to Assemblyman Griffith, who agreed it was worth pursuing. A bill was drafted, using the Uniform Certification of Questions of Law Act as a model.[82]

As a result of these efforts, on March 2, 1982, Assemblyman Griffith proposed the following addition to New York's Judiciary Law:

Rulemaking power of the court of appeals with respect to matters before certain federal courts. The court of appeals may adopt and from time to time amend a rule to permit the court of appeals to answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, the Court of Appeals of the District of Columbia, or a three judge district court of the United States, when requested by the certifying court if there are involved in any proceeding before it questions of law of the state of New York which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the court of appeals of New York.[83]

The legislative declaration accompanying this bill asserted that "federal court certification of unsettled state law questions fosters the principles of cooperative judicial federalism and comity upon which the American judicial system is based."[84] It noted the "extraordinary enthusiasm" with which commentators had greeted the procedure, and concluded that it was "a necessary and proper element of New York's judicial system" required "to avoid the inherent dangers of predicting what view the highest state court would take toward a legal question, and to avoid the added costs in terms of delay and expense to the litigants when the abstention doctrine is invoked."[85]

Almost immediately, however, Assemblyman Griffith's bill ran into an apparent roadblock. On February 24, 1982, Halloran had written to Joseph W. Bellacosa, then Clerk of the Court of Appeals (later a Judge of the court), requesting the court's view concerning the

Law, 36 Iowa L. Rev. 629, 645 (1951); *Abstention and Certification in Diversity Suits*, *supra* note 43, at 867-69 (1964) (highlighting the "speed, authority and economy possible using certification procedures").

80. Interview with John J. Halloran, Jr. (May 12, 2000).

81. *Id.*

82. *Id.*

83. Assemb. 10676, 207th Sess., § 53-a (N.Y. 1982).

84. *Id.* § 1.

85. *Id.*

proposed legislation.[86] The March 2, 1982 reply indicated in no uncertain terms that the court "has previously opposed this kind of legislation and . . . again strongly opposes its enactment."[87] The letter plainly was not Halloran's dream response. It did, however, identify the court's three objections to the bill, and thus was pivotal in reshaping future efforts.

The first problem noted by the court was that, although the legislative declaration stated that the "proposal does not in any way enlarge or modify the jurisdiction of the court of appeals,"[88] the bill presented "a potentially serious constitutional flaw in adding to this Court's jurisdiction via legislation and rule making rather than by constitutional amendment."[89] Article VI, section 3 of the New York Constitution generally limits the jurisdiction of the Court of Appeals to questions of law in particular categories of cases,[90] none of which allowed the court to answer an inter-jurisdictional certified question.[91] Thus, in the Court of Appeals' view, a statute empowering the court to answer such questions would have been patently unconstitutional. Second, the court was of the view that the proposal would require advisory opinions, an "historically inappropriate and unacceptable" role.[92] And third, the court expressed concern that certification would add to its already overloaded docket.[93]

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86. The purpose of the letter was to "solicit[] any commentary you would care to offer as to the impact of this legislation upon the Court of Appeals." Letter from John J. Halloran, Legislative Assistant to Edward Griffith, to Joseph Bellacosa, Chief Clerk, New York Court of Appeals (Feb. 24, 1982).

87. Letter from Joseph W. Bellacosa, Chief Clerk, New York Court of Appeals, to John J. Halloran, Legislative Assistant to Assemblyman Edward Griffith (Mar. 2, 1982).

88. Assemb. 10676, 207th Sess., § 1 (N.Y. 1982).

89. Letter from Joseph W. Bellacosa, *supra* note 87.

90. There are three exceptions to this restriction, where the court also may review facts: when a defendant has been sentenced to death; in certain cases when the intermediate appellate court has found new facts; and when a judge has requested that the court review a determination of the Commission on Judicial Conduct. N.Y. Const. art. VI, §§ 3(a), 22(d).

91. *See* N.Y. Const. art. VI, § 3(b).

92. Letter from Joseph W. Bellacosa, *supra* note 87. "The courts of New York do not issue advisory opinions for the fundamental reason that in this State '[t]he giving of such opinions is not the exercise of the judicial function.'" Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988) (quoting Matter of State Indus. Comm'n., 224 N.Y. 13, 16 (1918)). The court was not alone in this concern. Indeed, the opening of a *New York Times* article describing the proposed constitutional amendment to allow certification read "Should New York's highest court be able to give advisory opinions to out-of-state courts?" Maurice Carroll, *New York Ballot to Pose 5 Questions*, N.Y. Times, Oct. 27, 1985, at A54. Likewise, in announcing that the amendment passed, the *New York Law Journal* proclaimed that voters had approved a "proposition allowing the New York Court of Appeals to issue advisory opinions on state law for federal courts or other state appellate courts." *Voters Approve Court Question by Big Margin*, N.Y. L.J., Nov. 7, 1985, at 1.

93. Letter from Joseph W. Bellacosa, *supra* note 87. The court entertained 722 full appeals in 1982, and 684 in 1983. 1982 Annual Report of the Clerk of the Court to

Given the Court's opposition and the lack of a core constituency pressing for certification in New York, the bill seemed dead. Counseled by Assemblyman Griffith to rethink tactics, however, Halloran pressed ahead, obtaining support from several key sources, including the United States Supreme Court,[94] New York's State-Federal Judicial Council (then chaired by Court of Appeals Judge (later Chief Judge) Sol Wachtler)[95] and Professor Maurice Rosenberg of the "MacCrate Commission," which in 1982 had published a highly regarded study of state appellate courts in New York.[96]

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the Judges of the New York State Court of Appeals, appendix 4; 1983 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeals, appendix 4. After the court gained greater *certiorari* jurisdiction in 1986 (*see infra* note 123 and accompanying text), the number of appeals became far more manageable. In 1998, for example, the court heard 198 appeals, and in 1999, the Court heard 208. 1998 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeals, appendix 3; 1999 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeals, appendix 3. Again, the court was not alone in its concern over the effects of a certification procedure on its caseload. For example, a September 1983 report on Assembly Bill 2229 by the Committee on State Legislation of the New York County Lawyers' Association recommended disapproval of the bill because of the need for further study "to establish that the procedure, if implemented in New York State, would not cause unnecessary delay and increased expense to litigants." N.Y. County Lawyers' Ass'n, *Report on Proposed Legislation Allowing the Court of Appeals to Answer Questions of Law Certified to it by Specified Federal Courts* 5 (Sept. 1983) [hereinafter N.Y.C.L.A. Report]. The N.Y.C.L.A. Report noted that in the years leading up to 1982 "the caseload of the Court of Appeals has increased in staggering proportions." *Id.* at 5. Of all the potential concerns raised about certification, the Association found none to be "so compelling as that of delay," a problem especially difficult "in a state with as heavy a caseload as New York," and worried about the practical effect of certification on New York litigants, given the already strained resources of the Court of Appeals. *Id.* at 4-6.

94. Although the Supreme Court declined to express its view about Assemblyman Griffith's specific proposal, in a letter responding to John Halloran the Court (through its Clerk) noted that "it is a matter of public knowledge that appellate judges, generally, favor legislation in the States authorizing the Supreme Court to certify to the highest court of the State a question of state law on which a Federal appellate court is called on to act." Press Release, Assemblyman Edward Griffith (Mar. 14, 1983) (on file with authors). We were unsuccessful in locating the actual letter from the Supreme Court to Mr. Halloran.

95. Letter from Sol Wachtler, Judge, Court of Appeals of the State of New York, to Gordon A. Howe, II, Assistant Counsel to the Majority Leader (Apr. 27, 1984); *see also* Pratt, *supra* note 4, at 3-4 (noting that one of the issues discussed by the Council in 1982 was "the possibility of instituting a procedure for certifying questions of state law to the New York Court of Appeals," and that institution of such a procedure is a "substantial achievement—although not one that can be attributed solely to the efforts of the council"); Steven Flanders, *A New Approach Revitalizes State-Federal Judicial Council*, N.Y. L.J., Oct. 4, 1984, at 1 (describing the role of the Council in persuading the Court of Appeals to support certification). The Advisory Group to the Council recently produced a handbook on certification for New York practitioners. *See* Advisory Group to the State and Federal Judicial Council, Practice Handbook on Certification of State Law Questions by the United States Court of Appeals for the Second Circuit to the New York State Court of Appeals (Feb. 25, 2000).

96. Interview with John J. Halloran, Jr. (May 12, 2000); Robert MacCrate et al.,

Simultaneously, as support was generated for certification in New York, Assemblyman Griffith's bill was redrafted in order to address the problems identified by the Court of Appeals. To account for the court's limited jurisdiction, the bill took the form of a constitutional amendment.[97] The amendment allowed the Court of Appeals to adopt rules permitting it to accept certified questions of law from the Supreme Court, federal Courts of Appeals, the Court of Appeals of the District of Columbia and three-judge federal District Courts, when those courts were faced with open, potentially dispositive questions of New York law.[98] Shortly thereafter, an identical bill was introduced in the Senate.[99] The bill passed in the Assembly on March 14, 1983 but died in the Senate's Judiciary Committee.[100]

In late 1983, Halloran sought support from New York's Law Revision Commission.[101] The Commission reopened its earlier study and agreed to assume primary drafting responsibility.[102] On January 24, 1984, Senate Judiciary Committee Chair Douglas Barclay introduced a resolution that paralleled its predecessor, with certain notable exceptions.[103] The new resolution *required*, instead of allowing, the court to adopt a certification rule.[104] It permitted the Court of Appeals to accept certified questions of law from "an appellate court of another state," and dropped the reference to the District of Columbia Court of Appeals and three-judge district courts.[105] Finally, it required the certifying court to determine that there was no controlling precedent in the decisions of *any* of "the courts of New York," not just the state's high court.[106] A month later,

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Appellate Justice in New York (Am. Judicature Soc'y 1982). Professor Rosenberg suggested that New York's certification procedure allow the Court of Appeals to accept certified questions from state courts as well as federal courts, and the Law Revision Commission incorporated that proposal into A 8860. *See* Letter from Michael J. Hutter, Executive Director, New York State Law Revision Commission, to John Halloran (Jan. 4, 1984) (mistakenly designated 1983); *accord* Interview with John J. Halloran, Jr. (May 12, 2000).

97. Assemb. 2229, 208th Sess. (N.Y. 1983); Letter from John J. Halloran, Legislative Assistant to Edward Griffith, to Joseph W. Bellacosa, Chief Clerk, New York Court of Appeals (Apr. 29, 1982).

98. Assemb. 2229, 208th Sess. (N.Y. 1983).

99. S. 5631, 208th Sess. (N.Y. 1983).

100. *See* N.Y. Legis. Rec. & Index, at A 172, S 465 (1983).

101. Interview with John J. Halloran, Jr. (May 12, 2000).

102. Letter from Michael J. Hutter, Executive Director, New York State Law Revision Commission, to Joseph W. Bellacosa, Chief Clerk, New York Court of Appeals (Nov. 1, 1983); Memorandum of the Law Revision Comm'n, *supra* note 77, at 2977; *accord* Letter from Michael J. Hutter to John Halloran, *supra* note 96; Interview with John J. Halloran, Jr. (May 12, 2000).

103. *See* S. 7316, 209th Sess. (N.Y. 1984).

104. *Id.*

105. *Id.*

106. *Id.*

Assemblyman Griffith introduced an identical resolution in the Assembly.[107]

The Law Revision Commission made a persuasive case for the resolutions, noting that the process by which federal courts were ascertaining and applying New York law had "not produced wholly satisfactory results," created "a federal invasion of the state law-making process" and led "to federal-state friction," especially when federal courts failed to predict the state position accurately.[108] The Commission also noted the "limited utility" of abstention.[109] Although the Commission acknowledged the existence of objections to certification, it dismissed them as avoidable or empirically inaccurate.[110] Underscoring the "general agreement" that certification is the most effective method for resolving problems relating to the prediction of state law, the Commission concluded that certification "would facilitate federal-state and state-state judicial cooperation and aid litigants."[111] Thus, the Commission's support was unequivocal.[112]

The Assembly passed the resolution on April 30, 1984,[113] followed one month later by Senate passage of an amended version.[114] The amendment, made at the request of the Court of Appeals, changed the phrase "state appellate court" to "appellate court of last resort of

107. Assemb. 8860, 207th Sess. (N.Y. 1984).

108. Memorandum of the Law Revision Comm'n, *supra* note 77, at 2978-79.

109. *Id.* at 2980.

110. The objections mentioned by the Commission were that "the questions presented are too abstract; the procedure seeks advisory opinions from state courts; the procedure creates delay in the resolution of cases; and the procedure would create unnecessary certifications that would overwhelm the state courts." *Id.* at 2982 (*citing* Lillich & Mundy, *supra* note 35, at 900).

111. Memorandum of the Law Revision Comm'n, *supra* note 77, at 2982.

112. *See id.* at 2978-79. The Democratic Study Group of the New York State Assembly also supported certification, noting that "[t]he certification procedure proposed in this amendment has been regarded with extraordinary enthusiasm by legal commentators and 25 jurisdictions have already adopted such procedures." It also noted that the United States Supreme Court had expressed enthusiasm for the procedure. Democratic Study Group of the N.Y. State Assemb., Rep. on B. No. A 5453, *Constitutional Amendment: Certification of Questions of Law to the New York Court of Appeals*. The New York State Bar Association took no position on the issue. *Id.* As noted above, the New York County Lawyers' Association initially disapproved the bill on the ground that further study was "required to establish that the procedure, if implemented in New York State, would not cause unnecessary delay and increased expense to litigants." N.Y.C.L.A. Report, *supra* note 93, at 1. In August 1985, however, a County Lawyers' Association Committee recommended approval of the constitutional amendment, with a few minor changes. This decision was based on the "belief that the certification procedure, although necessarily involving a delay in the federal court or sister state court proceeding, will result in a more uniform interpretation and application of New York law and cause less of a time delay and involve less expense than that currently faced by litigants encountering the abstention doctrine." N.Y. County Lawyers' Ass'n Comm. on the Fed. Courts, *Comments on Proposed Constitutional Amendment Permitting Certification of Questions of Law to the Court of Appeals of New York* 6 (Aug. 1985).

113. N.Y. Legis. Rec. and Index, at A 609 (1984).

114. The Senate passed the resolution on May 29, 1984. *Id.*

another state."[115] On May 31, the Assembly concurred in the amendment and again passed the resolution.[116] But more was needed: amending the New York State Constitution requires passage by two successive Legislatures and then an affirmative vote of the people.[117] After a second passage by the Legislature,[118] New York voters overwhelmingly endorsed the amendment,[119] and the certification procedure became effective January 1, 1986[120] as article VI, section 3(b), clause 9 of the New York State Constitution. That provision reads:

> The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of

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115. Letter from Sol Wachtler, *supra* note 95. The letter indicated that "certain members of our Court have expressed concern" that the language should be changed to restrict state court certifications to those from state courts of last resort.

116. N.Y. Legis. Rec. and Index, at A 609 (1984).

117. N.Y. Const. art. XIX, § 1.

118. The resolutions passed in 1985—which had, as required, the identical language to those passed in 1984—were N.Y. Senate Bill 3620 (1985) and N.Y. Assembly Bill 5453 (1985). The resolution passed the Senate on April 30, 1985, and the Senate version substituted for the Assembly version on June 17. That same day, the Assembly passed the resolution. N.Y. Legis. Rec. and Index, at S 306 (1985).

119. N.Y. Const. art. VI, § 3(b), cl. 9. The amendment, which was on the ballot on November 5, 1985, passed by a vote of 1,249,238 to 654,198. Manual for the use of the Legislature of the State of New York (1988-89), at 216; *Voters Approve Court Question by Big Margin*, N.Y. L.J., Nov. 7, 1985, at 1 (reporting that, with ninety-six percent of the vote counted, 1,130,092 voted in favor of the amendment, and 601,055 voted against it).

Before a constitutional amendment is put to the voters in New York, the Attorney General's office prepares a plain-language abstract of the amendment, which the State Board of Elections may then alter. Telephone Interview by Frances Murray, Librarian, Court of Appeals of the State of New York, with Lew A. Millenbach, Office of the Attorney General of the State of New York (May 10, 2000); *accord*, Telephone Interview by Frances Murray with Peter S. Kosinski, Deputy Executive Director, New York State Board of Elections (May 15, 2000). The abstract disseminated to the voters regarding the certification amendment read:

> On occasion, an unresolved question of New York law may determine the outcome of a case pending before a court of another state or a federal court. This amendment would expand the jurisdiction of New York's highest court, the Court of Appeals, by permitting it to answer such questions at the request of the United States Supreme Court, a court of appeals of the United States or the highest court of another state.
>
> A yes vote on the question below would indicate your approval of the amendment to enlarge the jurisdiction of the Court of Appeals to permit it to answer such questions. A no vote would indicate your disapproval.

New York voters were busy at the ballot on Election Day 1985, as the certification procedure was one of five constitutional amendments confronting them that day. *See* Carroll, *supra* note 92.

120. N.Y. Const. art. XIX, § 1 ("[I]f the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval.").

> another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.[121]

2. The Court of Appeals' Certification Rule

Elimination of the three obstacles identified by the Court of Appeals cleared the way for court approval.[122] The jurisdictional infirmity was resolved by a constitutional amendment. Legislation effective the same day as the certification procedure greatly reduced the number of appeals as of right and gave the court broad *certiorari* powers.[123] Moreover, the permissive language of the certification amendment gave the court ultimate authority to decline questions.[124] Finally, the requirement that questions be "determinative," along with the Court's authority to establish its own rules for accepting certified questions, resolved concerns regarding advisory opinions.[125]

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121. N.Y. Const. art. VI, § 3(b), cl. 9.

122. *See* Memorandum dated April 23, 1984, attached to Letter from Sol Wachtler, Judge, New York Court of Appeals, to Gordon Howe, II, Assistant Counsel to Senate Majority Leader (Apr. 27, 1984) (expressing unanimous support of the bill).

123. Amendments enacted in 1985, and effective January 1, 1986—the same day as the certification amendment—eliminated several categories of civil appeals as of right. *See* Act of July 11, 1985, ch. 300, § 1, 1985 N.Y. Laws 2182; N.Y. C.P.L.R. 5601 (McKinney 1995). At present, a party may appeal as of right in a civil case when two judges at the New York Supreme Court, Appellate Division (an intermediate appellate court) dissent on a question of law, or a substantial constitutional question is directly at issue in an appellate division order. *See* N.Y. C.P.L.R. 5601. Prior to the 1985 amendments, a party in a civil case could also appeal when a single justice below dissented, when the appellate division reversed the judgment or order appealed from, or when the appellate division substantially modified the judgment or order of the court below. *See* Act of July 11, 1985, *supra*. On the criminal side, all non-capital appeals to the court of appeals are by permission only. *See* N.Y. Crim. Proc. Law §§ 450.90, 460.20 (McKinney 1994). A defendant who is sentenced to death, by contrast, may appeal as of right directly to the court of appeals. N.Y. Const. art. VI, § 3(b); N.Y. Crim. Proc. Law § 450.70.

124. *See* Memorandum dated April 23, 1984, *supra* note 122 (noting that, if the legislation restricting appeals as of right to the Court of Appeals was not enacted, the court "would, of necessity, have to limit the amount of certified questions we would accept").

125. *See id.* ("[W]e believe that an essential requirement of the proposed legislation is to allow this Court to establish its own rules with respect to the selection of those certified questions which this Court will address"). In the early days of inter-jurisdictional certification, the contention that certified questions seek advisory opinions was "[p]robably the most damaging argument against the use of certification." Corr & Robbins, *supra* note 28, at 419. This concern is minimized, however, by the requirement that the certified questions of New York law "may be determinative." N.Y. Ct. R. § 500.17(b) (N.Y. Ct. App.) (McKinney 2000). Furthermore, as one early commentator noted:

> In inter-jurisdictional certification . . . the answer is responsive to a question which was presented in actual litigation and presumably was posed nonabstractly by a federal court bound to solicit an answer in accordance with a standard at least as stringent as the state's own justiciability

The certification amendment required that the court adopt a rule permitting it to accept certified questions, and allows the court to amend its rule "from time to time."[126] Thus, rather than specify a particular certification procedure in the constitutional amendment, which then would be difficult to change, the legislature opted to leave the details to the Court of Appeals in the exercise of its rule-making power.[127] On December 17, 1985, the court adopted the following rule:

> Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the Court of Appeals.[128]

This rule parallels the constitutional provision in setting forth which courts may certify questions to the Court of Appeals, with one significant difference. Although the Constitution allows the court to accept certified questions of law "not controlled by precedent in the decisions of the courts of New York," the Rule allows certification of questions "for which there is no controlling precedent of the Court of Appeals." Thus, the court has allowed certification where it has not spoken, though there may be relevant precedent in other New York courts.[129]

> requirement. Most significantly, that answer will determine the rights of federal court parties, will have *res judicata* and stare decisis effect, and will authoritatively settle state law on the question.

Levin, *supra* note 29, at 357. Most state courts that have considered the issue have concluded that answers to certified questions are not advisory opinions. *See, e.g.*, W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633 (Or. 1991) (stating that while the court's authority does not extend to advisory opinions, it does extend to certified questions); Schlieter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) (finding that the intent behind certification is to avoid issuing advisory opinions).

126. N.Y. Const. art. VI, § 3(b), cl. 9.

127. *See* 1986 Annual Report of the Clerk of the Court to the Judges of the N.Y. Court of Appeals 13 (noting that "the flexible rule adopted by the Court" would allow the court to tailor procedures to "the peculiar circumstances of the certification").

128. N.Y. Ct. R. § 500.17(a). The provision was effective January 1, 1986, the same day as the certification amendment. The parallel rule of the Second Circuit, the most frequent sender of certified questions to the state Court of Appeals, provides that the Circuit Court may, on motion of a party or sua sponte, "certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court." N.Y. Ct. R. § 0.27 (2d Cir.) (McKinney 2000). The rule further provides that certification "will be in accordance with the procedures provided by the state's legislature or highest state court rules," and that certification "may stay the proceedings in this Court pending the state court's decision whether to accept the certification and its decision of the certified question." *Id.*

129. The Uniform Certification of Questions of Law Act, in contrast, restricts the ability of a state high court to answer certified questions to those situations where "there is no controlling appellate decision, constitutional provision, or statute of this State." Unif. Certification of Questions of Law Act § 3 (1995).

A court wishing to certify a question to the Court of Appeals must prepare a certificate that includes:

> [T]he caption of the case, a statement of facts setting forth the nature of the cause and the circumstances out of which the questions of New York law arise, and the questions of New York law, not controlled by precedent, which may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals.[130]

The document must be certified by the clerk of the court and along with "all relevant portions of the record and other papers before the certifying court, as it may direct," filed with the Clerk of the Court of Appeals.[131]

When the Court of Appeals receives a request for certification, the matter is referred to an individual judge of the court, who circulates a written recommendation to the full court on whether to accept it.[132] An accepted certification is treated as a regular appeal,[133] and upon

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130. N.Y. Ct. R. § 500.17(b) (N.Y. Ct. App.) (McKinney 2000).

131. *Id.* at § 500.17(c). If any additional papers are required for proper review of the question, the court, through the Clerk, may request them. *Id.* at § 500.17(e). Furthermore, if the constitutionality of a New York statute affecting the public interest is involved, and neither the state nor a state agency is a party, the Clerk of the Court must notify the state Attorney General. *Id.* at § 500.17(f).

132. 1998 Annual Report of the Clerk of the Court to the Judges of the N.Y. State Court of Appeals 7. One commentator has suggested that this rule is "contrary to the will of the people of New York" reflected in the constitutional amendment allowing the court to accept certified questions, as the constitutional provision does not state—as does the Court of Appeals Rule—that the court should review the merits of the question in deciding whether to accept it. Jack J. Rose, Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 Hofstra L. Rev. 421, 432-33 (1989). This criticism ignores the express grant of constitutional authority to the court to "adopt and from time to time . . . amend a rule to *permit* the court to answer questions of New York law certified to it." N.Y. Const. art. VI, § 3(b), cl. 9 (emphasis added). The constitution leaves to the court the procedures for accepting certified questions, and by the use of the word "permit," clearly contemplates the Court's rejection of questions that would not further the salutary goals of certification or which would unduly burden the Court's docket. Indeed, no state has adopted a procedure that *requires* its high court to accept a certified question.

133. 1998 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeals 7. The court makes a threshold determination of the procedure to follow for deciding the merits. N.Y. Ct. R. § 500.17(d) (N.Y. Ct. App.) (McKinney 2000). In addition to deciding a case after full briefing and oral argument, the Court of Appeals may examine the merits of an appeal, on its own motion, by an expedited procedure. Such expedited appeals may be determined on the briefs submitted to previous courts, the record and writings of the courts below and additional written submissions of counsel. *See id.* at § 500.4. An expedited procedure is generally used in cases governed by clear recent controlling precedent or narrow issues of law not of overriding or statewide importance, or where there are non-reviewable questions of discretion, affirmed findings of fact or non-preserved issues of law. Although these factors are not likely to be present when the court accepts a certified question of law, the expedited procedure was used by the Court of Appeals in resolving the first question certified to it, in *Kidney v. Kolmar Laboratories, Inc.*, 68

resolution of the case, the clerk of the state court transmits the decision to the certifying court.[134]

B. *Key Provisions of New York's Certification Procedure*

Like every other certification jurisdiction, New York accepts certified questions from the United States Supreme Court and federal courts of appeals.[135] Along with 18 other states, it also accepts questions from other state high courts.[136] Unlike 36 jurisdictions, however, New York does not accept certified questions from federal District Courts.[137] The intention here was both to prevent a flood of certified questions and to provide the state Court of Appeals with the benefit of a fully developed record and lower court opinions, as it would ordinarily have in a case that originated in the state system.[138]

An appropriate court may certify a question only when it appears that "determinative questions of New York law are involved,"[139] and the certifying court must state the open questions of New York law that "may be determinative" of the case.[140] The use of "may" instead of "must" eliminates the potential for "undue litigation regarding whether a question is determinative of the entire litigation,"[141] and

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N.Y.2d 343 (1986). *See* N.Y. Ct. R. § 500.4(b).

134. *See* N.Y. Ct. R. § 500.17(g).

135. *See* Goldschmidt, *supra* note 73, at 15-16 (tbl. 2).

136. *See id.* at 16-17 (tbl. 2); *see also* Cal. R. Ct. 29.5(a) (West rev. ed. 2000) (stating that the California Supreme Court may answer certified questions of law from the court of last resort of any state).

137. *See* Goldschmidt, *supra* note 73, at 15-16 (tbl. 2). The Uniform Act uses the all-encompassing phrase "court of the United States," which is meant to include all federal courts, including bankruptcy courts. Unif. Certification of Questions of Law Act § 3 (1995).

A few states also allow specialized federal courts to submit certified questions of law, such as the Court of International Trade, the Bankruptcy Court, the Bankruptcy Appellate Panel, the Judicial Panel on Multidistrict Litigation, the Tax Court, and the Court of Military Appeals. *See* Goldschmidt, *supra* note 73, at 17 (tbl. 2).

138. *See* Memorandum of the Law Revision Comm'n, *supra* note 77, at 2985-86. Despite the fears of the Commission and the other jurisdictions that have excluded district court certification in order to prevent too many certified questions, certification has been used judiciously, and "there has been no avalanche even in those states which permit district court certification." Braun, *supra* note 28, at 957-58; *see also* J. Michael Medina, *The Interjurisdictional Certification of Questions of Law Experience: Federal, State, and Oklahoma—Should Arkansas Follow?*, 45 Ark. L. Rev. 99, 114 (1992) ("Empirical evidence from states which permit district court certification shows that state appellate dockets are not flooded by questions certified from district courts.").

139. N.Y. Ct. R. § 500.17(a) (N.Y. Ct. App.) (McKinney 2000).

140. *Id.* at § 500.17(b). The Uniform Certification of Questions of Law Act has a more permissive standard, allowing a state high court to answer a certified question of law "if the answer may be determinative *of an issue* in pending litigation." Unif. Certification of Questions of Law Act § 3 (1995) (emphasis added).

141. Bassler & Potenza, *supra* note 19, at 551; *see also* Robbins, *supra* note 48, at 179-80 (arguing that the "must be determinative" language "leads to counterproductive battles concerning which questions should be answered. The

"allows both the certifying and answering courts to reach the crux of the substantive issue quickly."[142]

III. THE NEW YORK EXPERIENCE

Since inter-jurisdictional certification became available in New York, the Court of Appeals has received forty-five requests, most posing multiple questions.[143] Forty-four have been sent by the United States Court of Appeals for the Second Circuit, one by the Eleventh Circuit.

Of these requests—most of which have come in recent years—the court has accepted thirty-nine, declined five and one remains pending. In two cases, accepted questions were withdrawn by the Second Circuit before the state court answered, and five other cases are currently scheduled for briefing and argument. The average time from certification to acceptance or rejection has been approximately six weeks, and the average time from acceptance to resolution about six months.[144] Thus, one of the primary objections to the concept of certification—undue delay—has not been a problem in New York.[145]

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answering and certifying courts then become bogged down in procedural, rather than substantive, determinations.").

142. Robbins, *supra* note 48, at 180. The dispositive significance of the issue in the pending federal case is clearly important to the state court. Indeed, the "may be determinative" requirement has contributed to the rejection of certified questions in two cases, *Retail Software Servs., Inc. v. Lashlee*, 71 N.Y.2d 788 (1988), and *Yesil v. Reno*, 92 N.Y.2d 455 (1998). *See infra* notes 213-23, 243-48 and accompanying text. The state court, nevertheless, has been cognizant of the distinction between "may be determinative" and the stricter "must be determinative." For example, in *Hertz Corp. v. City of New York*, 967 F.2d 54 (2d Cir. 1992), the question certified was whether a local law enacted by the New York City Council was preempted by provisions of New York's General Business Law enacted by the state legislature. The state court accepted the question, even though it was not necessarily determinative of the appeal. If the court answered in the negative, which it did, the Second Circuit still could have struck down the local law on federal preemption grounds, as plaintiff claimed the law also violated the federal Constitution and Sherman Antitrust Act. *See id.* at 56. On the other hand, if the certified question were answered in the affirmative, the local law would be invalid and the Second Circuit would not have to reach the federal preemption questions. *Id.* at 57. Thus, while the question would not have satisfied a "must be determinative" standard, it did satisfy the "may be determinative" standard.

143. Statistics in this article concerning certification to the New York Court of Appeals are accurate as of Oct. 13, 2000. Citations to the questions received by the New York State Court of Appeals and its responses are provided in Appendix B *infra*. Between 1990 and 1994, the average number of questions certified by United States Circuit Courts of Appeals nationwide was 14.8. During that period, the Second Circuit certified thirteen questions to the state Court of Appeals. *See* Goldschmidt, *supra* note 73, at 28.

144. *See* Memorandum from Laurene L. Tacy, Assistant Deputy Clerk of the Court of Appeals, to Stuart M. Cohen, Clerk of the Court of Appeals (June 30, 2000). Through the first half of 2000, when the court accepted two of the three questions received, the average time from certification to acceptance or rejection was approximately five weeks. *Id.*

145. *But see, e.g.*, Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 Suffolk U. L. Rev. 677, 681 n.18, 688-89 (1995) (discussing cases in which state courts

A. *Certification in Practice*

1. The Certification Era Begins

Six months after certification became effective in New York, the Second Circuit sent its inaugural request: "whether money advanced by an insurer on behalf of its insured to an injured party, prior to settlement or judgment of a tort action, is 'the payment of any monies' within the meaning of section 104-b(2) of the New York Social Services Law."[146] The federal court decided that the question should be resolved by the state court because there was no controlling precedent and the issue seemed "likely to recur with some frequency."[147]

The question arose in a case in which William Kidney, Jr., an infant, was injured on defendant Kolmar's property.[148] Kolmar's insurer voluntarily advanced $30,000 to William's father for medical treatment, and the Department of Social Services (the "DSS") advanced $27,503. William and his father later sued Kolmar in the United States District Court for the Southern District of New York, resulting in judgment against Kolmar for $22,500. Two weeks after the entry of judgment, DSS filed a lien, pursuant to New York Social Services Law section 104-b, for the money previously paid to William's father. Effectiveness of the lien depended on whether Kolmar had been notified of it "prior to the payment of any moneys to [the] injured party."[149] The certified question arose because the statutory phrase "payment of any moneys" could be interpreted two ways: "broadly to include any delivery of money, or narrowly to include only required transfers."[150]

Kidney v. Kolmar presented an ideal scenario for certification: an open choice between two reasonable readings of a New York statute would resolve a federal case. After the state court answered the question in the negative,[151] the Second Circuit, in disposing of the case, praised certification as a "valuable device for securing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit."[152]

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took a long time to respond to certified questions, and noting that, while certification may be faster than abstention, it still is not as fast as federal court determination of all issues before it).

146. Kidney v. Kolmar Labs., No. 86-7194, slip op. at 2-3 (2d Cir. July 7, 1986).
147. *Id.* at 3.
148. *See* Kidney v. Kolmar Labs., 68 N.Y.2d 343, 344 (1986).
149. N.Y. Soc. Services Law § 104-b[2] (McKinney 1993).
150. *Kidney*, 68 N.Y.2d at 345.
151. *See id.* at 346-47.
152. Kidney v. Kolmar Labs., 808 F.2d 955, 957 (2d Cir. 1987).

2. The Court of Appeals' Experience Answering Certified Questions

Since *Kidney*, certified questions have settled New York law in areas as diverse as the rule against perpetuities,[153] the attorney-client privilege,[154] loss of consortium[155] and malicious prosecution.[156] One particularly fruitful area has been products liability, a field well suited for certification, as it is dominated by state common law and arises frequently in federal diversity cases. Thus, it is hardly surprising that several of New York's certified questions have involved product-related injuries. For example, in *Bocre Leasing Corp. v. General Motors Corp.*,[157] the issue was whether New York law allowed the purchaser of a helicopter to recover under either strict liability or negligence theories for damages to the craft caused by a defective engine.[158] The court answered this open policy question in the negative, holding that tort recovery "should not be available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract."[159] In doing so, the court adopted the reasoning of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[160] thereby placing New York "in the mainstream, where it belongs in such matters."[161]

In *Denny v. Ford Motor Co.*,[162] the core question was whether, in New York, causes of action for strict products liability and breach of implied warranty were necessarily coextensive, again a policy choice between reasonable alternatives.[163] The underlying personal injury

153. *See* Wildenstein & Co. v. Wallis, 79 N.Y.2d 641 (1992).
154. *See* Madden v. Creative Servs., Inc., 84 N.Y.2d 738 (1995).
155. *See* Consorti v. Owens-Corning Fiberglas Corp., 86 N.Y.2d 449 (1995).
156. *See* Engel v. CBS, Inc., 93 N.Y.2d 195 (1999).
157. 20 F.3d 66 (2d Cir. 1994).
158. *See* Bocre Leasing Corp. v. Gen. Motors Corp., 84 N.Y.2d 685 (1995).
159. *Id.* at 694.
160. 476 U.S. 858 (1986).
161. *Bocre Leasing*, 84 N.Y.2d at 693-94.
162. 42 F.3d 106 (2d Cir. 1994), *certified question answered in* 87 N.Y.2d 248 (1995).
163. In addition to *Bocre* and *Denny*, the Second Circuit has, on several occasions, certified questions containing policy choices "singularly appropriate for resolution by the New York Court of Appeals." Banque Worms v. BankAmerica Int'l, No. 90-7106/7107, slip op. at 5 (2d Cir. May 30, 1990); *see, e.g.*, Royal Indem. Co. v. Providence Wash. Ins. Co., No. 97-7301 (2d Cir. Mar. 6, 1998) (validity of exclusion in truckers' insurance policy); West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co., 49 F.3d 48 (2d Cir. 1995) (enforcement of liens); Fed. Home Loan Mortgage Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, No. 94-7677 (2d Cir. Apr. 28, 1995) (rent stabilization); Madden v. Creative Servs., Inc., 24 F.3d 394 (2d Cir. 1994) (third party intrusion into attorney-client privilege); Westinghouse Elec. Corp. v. New York City Transit Auth., 990 F.2d 76 (2d Cir. 1993) (validity of contractual alternative dispute resolution provision authorizing the employee of a party to make binding decisions on all questions arising under the contract); Hertz Corp. v. City of New York, 967 F.2d 54 (2d Cir. 1992) (preemption of municipal legislation by state legislation); Home Ins.

action arose after plaintiff's sport-utility vehicle rolled over. The district judge submitted plaintiff's claims for strict products liability and breach of implied warranty of merchantability to the jury, over Ford's protests that they were identical. Responding to interrogatories, the jury found that Ford was not strictly liable because the vehicle was not "defective," but also found that Ford had breached its implied warranty of merchantability.[164] On appeal, Ford argued that the breach of implied warranty cause of action had "been subsumed by the more recently adopted, and more highly evolved, strict products liability theory."[165]

The state court, in responding to the Second Circuit's certified questions, concluded Ford overlooked "the continued existence of a separate *statutory* predicate for the breach of warranty theory and the subtle but important distinction between the two theories."[166] Thus, the court determined that, under New York law, a rational factfinder could have found for defendant on the strict liability claim and for plaintiff on the warranty claim.[167]

Products liability was also central to *Liriano v. Hobart Corp.*,[168] in which plaintiff, a supermarket employee, was injured on the job while feeding meat into a commercial grinder manufactured by Hobart. At the time the grinder was sold, an affixed safety guard prevented the user's hands from coming into contact with the machine's dangerous parts. Before the accident, however, the safety guard had been removed, a common practice of which the manufacturer was aware. After plaintiff sued Hobart in state court on negligence and strict products liability theories, Hobart removed the case to federal court and impleaded plaintiff's employer. The federal court dismissed all of plaintiff's claims except those based on failure to warn, and a jury concluded that Hobart's failure to warn was a proximate cause of plaintiff's injuries.[169]

Co. v. Am. Home Prods. Corp., 873 F.2d 520, 522 (2d Cir. 1989) (duty of insurer to "reimburse insured for punitive damages awarded [in an] out-of-state judgment"); and *Banque Worms*, No. 90-7106/7107, slip op. at 5 (ability to recover money sent in a mistaken wire transfer).

164. *Denny*, 87 N.Y.2d at 253-54.

165. *Id.* at 255.

166. *Id.*

167. For commentary on *Denny*, see Peter J. Ausili, *Ramifications of* Denny v. Ford Motor Co., 15 Touro L. Rev. 735 (1999); Sean M. Flower, *Is Strict Product Liability in Tort Identical to Implied Warranty in Contract in the Context of Personal Injuries?:* Denny v. Ford Motor Company, 62 Mo. L. Rev. 381 (1997); Victor E. Schwartz & Mark A. Behrens, *An Unhappy Return to Confusion in the Common Law of Products Liability*—Denny v. Ford Motor Company *Should Be Overturned*, 17 Pace L. Rev. 359 (1997).

168. 132 F.3d 124 (2d Cir. 1998).

169. The jury concluded that, between defendants, Hobart was 5% liable, and plaintiff's employer, who owned the grinder when the guard was removed, was 95% liable. The jury subsequently assigned one-third of the responsibility to plaintiff. *Id.* at 125-26.

On appeal, defendants argued that as a matter of law, manufacturers had no duty to warn in these circumstances. Although they must warn users of the foreseeable dangers inherent in their products,[170] manufacturers in New York cannot be held liable for strict liability or negligence where, "after the product leaves [their] possession and control . . ., there is a subsequent modification [that] substantially alters the product" and causes plaintiff's injuries.[171] On the other hand, manufacturers are under a continuing duty to warn of dangers that are discovered after the sale of the product.[172] The tension between these principles had led to a split in authority over whether a failure to warn claim such as plaintiff's was cognizable,[173] and prompted the Second Circuit to ask the Court of Appeals whether manufacturer liability can "exist under a failure to warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory."[174] The state court answered the question in the affirmative, finding persuasive a manufacturer's duty "to warn against the dangers of foreseeable misuse of its product,"[175] as well as dangers that present themselves after a product has been sold.[176]

Contract law has been another fertile area for certification in New York. In *Rooney v. Tyson*,[177] for example, a former trainer of boxer Mike Tyson sued for breach of his employment contract. A federal jury found for the trainer, but the verdict was sustainable only if the employment was not "at will." The Second Circuit, finding the common law interpretive principles unclear, certified the question whether the oral contract for Rooney to train Tyson "'for as long as the boxer fights professionally'" was for a fixed duration, in which

170. *See, e.g.*, Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 297 (1992) ("[A] plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product . . . .").

171. Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 475 (1980).

172. *See* Cover v. Cohen, 61 N.Y.2d 261, 274-75 (1984).

173. *See Liriano*, 132 F.3d at 129-31 (citing cases).

174. *Id.* at 132.

175. Liriano v. Hobart Corp., 92 N.Y.2d 232, 240 (1998) (citing Lugo v. LJN Toys, Ltd., 75 N.Y.2d 850 (1990)).

176. *See id*; *see also Cover*, 61 N.Y.2d at 274-75 (noting that a manufacturer may be liable for failing to warn of risks that the manufacturer learns of after the sale). The Court of Appeals declined to answer the second part of the Second Circuit's question—whether a manufacturer's liability on a failure to warn theory would be barred as a matter of law on the facts of this case—as a resolution of this issue required a fact-specific inquiry but did not involve any unsettled New York law. *Liriano*, 92 N.Y.2d at 243. For a detailed analysis of *Liriano*, see Hildy Bowbeer & David S. Killoran, Liriano v. Hobart Corp.: *Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 Brook. L. Rev. 717 (1999).

177. 127 F.3d 295 (2d Cir. 1997), *certified question answered in* 91 N.Y.2d 685 (1998).

case the employment would not be at will.[178] After clarifying state law regarding what constitutes a "definite" duration, the New York State Court of Appeals held that the contract between Rooney and Tyson fell into that category, rendering the at-will doctrine inapplicable.

The question in *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*[179] required the state Court of Appeals to determine whether a party may demand adequate assurances of future performance when there are reasonable grounds to believe that a solvent counterpart will commit a breach in a transaction that was not governed by the Uniform Commercial Code.[180] Noting the effectiveness of the Code provision for the demand for future performance and the incentive that such a procedure provides for parties to resolve their disputes without judicial intervention, the court chose to apply the same standard as a matter of common law, thus answering the open state law issue in the affirmative.[181]

A variety of other unsettled contract issues have also been resolved by answers to certified questions. Topics have included the part performance exception to the Statute of Frauds,[182] the validity of an alternative dispute resolution provision,[183] a pay-when-paid clause in a subcontract,[184] and a number of insurance disputes.[185]

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178. *Rooney*, 127 F.3d at 296-98. For a discussion of at-will employment, see *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 333-36 (1987).

179. 92 N.Y.2d 458 (1998).

180. *Id.* at 460. The New York U.C.C. provides "[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." N.Y. U.C.C. § 2-609(1) (McKinney 1993).

181. *Norcon Power*, 92 N.Y.2d at 468. The court limited its holding to long-term commercial contracts that are "complex and not reasonably susceptible of all security features being anticipated, bargained for and incorporated." *Id.*

182. Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group PLC, 93 N.Y.2d 229 (1999).

183. Westinghouse Elec. Corp. v. New York City Transit Auth., 82 N.Y.2d 47 (1993).

184. West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co., 87 N.Y.2d 148 (1995).

185. Insurance contracts, a staple of the state court docket, have been a steady source of certified questions. The court has been asked to determine whether "'a commercial general liability policy [was] excess to the third-party liability coverage provided by a homeowner's policy,'" where both policies covered the subject loss, *see* Great N. Ins. Co. v. Mount Vernon Fire Ins. Co., 92 N.Y.2d 682, 684 (1999); "'[w]hether a non-trucking-use exclusion from coverage in an insurance policy obtained by the owner of a commercial vehicle is valid'" in New York, *see* Royal Indem. Co. v. Providence Wash. Ins. Co., 92 N.Y.2d 653, 656 (1998); whether conduct fell within a clause excluding coverage for assault and battery, *see* Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd., 88 N.Y.2d 347 (1996); whether a reinsurer must "'prove prejudice before it can successfully invoke'" a late-notice defense, *see* Unigard Sec. Ins. Co. v. N. River Ins. Co., 79 N.Y.2d 576, 581 (1992); and whether an insurer is required to reimburse the insured for punitive damages awarded in an out-of-state judgment, *see* Home Ins. Co. v. Am. Home Prods. Corp., 75 N.Y.2d 196 (1990).

Because statutory interpretation is so much a part of today's litigation landscape,[186] it is not surprising that several certified questions have dealt with construction of state statutes invoked in federal court. Questions sent to the state court have involved statutes relating to personal jurisdiction,[187] rent stabilization,[188] limitations periods,[189] elevation-related hazards to workers[190] and truck owner liability for injuries sustained during unloading.[191]

Recently, certification enabled the state Court of Appeals to define the scope of New York's right to privacy statutes, which had been invoked in a federal diversity action. In *Messenger v. Gruner + Jahr Printing & Publishing*,[192] plaintiff, a teenage model who had posed for a series of photographs to appear in *Young & Modern* magazine, sued the publisher in federal court after the pictures were published in conjunction with a "Love Crisis" advice column headlined "I got trashed and had sex with three guys."[193] Plaintiff alleged that the magazine violated sections 50 and 51 of the New York Civil Rights Law by using her photographs for trade purposes without consent,[194] and a jury found in her favor.

The appeal centered on interpretation of New York Civil Rights Law sections 50 and 51. The state Court of Appeals had earlier established that these statutes did not apply to reports of newsworthy events or matters of public interest.[195] The court also made clear that this "newsworthiness exception" was inapplicable both where pictures had no real relationship to the article and where the article was a disguised advertisement.[196] In the Second Circuit's view, however, there existed a conflict of New York authority on whether there was

186. Despite the enduring importance of the common law, the proliferation of legislation during the last half of the twentieth century has made statutory interpretation "likely the principal task engaged in by state courts." Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 18-19 (1995); *see also* Guido Calabresi, A Common Law for the Age of Statutes 1 (Harv. Univ. Press 1982) (discussing the "'statutorification' of American law").

187. Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 77 N.Y.2d 28 (1990).

188. Fed. Home Loan Mortgage Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, 87 N.Y.2d 325 (1995).

189. Ins. Co. of N. Am. v. ABB Power Generation, Inc., 91 N.Y.2d 180 (1997).

190. Joblon v. Solow, 91 N.Y.2d 457 (1998).

191. Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554 (1999).

192. 94 N.Y.2d 436 (2000).

193. *Id.* at 439.

194. Section 51 of the Civil Rights Law provides, in relevant part, that "[a]ny person whose name, portrait, picture or voice is used within this state for ... the purposes of trade without the written consent first obtained as above provided [in section 50] may ... sue and recover damages for any injuries sustained by reason of such use." N.Y. Civ. Rights Law § 51 (McKinney 1992 and Supp. 2000).

195. Howell v. N.Y. Post Co., 81 N.Y.2d 115, 123 (1993); Stephano v. News Group Publ'ns, Inc., 64 N.Y.2d 174, 184 (1984).

196. Finger v. Omni Publ'ns Int'l Ltd., 77 N.Y.2d 138, 143 (1990).

an additional, third limitation, where use of a photograph was substantially fictionalized.[197] Thus, the federal court asked the state court whether a plaintiff may recover under sections 50 and 51 "where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy column?"[198]

Answering in the negative, the Court of Appeals concluded that the only relevant questions were whether a real relationship existed between the photograph and the article, and whether the article was an advertisement in disguise. As for the "substantial fictionalization" cases, the state court held that they apply only when an article is "so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception."[199] Because the "Love Crisis" column did not fall into that category—it was concededly newsworthy—plaintiff could not successfully invoke the Civil Rights Law.[200]

B. *Cases in Which Certification Was Not Used*

Because certification is discretionary for both federal and state courts, there will invariably be instances when a court declines to answer questions sent by another jurisdiction. Likewise, courts sometimes choose not to certify open questions. Thus, cases in which the procedure has been successfully invoked tell only part of the story. To complete the picture, it is also necessary to consider cases in which either jurisdiction has decided *against* certification.

1. Questions Asked But Not Answered

Despite the auspicious beginning in *Kidney v. Kolmar*, certification was little used in New York during its early years.[201] Federal court

197. *See, e.g.*, Spahn v. Julian Messner, Inc., 21 N.Y.2d 124 (1967) (allowing recovery under section 51 of New York's Civil Rights Law when the presentation is knowingly fictionalized); Binns v. Vitagraph Co. of Am., 210 N.Y. 51, 57 (1913) ("A picture within the meaning of the statute is not necessarily a photograph . . . , but includes any representation . . . .").

198. Messenger v. Gruner + Jahr Printing & Publ'g, 175 F.3d 262, 266 (2d Cir. 1999). The federal court also asked whether there are any additional limitations on plaintiff's cause of action that precluded her recovery in the case. *Id.* In light of the state court's response to the first certified question, it was unnecessary to answer the second. *See infra* notes 199-200 and accompanying text.

199. Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 446 (2000).

200. The Second Circuit ultimately vacated the District Court's judgment and remanded for further proceedings in accordance with the state court's answer. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 208 F.3d 122, 124 (2d Cir. 2000), *petition for cert. filed* (May 30, 2000) (No. 99-1915).

201. In the first five years of the procedure's availability, the state Court of Appeals received certified questions only seven times. *See infra* Appendix B.

reluctance to certify may have stemmed from fears that certified questions would burden already busy state courts, thus extending delays for federal court litigants,[202] or would require state courts to answer abstract questions without adequate grounding in the relevant facts.[203] Courts also needed time to learn when the procedure could be used to best advantage, and when complications impeded its most effective use. In this regard, on five occasions the New York State Court of Appeals has declined to answer questions certified by the Second Circuit. Because both the federal court in certifying, and the state court in declining, have followed the mutually beneficial practice of stating the grounds for their decisions—a practice not uniformly followed elsewhere[204]—a review of these cases is particularly instructive about optimal use of the procedure.[205]

Two of the first four times the Second Circuit certified questions, the state court rejected them, no doubt contributing to federal courts' wariness of the procedure. *Rufino v. United States*[206]—which followed on the heels of *Kidney*—presented two questions regarding whether "loss of enjoyment of life" is a distinct element of damages for a plaintiff rendered comatose by a defendant's negligence.[207] The questions presented open, dispositive state law issues, meeting the

202. *See* The Comm. on Fed. Courts of the Ass'n of the Bar of the City of New York, *Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law*, 42 Rec. Ass'n B. City N.Y. 101, 111, 125 (1987) (noting that "concern about delay has been one of the reasons cited by various courts which have declined to certify questions," concluding that certification "would in most cases merely add to the time and expense of resolving disputes and frustrate litigants who are properly before the federal courts," and recommending that the Second Circuit certify only in a "rare case"); *see also* Larry M. Roth, *Certified Question from the Federal Courts: Review and Re-proposal*, 34 U. Miami L. Rev. 1 (1979) (arguing that Florida should establish a specialized court to deal with certified questions).

203. *See* Schneider, *supra* note 48, at 294.

204. Not all courts state their reasons for declining certified questions. *See, e.g.*, Conn. Performing Arts Found., Inc. v. Brown, 801 F.2d 566, 568 (2d Cir. 1986) (noting that the Connecticut Supreme Court rejected a certified question in that case without comment); Schneider, *supra* note 48, at 315 ("The Michigan Supreme Court, to say the least, is not very receptive to the certified question. Not only does the court refuse to answer most questions, but it generally fails to state the reasons for its refusal."); Selya, *supra* note 145, at 681-82 n.19 (citing cases in which state courts gave little or no reason for rejecting certified questions).

205. Of course, rejection of a certified question is not a decision on the merits, and therefore offers no clue as to how the state court would answer the question. *See* Richard Alan Chase, Note, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 St. John's L. Rev. 407, 422 (1992).

206. 69 N.Y.2d 310 (1987).

207. The questions were:

> (a) whether "loss of normal pursuits and pleasures of life" or "loss of enjoyment of life" is a separately compensable item of damages apart from other items, such as pain and suffering; and (b) if so, whether a claimant must possess cognitive awareness in order to recover for such a loss.

Id. at 311 n.[*].

threshold requirements for certification.[208] As the Second Circuit noted, however, a state trial court had recently answered the identical questions in a different case, *McDougald v. Garber*.[209] Although the trial court opinion in *McDougald* did not authoritatively represent the law of the State of New York, the state court nonetheless declined certification on the ground that *McDougald* was then pending in the intermediate appellate court, and it was "unquestionably preferable in the resolution of significant State law issues to secure the benefit afforded by our normal process—the considered deliberation and writing of our intermediate appellate court in a pending litigation."[210]

A year later, the state court again declined a Second Circuit request. At issue in *Retail Software Services, Inc. v. Lashlee*[211] was whether New York's Franchise Sales Act,[212] which provides for service of process on the secretary of state for any person who has sold a franchise in the state, also provides a basis for personal jurisdiction over nonresident defendants.[213] The question arose in connection with the purchase by Retail Software Services, a New York corporation, of seven franchises for retail computer software stores from Software Centre International ("SCI"), a California-based franchisor. Shortly after the purchase, SCI went bankrupt and did not perform the agreement. Retail Software commenced an action in the United States District Court for the Eastern District of New York, claiming that SCI officers had violated the Franchise Sales Act by making numerous misrepresentations during a California meeting about SCI's financial condition and the agreements, and seeking

208. *See* McDougald v. Garber, 135 A.D.2d 80, 82 (N.Y. App. Div. 1988).

209. McDougald v. Garber, 132 Misc. 2d 457 (N.Y. Sup. Ct. 1986).

210. *Rufino*, 69 N.Y.2d at 312. The Court of Appeals eventually did confront the questions presented in *Rufino* through the "normal process" of the *McDougald* appeal. The Appellate Division affirmed the trial court in *McDougald*, holding that "loss of enjoyment is a damage element separate and distinct from pain and suffering, for which compensation may be awarded despite the injured party's lack of cognitive awareness." *McDougald*, 135 A.D.2d at 82. After the state Court of Appeals declined to answer the certified questions in *Rufino*, the Second Circuit followed "the well reasoned opinion" of the lower courts in *McDougald*. Rufino v. United States, 829 F.2d 354, 361 (2d Cir. 1987). When the state Court of Appeals decided *McDougald*, however, it disagreed on both questions, holding that cognitive awareness is a prerequisite to recovery, and that a jury should not make a "loss of enjoyment of life" award separate from its pain and suffering award. McDougald v. Garber, 73 N.Y.2d 246, 254 (1989).

211. 838 F.2d 661 (2d Cir. 1988).

212. N.Y. Gen. Bus. Law § 686 (McKinney 1984). The statute provides:

> Any person who shall offer to sell or sell a franchise in this state as a franchisor, subfranchisor or franchise sales agent shall be deemed to have irrevocably appointed the secretary of state as his or its agent upon whom may be served any summons, complaint . . . or other process directed to such person . . . in any action, investigation, or proceeding which arises under this article or a rule hereunder, with the same force and validity as if served personally on such person.

213. *See* Retail Software Servs., Inc. v. Lashlee, 71 N.Y.2d 788, 789 (1988).

recovery of deposits paid and expenses incurred under the agreements.

The District Court granted the motion of three individual defendants to dismiss for lack of personal jurisdiction, holding that the Franchise Sales Act does not supply an independent basis for personal jurisdiction, and that jurisdiction could not be obtained under New York's long-arm statute.[214] On appeal, defendants argued that use of the Act to establish jurisdiction was not intended, and would violate the Due Process Clause of the Fourteenth Amendment.[215] The Circuit Court concluded that there was an open statutory interpretation issue that should be decided by the state court, reasoning that the statute:

> reflects a policy of the state legislature to protect operators of franchises in New York State, because determination of the legislative intent with respect to the possible jurisdictional application of [the statute] is important to operators of many of the franchises existing in New York, and because without a definitive interpretation of the New York statute by the Court of Appeals there would be no "sufficient sources of state law" to allow this federal court to make a "principled rather than conjectural" decision.... In addition, in view of the constitutional challenge to plaintiff's interpretation of [the statute], it is appropriate that the New York court should have an opportunity first to interpret the statute.[216]

After initially accepting the question,[217] the Court of Appeals declined to answer on the ground that the question did not meet the constitutional requirement that it "may be determinative of the cause ... pending in the certifying court."[218] If the court were to answer the question in the affirmative, it would establish only that in some circumstances the statute provides a basis for personal jurisdiction, not necessarily "whether the statute provides a basis for jurisdiction where, as in the present case, the individual defendants have apparently engaged in no activities within this State."[219] Nor would the answer be determinative if the court concluded that the statute did not provide a basis for jurisdiction, as the question would remain whether New York's long-arm statute would nevertheless subject the defendants to suit in New York. Indeed, after the state court declined to answer the question, the Second Circuit itself concluded that personal jurisdiction could be exercised over defendants pursuant to the long-arm statute, and found it unnecessary to reach the question it had certified.[220]

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214. *See id.* at 790; N.Y. C.P.L.R. § 302(a) (McKinney 1990).
215. *See Retail Software Servs.*, 838 F.2d at 662.
216. *Id.* (citations omitted).
217. *Retail Software Servs.*, 71 N.Y.2d at 789.
218. *Id.* (quoting N.Y. Const. art. VI, § 3(b)(9)).
219. *Id.* at 790-91.
220. *See* Retail Software Servs., Inc. v. Lashlee, 854 F.2d 18, 21 (2d Cir. 1988).

A significant additional factor figured in the state court's declination. With defendants' federal constitutional challenge hovering in the background, the state court determined that it could not answer the question posed "in a vacuum, divorced from consideration of the constitutionality of the statute in its actual application."[221] Because the certified question did not permit consideration of the constitutional issue, the court "would have to assume constitutionality in order to answer the question posed."[222] Thus, even if the question had been determinative—which it was not—there existed an independent ground for declining to answer it.[223]

After the Court of Appeals rejected the questions in *Rufino* and *Retail Software*, there was concern that the "much heralded certification procedure . . . [had] hit a snag."[224] Indeed, New York's early experience highlighted difficulties associated with declining certified questions: delaying the litigation, placing both courts in an awkward position[225] and leaving the federal court to answer questions it said should be answered by the state court.[226] These early rejections obviously did little to enhance federal courts' zeal for the procedure.[227] After *Retail Software* in 1988, the Second Circuit made only one request in 1989,[228] two in 1990,[229] and three each in 1991[230] and 1992.[231]

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221. *Retail Software Servs.*, 71 N.Y.2d at 791.

222. *Id.* Without the constitutional issue before it, the court cannot effectively implement the rule of construction that courts "should, of course, interpret a statute so as to avoid constitutional infirmities, if at all possible." People v. Ferber, 52 N.Y.2d 674, 678 (1981).

223. After determining that New York's long-arm statute applied, the circuit court applied the Supreme Court's "minimum contacts" jurisprudence, concluding that the exercise of jurisdiction in this case would not violate the Due Process Clause. *Retail Software Servs.*, 854 F.2d at 22-24.

224. David D. Siegel, *The Second Circuit Gets Some Mixed Signals From the New York Court of Appeals About Certifying New York Law Questions*, 346 N.Y. St. L. Dig. 1 (Oct. 1988).

225. *See* Tunick v. Safir, 209 F.3d 67, 99 (2d Cir. 2000) (characterizing as "obviously unpleasant" the Court of Appeals' "task of refusing to accept questions certified by this Court") (Van Graafeiland, J., dissenting).

226. *See, e.g.*, Conn. Performing Arts Found., Inc. v. Brown, 801 F.2d 566, 568 (2d Cir. 1986) ("Although resolution of these questions of Connecticut law by the Connecticut Supreme Court would appear to have been in the interest of judicial economy, the supreme court denied certification without comment. Left without guidance from the state on this question of state law portending serious consequences for a significant cultural institution in the State of Connecticut, we must now, for better or for worse, address [the questions].").

227. Despite the large number of cases the state Court of Appeals has accepted, the rare declination still presents the possibility of chilling the certification atmosphere. *See* Rangolan v. County of Nassau, Nos. 99-9343, 99-9397, 2000 WL 777952, at *6 (2d Cir. June 15, 2000) ("I know that in the current climate, i.e., in light of [the declination of a certification request in] *Tunick v. Safir*, 209 F.3d 67 (2d Cir. 2000), [certification] may not be a workable recommendation.").

228. *See* Home Ins. Co. v. Am. Home Prods. Corp., 873 F.2d 520 (2d Cir. 1989).

229. *See* Alexander & Alexander Servs., Inc. v. Lloyd's Sydicate 317, 902 F.2d 165

Early fears, however, have proved groundless, as subsequent declinations have been few and far between. The next did not come until eight years after *Retail Software*, in *Grabois v. Jones*.[232] At issue in *Grabois*, an interpleader action, was whether Junior Jones' second wife was entitled to a portion of his death benefits even though the marriage was void.[233] Although the second marriage was performed by a judge, yielded a marriage certificate and lasted almost thirty years, the existence of a prior, undissolved marriage rendered it a nullity. The administrator of Jones' union death benefit fund filed an interpleader complaint pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA")[234] in federal district court seeking a declaration as to which of Jones' two wives was entitled to receive the benefits.

The District Court ruled that because the second marriage was void, Jones' second wife was not entitled to any of the benefits.[235] On appeal, the Circuit Court noted that several New York decisions displayed a reluctance to find a second marriage void where an apparent injustice would result, although the state's high court had not addressed the issue. The court also noted that the Uniform Marriage and Divorce Act entitled a person with a good faith belief that a marriage is valid to an apportionment of property where required by the interests of justice. Thus, the federal court sought guidance from the state court as to whether it would extend this reasoning to the context presented in *Grabois*.

The Circuit Court noted that although the question was not one "likely to arise with much frequency," the stakes were high for the parties, and fund administrators would benefit greatly from a "clearly settled rule."[236] The court also commented on the relationship between state and federal law regarding such cases:

> Because benefit disputes are now generally controlled by ERISA, and hence almost always are tried in the federal courts, *see* 29 U.S.C. § 1132(e)(1) (providing for nearly exclusive federal jurisdiction over ERISA disputes), the New York Court of Appeals is unlikely to be able to consider the question presented by this case on review of a New York court decision. Thus, not only will this question not be

(2d Cir. 1990); Banque Worms v. BankAmerica Int'l, No. 90-7106/7107 (2d Cir. May 30, 1990).

230. *See* Ass'n of Surrogates and Supreme Court Reporters v. New York, No. 90-9036 (2d Cir. Mar. 21, 1991); Wildenstein & Co., Inc. v. Wallis, 949 F.2d 632 (2d Cir. 1991); Unigard Security Ins. Co., Inc. v. N. River Ins. Co., 949 F.2d 630 (2d Cir. 1991).

231. *See* Hertz Corp. v. City of New York, 967 F.2d 54 (2d Cir. 1992); Gonzales v. Armac Indus., Ltd., 970 F.2d 1123 (2d Cir. 1992); Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47 (2d Cir. 1992).

232. 77 F.3d 574 (2d Cir. 1996), *certified question declined in* 88 N.Y.2d 254 (1996).

233. *See id.* at 575-76.

234. *See* 29 U.S.C. § 1132(a)(3)(B), (e)(1) & (f).

235. *See Grabois*, 77 F.3d at 576.

236. *Id.* at 577-78.

> presented to the Court of Appeals except through certification, but since federal courts will most often be the courts called upon in such cases, these courts will continue to apply an uncertain New York law, unless the question is settled through certification.[237]

The state court saw the matter in a different light, and declined to answer the question. With "the interplay between Federal and State law in interpreting issues of statutory construction under ERISA . . . as yet not fully settled," the court found the question to be "more appropriate for resolution in the first instance by the Federal courts."[238] The state court also noted the federal court's prediction that recurrence of the issue would be rare, and that Jones' two wives were pro se litigants, meaning that there likely would be "only limited assistance from the parties in deciding this issue, which may have precedential significance beyond the ERISA context."[239]

On return, the Second Circuit acknowledged that the Court of Appeals "properly[] noted that because this dispute arises under ERISA, it was preferable for us to speak to it first," as "the designation of the proper beneficiary to a pension plan covered by ERISA may well be one that is properly resolved by application of federal, rather than state, law."[240] The court also noted the unrelated difficulty of the undeveloped record in the case, commenting that "on the record developed below, we are in no position to make any final determination, either as to the relevant legal standards or as to their application to the facts of this case," and remanded the case to the District Court for fuller factual development.[241] After determining that "the parties have provided all the evidence on the subject that they can possibly provide," the District Court granted summary judgment to Jones' first wife, concluding that the absence of evidence that the first marriage had been dissolved overcame the presumption that the second marriage was valid.[242]

Another issue more appropriate for federal resolution arose in *Yesil v. Reno*:[243] whether the District Director of an Immigration and Naturalization Service ("INS") detention center in Louisiana was subject to long-arm jurisdiction in New York, where he had been named a respondent in two habeas corpus petitions.[244] After describing the New York activities of the INS official related to the petitioners, the Second Circuit certified two questions:

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237. *Id.* at 578.
238. Grabois v. Jones, 88 N.Y.2d 254, 255 (1996).
239. *Id.*
240. Grabois v. Jones, 89 F.3d 97, 101 (2d Cir. 1996).
241. *Id.* at 100.
242. Grabois v. Jones, No. 94-2070, 1998 WL 158756, at *4 (S.D.N.Y. Apr. 3, 1998).
243. 172 F.3d 39, 1998 WL 667661 (2d Cir. Sept. 18, 1998), *certified question declined in* 92 N.Y.2d 455 (1998).
244. *See id.* at *1.

> (1) What contacts between an Immigration and Naturalization Service District Director, whose office is located outside the State of New York and whose district does not encompass the State of New York, and an alien residing in the State of New York, are sufficient to bring the District Director within the scope of the New York long-arm statute, N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990)?
>
> (2) On the specific facts of each of the two above mentioned cases, does personal jurisdiction over District Director Caplinger exist in New York pursuant to N.Y. C.P.L.R. § 302(a)(1)?

In declining to answer these questions, the Court of Appeals saw a boundless potential for "[a]lternative possibilities for obtaining jurisdiction, flowing from other potential Federal and State sources."[245] Thus, as in *Retail Software*, the court expressed doubt as to whether the questions could "be determinative of the underlying matters."[246] The court also noted that the questions, which concerned immigration and naturalization—matters unlikely to arise in state court proceedings—were better addressed by the federal courts. Finally, the court was concerned "that a theoretical quality inheres in the form of the first certified question," which would detract from the determinative nature of the court's answer.[247] On its return to federal court, the case settled.[248]

The Court of Appeals' most recent declination came in *Tunick v. Safir*.[249] In July of 1999, photographer Spencer Tunick applied for a permit to conduct a photo shoot of 75 to 100 nude models in a residential neighborhood in lower Manhattan.[250] On July 13, 1999, after the city denied permission, Tunick moved for injunctive relief preventing interference with a proposed shoot on July 18, 1999.[251] Tunick argued that his artistic expression was constitutionally protected and that the photo shoot fell within the exemption to the New York statute prohibiting the promotion of public nudity except for "any person entertaining or performing in a play, exhibition, show or entertainment."[252]

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245. *Yesil*, 92 N.Y.2d at 457.

246. *Id.* at 456-57.

247. *Id.* at 457; *see* David D. Siegel, *Court of Appeals Refuses to Answer Two Questions Certified by Second Circuit, One Because Too Loose and the Other Because Likely to Arise* Only *in Federal Court*, 470 N.Y. St. L. Dig. 1 (Feb. 1999) ("A response to the question would be like an opinion containing nothing but dicta.... For the New York Court of Appeals to try to formulate a list of all the possibilities [of contacts relevant to long-arm jurisdiction] would be unwise, and its answer in any event a tome.").

248. *See* Yesil v. Reno, 175 F.3d 287, 288-89 (2d Cir. 1999).

249. 209 F.3d 67 (2d Cir. 2000), *certified question declined in* 94 N.Y.2d 709 (2000).

250. *Id.* at 69.

251. *Id.*

252. N.Y. Penal Law §§ 245.01, 245.02 (McKinney 2000).

On July 16, 1999, the District Court granted a preliminary injunction prohibiting city interference with Tunick's photo shoot.[253] The following day, the Second Circuit stayed the preliminary injunction pending its review.[254] On appeal to that court, the city's sole argument was that the exemption to the ban on public nudity did not protect Tunick, because it "applies only to performances or exhibitions that [take] place indoors before audiences."[255]

In a two-to-one decision that prompted writings from each panel member, the Circuit Court decided to certify three questions to the Court of Appeals.[256] The questions were:

> (1) Whether a photographic shoot involving 75 to 100 nude bodies arranged in an abstract formation on a public street constitutes entertainment or performance in a "play, exhibition, show or entertainment" within the meaning of the exception to N.Y. Pen. Law § 245.01 and § 245.02.
>
> (2) If the answer to the first question is yes, whether the exceptions to N.Y. Pen. Law § 245.01 and § 245.02 are limited to indoor activities.
>
> (3) If the answer to the first question is no, or if the answers to the first and second questions are both yes, whether N.Y. Pen. Law § 245.01 and § 245.02, so interpreted, are valid under the Constitution of the State of New York.[257]

Second Circuit Judge Guido Calabresi, writing for the panel, noted that no New York appellate court had examined the statutory exemption, and the two trial courts that had construed it reached opposite conclusions regarding whether it applied to the photographing of nude models.[258] Judge Calabresi reviewed the case law relating to abstention and certification—emphasizing *Arizonans's* message "that we should consider certifying in more instances than had previously been thought appropriate"[259]—and found particularly persuasive the absence of authoritative state court decisions, the likelihood of the issue's recurrence and the possibility that an interpretation of the statute would remove federal constitutional issues from the case and resolve the litigation.[260] He also found "distinct federalism concerns" favoring certification, as a recent

253. *Tunick*, 209 F.3d at 69.
254. *Id.* at 68.
255. *Id.* at 71 (internal quotation marks and citation omitted).
256. The Court's decision was made on its own, not at the request of either party. *Id.* at 89 n.18.
257. *Id.* at 90.
258. *See id.* at 71 (discussing People v. Gilmore, 120 Misc. 2d 741 (1983) and People v. Wilhelm, 69 Misc. 2d 523 (1972)).
259. *Id.* at 73; *see supra* notes 58-61 and accompanying text (discussing Arizonans for Official English v. Ariz., 520 U.S. 43 (1997)).
260. *See Tunick*, 209 F.3d at 81-84.

"heavy stream of First Amendment litigation" similar to Tunick's created a danger that federal courts were performing crucial local government functions.[261] In a key passage, however, he observed that if the delay caused by certifying the questions unacceptably impaired Tunick's First Amendment rights, the Circuit Court could abort the process:

> [B]ecause we retain jurisdiction over this case . . . we have the option of reconsidering the stay that we earlier imposed on the preliminary injunction should certification impose unexpected delays or should conditions with respect to the asserted right change. This option allows us to continue, in the light of evolving circumstances, to balance the desirability of avoiding needless friction with state courts and of unnecessary constitutional decision making against the harm of extended delay in the adjudication of potential First Amendment rights.[262]

Judge Robert Sack, concurring, disagreed "because certification in this case will postpone Tunick's speech indefinitely, and in the realm of prior restraints on expression I think that such delay, being unnecessary, is constitutionally intolerable."[263] Judge Sack maintained that "time is *always* of the essence when it comes to speech," and would have preferred to lift the stay of the District Court's injunction and remand the case for that court to re-enter an injunction preventing the city from interfering with Tunick's photo shoot.[264] According to Judge Sack, this result would have protected Tunick's right to engage in his desired expression without further delay, although it would have placed him at risk of subsequent punishment. Nevertheless, Judge Sack joined in certification, finding it preferable to dismissal based on mootness, the alternative proposed by the third panel member, Judge Ellsworth Van Graafeiland.[265] Judge Sack beseeched the state Court of Appeals "to be more expeditious in deciding whether to accept this certification and, if [the court does] accept it, in deciding the certified questions, than we have been in deciding to certify them in the first place."[266]

The state court, in declining, underscored the procedural posture of the case: a preliminary injunction motion. Although the nature of plaintiff's claims called for expedited resolution, there already had been a significant delay between the filing of the complaint and certification. Immediate resolution was far more likely in the Second Circuit, where the case had been briefed and argued. Adding to the complication of delay was the federal court's observation that it could

261. *Id.* at 85, 87.
262. *Id.* at 89.
263. *Id.* at 95.
264. *Id.* at 96 (emphasis in original).
265. *See id.*; *see also id.* at 99-100 (Van Graafeiland, J., dissenting).
266. *Id.* at 96 (Sack, J., concurring).

lift the stay on the preliminary injunction "should certification impose unexpected delays or should conditions with respect to the asserted right change."[267] If the stay were lifted, the controversy would end. Thus, the state court noted, "the questions come to us in the unique posture that, once accepted, they may become moot."[268]

Further counseling against acceptance was the third certified question—a state constitutional issue not raised, briefed or argued by the parties. The state court noted that it "could not responsibly engage on that question where the parties to the litigation have not sought relief under this State's Constitution and the issue would be first briefed and raised in our Court."[269] Because the constitutional question was material to the federal court's decision to certify, the fact that the question could not be reached was part of the "confluence of factors" leading the court to decline.[270]

One week after the state court declined the questions, the Second Circuit dissolved the stay and remanded so the District Court could re-enter the injunction prohibiting interference with the photo shoot.[271] Precisely two weeks later, on June 4, 2000, the shoot took place on a closed-off stretch of Delancey Street under the Williamsburg Bridge in New York City. One hundred fifty-two models posed nude during the fifteen minutes allowed by the District Court for the photograph.[272]

3. Questions Not Asked

As with cases in which the state court has declined to answer, it is instructive to examine cases in which federal courts have declined to ask. Obviously, it is far more difficult to gather cases where courts have passed up certification, and often impossible to know why, because they rarely explain why such a request was not made. The following examples, however, offer some insight into the subject.

McCarthy v. Olin Corp.[273] is the most explicit example of a question not asked. The case arose out of the Long Island Railroad massacre

267. *Id.* at 89; *see also* SG Cowen Secs. Corp. v. Messih, 2000 WL 1174969, at *7 n.1 (2d Cir. Aug. 18, 2000) (citing Tunick v. Safir, and declining to certify question because certification not deemed feasible in light of need for expedition).

268. Tunick v. Safir, 94 N.Y.2d 709, 711 (2000).

269. *Id.*

270. *Id.* at 712. Once again, in declining the questions, the court underscored the great value in New York's certification procedure, noting that it "can provide the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation." *Id.* at 711-12.

271. *See* Tunick v. Safir, No. 99-7823, 2000 U.S. App. LEXIS 11088 (2d Cir. May 19, 2000).

272. *See* Shaila K. Dewan, *Live! Nude! And Legal! Artist Gets his Naked Photo*, N.Y. Times, June 5, 2000, at B3.

273. 119 F.3d 148 (2d Cir. 1997).

of December 7, 1993, in which Colin Ferguson opened fire on a busy commuter train, killing six people and wounding nineteen. Ferguson's nine millimeter handgun was loaded with Olin's "Black Talon" bullets, which have unusually great wounding power. Although these bullets were originally designed for law enforcement agencies, they were briefly made available to the general public. Plaintiffs, two survivors and the estate of one deceased victim of the shooting, sued Olin in state court, alleging causes of action in negligence and strict products liability. The case was removed to the Southern District, where Olin successfully sought dismissal for failure to state a claim. On appeal, plaintiffs urged reinstatement or, in the alternative, certification of the novel questions of New York law raised by their complaint to the state Court of Appeals.

The Circuit Court declined to certify, determining that although the state Court of Appeals had not yet addressed the issue of ammunition manufacturer liability, "existing precedents in New York law... provide us with sufficient guidance to analyze the district court's dismissal of this case."[274] In particular, the court pointed to opinions of two New York lower courts that had dismissed claims against Olin for the manufacture and marketing of Black Talon bullets. Relying on these cases, as well as other New York precedents regarding design defects, inherently dangerous products and duty, the federal court affirmed dismissal of the complaint. [275]

In a lengthy dissent, Judge Calabresi vigorously urged certification. In his view, the case was "less about bullets than about federal/state relations," raising "important questions of when it is appropriate for this court to certify issues of New York law to the New York Court of Appeals."[276] He opined that "federal courts in general, and this circuit in particular, have tended to be far too reluctant to certify questions to the state courts," especially in the presence of on-point state lower court opinions.[277] Judge Calabresi characterized this reluctance as "both wrong and unjust," promoting forum shopping and creating anomalies when a federal court's decision is different from what a state court's would have been.[278] As for the claims themselves, he found significant open questions regarding both duty and defect,

274. *Id.* at 154.

275. *See id.* at 153-57 (citing Forni v. Ferguson, 232 A.D.2d 176 (1st Dep't 1996) and Perkarski v. Donovan, Nos. 95-11161, slip op. (N.Y. Sup. Ct. Oneida County Sept. 27, 1995)).

276. *Id.* at 157 (Calabresi, J., dissenting).

277. *Id.*

278. *Id.* at 157-59. According to Judge Calabresi, forum shopping when there is authority in the intermediate state courts, but not the state high court, will frequently lead to a funneling of all similar litigation into federal court. "If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court; similarly any departure in the manufacturer's favor leads the defendant to remove any suit filed in state court." *Id.* at 158 (Calabresi, J., dissenting) (quoting Todd v. Société BIC, S.A., 9 F.3d 1216, 1222 (7th Cir. 1993)).

involving policy choices appropriate only for the state's highest tribunal.

In *DeWeerth v. Baldinger*,[279] the Second Circuit again chose not to certify. At issue there was whether a person claiming ownership of stolen personal property was required to use due diligence to locate the property in order to toll the statute of limitations for a subsequent suit against a good-faith purchaser. A Monet painting had been stolen from plaintiff's German residence in 1945, and during the next twelve years plaintiff unsuccessfully tried to locate the work. She took no action, however, from 1957 until 1982, when her nephew found documentation of the painting's 1957 sale by a New York art dealer. After a state trial court ordered the dealer to identify the painting's owner, plaintiff demanded its return. The owner, who had purchased the painting in good faith in 1957, refused.

Two weeks later, plaintiff filed suit in the Southern District of New York, which ruled that plaintiff "had superior title and that the action was timely as she had exercised reasonable diligence in finding [it]."[280] On appeal, the parties hotly contested the timeliness of the action, in particular whether plaintiff had an obligation to use due diligence in attempting to locate the property. Although noting that the issue was "interesting," the Second Circuit declined certification, believing that the issue would not "recur with sufficient frequency to warrant use" of the procedure.[281] Resolving the issue itself, the Second Circuit held that "under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property."[282] The court concluded that plaintiff had not exercised due diligence and dismissed her claim as time barred.

In fact, the issue recurred several times in the years following *DeWeerth*, ultimately reaching the state Court of Appeals in *Solomon R. Guggenheim Foundation v. Lubell*.[283] The work at issue in *Lubell*, a Chagall gouache worth an estimated $200,000, had been stolen from the Guggenheim museum by a mail room employee in the late 1960s. Rachel Lubell and her husband purchased the painting from a gallery in 1967, and had no reason to believe it was stolen until the museum demanded its return in 1986. The trial court granted Lubell's motion to dismiss the action as time barred, relying on *DeWeerth*'s reasonable efforts requirement. The intermediate appellate court dismissed the statute of limitations defense and held that any lack of diligence by

279. 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).
280. *Id.* at 106 (citing DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y. 1987)).
281. *Id.* at 108 n.5. The court did not state whether certification was raised by a party or sua sponte.
282. *Id.* at 110.
283. 77 N.Y.2d 311 (1991).

the museum was relevant only to Lubell's laches defense.[284] The state Court of Appeals agreed, holding that the only factors relevant to the statute of limitations defense were the timing of the museum's demand for the gouache and the Lubells' refusal to return it. Thus, the Second Circuit's prediction that New York would require a showing of reasonable diligence in order to toll the Statute of Limitations proved incorrect.

Recently, the state Court of Appeals settled a vexing issue regarding malicious prosecution actions that the federal court chose not to certify three years earlier. In New York, a plaintiff in a malicious prosecution action bears the burden of demonstrating favorable termination of the underlying criminal action.[285] Until this year, the state high court had not decided whether the dismissal of a criminal action for failure to satisfy speedy trial requirements[286] should be considered a favorable termination for malicious prosecution purposes. Faced with that very question in *Murphy v. Lynn*,[287] the Second Circuit acknowledged that the issue was open before the state Court of Appeals, but noted that "[t]he intermediate state appellate courts considering that question . . . have generally concluded that such dismissals are favorable to the accused," as had several other jurisdictions.[288] The federal court saw "no reason to infer that the New York Court of Appeals would adopt a different view," and chose not to certify.[289]

When the issue reached the state Court of Appeals three years later, the answer proved to be less clear than the *Murphy* court had believed.[290] Indeed, in *Smith-Hunter v. Harvey*,[291] both the trial and intermediate appellate courts had concluded that under existing Court of Appeals precedents, dismissal of a criminal action did not, as a matter of law, constitute favorable termination for purposes of a subsequent malicious prosecution action. The state high court, however, reversed, and distinguished its own recent precedents "implying that a dismissal, in order to qualify as a favorable

284. Solomon R. Guggenheim Found. v. Lubell, 153 A.D.2d 143 (App. Div. 1st Dep't 1990).

285. *See, e.g.*, MacFawn v. Kresler, 88 N.Y.2d 859, 860 (1996) (holding that dismissal of grand larceny charge against an employee due to insufficient evidence did not constitute termination in favor of employee for purposes of malicious prosecution action against employer).

286. *See* N.Y. Crim. Proc. Law § 30.30 (McKinney 1992) (providing for dismissal of a criminal prosecution if the state is not ready for trial within specified time periods).

287. 118 F.3d 938 (2d Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998).

288. *Id.* at 949-50.

289. *Id.* at 950. The court did not state whether either party requested certification.

290. Before the state Court of Appeals ultimately decided the issue, other federal courts cited *Murphy* in deciding the same question. *See, e.g.*, Posr v. Court Officers Shield #207, 180 F.3d 409, 417-18 (2d Cir. 1999); Kurschus v. Painewebber, Inc., 16 F. Supp. 2d 386, 392-93 (S.D.N.Y. 1998).

291. 2000 WL 893310 (N.Y. July 6, 2000).

termination, must affirmatively indicate the innocence of the accused."[292] The court rejected application of this principle in *Smith-Hunter*, as it would bar a malicious prosecution plaintiff whose criminal case had been dismissed for lack of merit, and could force a person to waive speedy trial rights in order to preserve a civil remedy. Instead, because no further prosecution of plaintiff was possible after the speedy trial dismissal, and there were no circumstances surrounding the dismissal inconsistent with plaintiff's innocence, the dismissal was adequate to demonstrate a termination favorable to plaintiff. Unlike the federal court in *Murphy*, which established a presumption that speedy trial dismissals should generally be considered favorable to the accused, the state court in *Smith-Hunter* simply held that the dismissal in that case was not inconsistent with plaintiff's innocence.[293] Thus, three years after the federal court's prediction in *Murphy*, the state court in *Smith-Hunter* both settled and clarified the law in this area.[294]

C. *Lessons Learned From New York's Experience with Certification*

The New York experience has shown beyond dispute that inter-jurisdictional certification is beneficial to state and federal courts and litigants. In cases where it has been used, it has effectively addressed the difficulty of determining open state law issues in federal litigation—which has troubled courts since *Erie Railroad Co. v.*

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292. *Id.* at *5.

293. *Id.* at *6.

294. The Second Circuit has discussed its decision not to certify in several additional cases. In *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531 (2d Cir. 1997), the court noted that the defendant, who disagreed with the court's choice-of-law holding, was the party that had removed the case to federal court in the first place, and that neither party asked the court to certify the question to the state high court. *Id.* at 1541 n.8. Furthermore, whether New York's tort or contract choice of law rules applied—the question at issue—the Second Circuit concluded it was likely that New York law governed the dispute. In *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), the Second Circuit decided not to certify to the Connecticut Supreme Court the meaning of a statute subject to a constitutional challenge for vagueness and overbreadth, as it concluded the statute was not reasonably susceptible to a limiting interpretation. *Id.* at 434-36. In *Lehman v. Dow Jones & Co., Inc.*, 783 F.2d 285 (2d Cir. 1986), the case was in an advanced procedural stage when the certification procedure became effective. The court stated: "[W]e have determined not to seek to avail ourselves of the procedure in this case, happy as we are to have it available in the future." *Id.* at 294 n.9. Most recently, the Second Circuit addressed its decision not to certify a question to the New York State Court of Appeals in two cases. Goodlett v. Kalishek, 2000 WL 1056066, at *6-9 (2d Cir. Aug. 1, 2000) (Feinberg, J., dissenting) ("I see no persuasive reason why, in a situation where the stakes are high and the law is arguably unclear, we should not try to make sure we properly understand New York law before proceeding further."); SG Cowen Secs. Corp. v. Messih, 2000 WL 1174969, at *7 n.1 (2d Cir. Aug. 18, 2000) (finding that certification was not feasible in light of need for prompt resolution).

Tompkins[295]—by eliminating federal court guesswork and allowing state high courts to settle state law authoritatively.

Evidencing the success of certification, nearly every state has adopted the procedure, and both state and federal judges throughout the nation have given it high marks.[296] Widespread experience has mooted the question whether the procedure works; clearly it does. More significant today is the question of how to optimize its use. With many successes and a few missteps under their belts, New York courts and litigants now have a healthy start on answering that question.

Assuming the baseline requirements for certification are met—meaning the question is open before the state high court and potentially determinative of the federal litigation—experience has shown that the procedure works best with uncluttered questions of common law or state statutory interpretation that are likely to recur. Certification has had its greatest value where a policy choice among reasonable alternatives—the province of the state high court—is implicated, whether in the reading of a statute or the evolution of a common law principle. Issues involving the application of settled law to particular facts, issues that are primarily federal in nature and issues not raised by the parties themselves have proven inappropriate for certification. Furthermore, the delay and cost involved have rendered the procedure unattractive when time-sensitive extraordinary relief is sought, when the issue is unlikely to recur or when the issue is already independently working its way through the state appellate system. Courts also have been disinclined to use the procedure when the party seeking certification invoked federal jurisdiction, as the voluntary election of a federal forum for factual determinations and simultaneous desire to have state court determination of the key legal issue may be viewed as wasteful, and worse.[297]

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295. 304 U.S. 64 (1938).

296. *See* Carroll Seron, Federal Judicial Center, *Certifying Questions of State Law: Experience of Federal Judges* 10 (1983) (reporting that eighty-four percent of judges surveyed found the procedure to be "extremely useful," and seventy-six percent gave it a "very positive" rating); Corr & Robbins, *supra* note 28, at 457 (noting that judges surveyed "indicated overwhelming judicial support for the certification process"); Goldschmidt, *supra* note 73, at 110 (judges highly satisfied with certification). Nevertheless, like most things in life, certification also has its critics. *See, e.g.*, Selya, *supra* note 145, at 691 (arguing that certification has been ineffective in meeting its goals while adding to the time and cost of litigation); Yonover, *supra* note 31, at 316-17 (noting past criticisms of certification process and proposing procedural limitations).

297. *See, e.g.*, *Lazard Freres & Co.*, 108 F.3d at 1541 n.8 (noting in declining to certify that defendant, who disagreed with its holding, had removed the case to federal court); Tidler v. Eli Lilly & Co., 851 F.2d 418, 426 (D.C. Cir. 1988) (commenting that plaintiffs' choice of a federal forum "is not helpful to their request for certification"); Smigiel v. Aetna Cas. & Sur. Co., 785 F.2d 922, 924 (11th Cir. 1986) ("[T]his court is struck by an amazing irony. Aetna, which now prays for an opinion

The way in which courts have presented certified questions has been essential to optimal use of the procedure. While certification requests in New York began with a mere three paragraphs in *Kidney v. Kolmar*[298] and four in *Rufino v. United States*,[299] it is now standard practice for a certifying court to supply a full description of the facts and reasons why certification is appropriate.[300] Such explication has been beneficial in enabling the state court to make an informed decision on whether to accept the certification and how to resolve the case.[301] Because determinativeness is required by the state constitution and both courts' rules—and twice contributed to the rejection of certified questions—federal court discussions of the ways in which questions "will control the outcome" of the case have also been valuable.[302] By the same token, full state court explanations in the few instances when it has declined questions have helped certifying courts to avoid similar pitfalls in the future.

Further assisting the process has been the development of some degree of flexibility for both the asking and answering courts. The New York state court has, on a few occasions, reframed questions in order to make them more readily answerable and to remove abstractness, ambiguity or other obstacles that may not have been apparent at the time of certification.[303] Moreover, experience has

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from a Florida court, petitioned to remove the case from the jurisdiction of the state courts."); Smith v. FCX, Inc., 744 F.2d 1378, 1379 (4th Cir. 1984) (noting that because plaintiff filed suit in federal court, his request for certification "comes with little grace"); Cantwell v. Univ. of Mass., 551 F.2d 879, 880 (1st Cir. 1977) ("[T]he bar should take notice that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort."); Yonover, *supra* note 31, at 325-59.

298. No. 86-7194, slip op. (2d Cir. July 7, 1986).

299. No. 86-6175, slip op. (2d Cir. Jan. 21, 1987).

300. *See* Sec. Investor Prot. Corp. v. BDO Seidman, LLP, Nos. 99-7719(L), 99-7720(C), 2000 WL 713909 (2d Cir. June 5, 2000); Green v. Montgomery, No. 99-7515, 2000 WL 674757 (2d Cir. May 24, 2000); Tunick v. Safir, 209 F.3d 67 (2d Cir. 2000); Messenger v. Gruner + Jahr Printing & Publ'g, 175 F.3d 262 (2d Cir. 1999).

301. Indeed, the importance of a fully developed record was a key reason why the constitutional amendment permitting certification does not allow the state court to accept questions from federal trial courts. *See supra* note 98 and accompanying text.

302. N.Y. Ct. R. § 0.27 (2d Cir.) (McKinney 2000).

303. *See, e.g.*, Engel v. CBS, Inc., 93 N.Y.2d 195, 199 (1999) (clarifying the certified question to make it more answerable); *In re* Southeast Banking Corp. v. First Trust of N.Y., 93 N.Y.2d 178 (1999) (same). The question posed in *Southeast Banking Corp.*, 156 F.3d 1114 (11th Cir. 1998)—which asked for "any language" that could alert a junior creditor to its assumption of the risk—called for a potentially endless litany of relevant language. *Id.* at 1125. Thus, the state court recast the question, "within the procedural boundaries" of the certification. *Southeast Banking Corp,* 93 N.Y.2d at 181. Two questions sent by the Second Circuit in *Wildenstein & Co., Inc. v. Wallis*, 949 F.2d 632 (2d Cir. 1991) also were recast. The questions asked in general whether "the New York Rule Against Perpetuities applies to preemptive rights and future consignment interests in personal property," and whether "the New York common

shown that meaningful answers may ultimately require the state court to address matters not directly presented by the certification request. The Second Circuit has been sensitive to this fact, and several times explicitly invited the state court, if it so desired, to consider additional state law issues related to the questions.[304]

The entanglement of related issues has proved especially problematic when a statute to be interpreted by the state court is also the subject of a federal constitutional challenge. In these circumstances—where *Pullman* abstention once reigned—certification may present difficulties if the state law issue is presented in a vacuum, simply as a matter of statutory interpretation. Ordinarily, a state court must consider the statute in the context of the constitutional challenge in order to avoid constitutional infirmity to the extent possible. The problems that can arise when the context is not provided were illustrated in *Retail Software v. Lashlee*,[305] where the state court was asked whether a particular statute provided a basis for personal jurisdiction, but was not presented with the constitutional defense mounted in federal court based on a lack of minimal contacts. Had the state court answered the question as posed—which it did not—it would have had to assume constitutionality, an assumption that may well have been unfounded in the eyes of the federal court.[306]

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law rule against unreasonable restraints on alienation invalidates preemptive rights and future consignment interests in personal property." *Id.* at 636. Answers to the questions as written would merely have set forth general propositions and would not have determined whether the particular agreement at issue was invalid. The state Court of Appeals recognized, however, that the questions "must be construed in the context of the real case in controversy in order to provide meaningful and appropriate answers." Wildenstein & Co. v. Wallis, 79 N.Y.2d 641, 645 (1992).

304. *See, e.g.*, Madden v. Creative Servs., Inc., 24 F.3d 394 (2d Cir. 1994):

> Though certifying to the Court of Appeals the questions as framed above, we also wish to make clear that we have no desire to restrict the Court of Appeals from considering any state law issues that it might wish to resolve in connection with this appeal. Therefore, though our immediate request is for answers to the questions as framed, we would welcome any guidance the Court of Appeals might care to provide us with respect to any state law issues presented by this appeal.

Id. at 397.

For similar statements, see also *Sec. Investor Prot.*, 2000 WL 713909, at *18; *Green*, 2000 WL 674757, at *8; Ins. Co. of N. Am. v. ABB Power Generation Inc., 112 F.3d 70, 73 (2d Cir. 1997); Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd., 70 F.3d 720, 723-24 (2d Cir. 1995); West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co., 49 F.3d 48, 51 (2d Cir. 1995); Consorti v. Owens-Corning Fiberglas Corp., 45 F.3d 48, 51 (2d Cir. 1995).

305. 71 N.Y.2d 788 (1988).

306. This problem is, of course, not unique to New York. For examples from Massachusetts, see Herbert P. Wilkins, *Certification of Questions of Law: The Massachusetts Experience*, 74 Mass. L. Rev. 256, 257 (1989) (noting that two cases in which federal courts certified issues of statutory construction but not the "associated constitutional questions placed [Massachusetts'] Supreme Judicial Court in an awkward position" because that court tried to save the statutes to the extent constitutionally permissible).

One possible solution to this dilemma is for certifications to set out the constitutional issues, and for such issues to be briefed and argued. Because the parties ultimately will have to present the constitutional issues to the federal court—indeed, they may already have done so before certification—the additional burden should be minimal, and the benefits should justify the costs. If the state court is not fully informed of the constitutional challenges, it is placed in the unenviable position of either denying certification or attempting to interpret a statute to avoid unknown constitutional challenges, and may reach a different result than it would if the constitutional challenges were presented. Thus, in these circumstances, the salutary effects of certification could be substantially undermined.

CONCLUSION

During these past fifteen years in New York, inter-jurisdictional certification has proved itself a valuable tool for the efficient, orderly development of state law when unresolved questions arise in federal litigation. Wholly apart from its contributions to the substantive law, the procedure has enabled state and federal courts to speak openly to one another in the resolution of cases that concern them both, thereby promoting a cooperative federalism that independent court systems and overflowing dockets do not ordinarily permit. We can only conclude that these benefits will be multiplied in the years ahead, as still greater use is made of the certification procedure.

APPENDIX A

The state inter-jurisdictional certification statutes and rules are:

Ala. R. App. P. 18; Alaska R. App. P. 407; Ariz. Rev. Stat. Ann. § 12-1861 (West 1994); Ariz. Sup. Ct. R. 27; Cal. R. Ct. 29.5; Colo. App. R. 21.1; Conn. Gen. Stat. Ann. § 51-199a (West 1997); Conn. R. App. P. §§ 82-1 to -7; Del. Const. art. IV, § 11(8); Del. Sup. Ct. R. 41; D.C. Code Ann. § 11-723 (1981 & Supp. 1987); Fla. Const. art. V, § 3(b)(6); Fla. Stat. Ann. § 25.031 (West 1998); Fla. R. App. P. 9.150; Ga. Code Ann. § 15-2-9 (1999); Ga. R. Sup. Ct. 46; Haw. R. App. P. 13; Idaho App. R. 12.1; Ill. Sup. Ct. R. 20; Ind. Code Ann. § 33-2-4-1 (Michie 1998); Ind. R. App. P. 15(O); Iowa Code Ann. §§ 684A.1-.11 (West 1998); Kan. Stat. Ann. §§ 60-3201 to -3212 (1994); Ky. R. Civ. P. 76.37; La. Rev. Stat. Ann. § 13:72.1 (West 1999); La. Sup. Ct. R. XII; Me. R. Civ. P. 76B; Md. Code Ann., Cts. & Jud. Proc. §§ 12-601 to -609 (1998); Mass. Sup. Jud. Ct. R. 1:03; Mich. Ct. R. 7.305; Minn. Stat. Ann. § 480.065 (West Supp. 2000); Miss. R. App. P. 20; Mo. Ann. Stat. § 477.004 (West Supp. 2000) (held unconstitutional by *Grantham v. Mo. Dep't of Corrs.*, No. 72576, 1990 WL 602159, at *1 (Mo. Jul. 13, 1990)); Mont. R. App. P. 44; Neb. Rev. Stat. § 24-219 to -225 (1997); Nev. R. App. P. 5; N.H. Sup. Ct. R. 34; N.M. Stat. Ann. §§ 39-7-1 to 7-

10 (Michie 1997 & Supp. 1999); N.M. R. App. P. 12-607; N.Y. Ct. R. § 500.17; N.D. R. App. P. 47; Ohio Sup. Ct. Prac. R. XVIII; Okla. Stat. Ann. tit. 20, §§ 1601-11 (West 1991); Or. Rev. Stat. §§ 28.200-.255 (1997); Or. R. App. P. 12.20; *In re: Certification of Questions of Law*, No. 197 Judicial Administration Docket No. 1 (Penn. Sup. Ct. Jan. 12, 2000); R.I. Sup. Ct. R. 6; S.C. App. Ct. R. 228; S.D. Codified Laws §§ 15-24A-1 (Michie 1994); S.D. S. Ct. R. 85-7; Tenn. R. Sup. Ct. 23; Tex. R. App. P. 74 (Tex. Crim. App.); Tex. R. App. P. 58; Utah R. App. P. 41; Va. R. Sup. Ct. 5:42; Wash. Rev. Code §§ 2.60.010-60.900 (West 1998); Wash. R. App. P. 16.16; W. Va. Code §§ 51-1A-1 to -12 (1994); Wis. Stat. Ann. §§ 821.01-.12 (West 1994); Wyo. Stat. Ann. § 1-13-106 (Michie 1994); Wyo. R. App. P. 11.01-.07.

The high courts of Washington, D.C. and Puerto Rico may also accept certified questions. *See* D.C. R. Ct. App. R. 54; P.R. Sup. Ct. R. 27.

APPENDIX B

The forty-four certified questions sent to the New York Court of Appeals, and their subsequent history, are as follows:

Kidney v. Kolmar Labs., Inc., No. 86-7194 (2d Cir. July 7, 1986); 68 N.Y.2d 343 (1986); 808 F.2d 955 (2d Cir. 1987).

Rufino v. United States, No. 86-6175 (2d Cir. Jan. 21, 1987); 69 N.Y.2d 310 (1987) (certification declined); 829 F.2d 354 (2d Cir. 1987).

Loengard v. Santa Fe Indus., Inc., No. 86-7682 (2d Cir. Jan. 28, 1987); 70 N.Y.2d 262 (1987).

Retail Software Servs., Inc. v. Lashlee, 838 F.2d 661 (2d Cir. 1988); 71 N.Y.2d 788 (1988); 854 F.2d 18 (2d Cir. 1988) (certification declined).

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