



The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience

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I. INTRODUCTION

The facts of *Holmes v. Kimco Realty Corp.*² are straightforward. On January 20, 2005, Walter Holmes drove to a shopping center in Maple Shade, New Jersey to shop at Lowe's Home Center ("Lowe's").³ Lowe's, like the other businesses in the shopping center, was in a stand-alone building but was some distance from the other businesses in the shopping center.⁴ Holmes, accordingly, parked in the area of the parking lot closest to Lowe's, an area that included shopping cart corrals reading, in part, "[t]hank you for shopping at Lowe's."⁵ While returning to his vehicle, Holmes fell on ice in the parking lot.⁶ He sued Lowe's for negligent maintenance of the parking lot.⁷ Although the complaint was initially filed in New Jersey Superior Court, the defendants removed the case to the United States District Court for the District of New Jersey,⁸ based on diversity jurisdiction.⁹

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2. *Holmes v. Kimco Realty Corp.*, 598 F.3d 115 (3d Cir. 2010).

3. *Id.* at 116.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 117.

8. *Holmes v. Lowe's Home Centers, Inc.*, No. 1:07-cv-00961 (D.N.J.) (docket sheet).

9. *Holmes*, 598 F.3d at 118 (citing 28 U.S.C. § 1332 (2010)).

Lowe's then informed Holmes that it was a tenant of the shopping center, not the owner of the shopping center or parking lot where he fell.¹⁰ In fact, four years prior to Holmes's accident, Lowe's entered into a lease agreement with Price Legacy Corporation ("Price"), pursuant to which Price, as landlord, was required to maintain common areas, including the parking lot, by, among other things, providing for snow removal, and was required to carry "commercial general liability insurance . . . upon all [c]ommon [a]reas."¹¹ Holmes attempted to amend his complaint to include Price, as well as another entity suspected of owning the parking lot, Kimco Realty Corporation.¹² But, because the statute of limitations had expired, the District Court granted summary judgment in favor of the potentially liable landlords.¹³ The District Court also granted summary judgment in favor of Lowe's, predicting that the Supreme Court of New Jersey would not extend liability for injuries occurring in common areas to a commercial tenant in a multi-tenant shopping center.¹⁴

On appeal, the United States Court of Appeals for the Third Circuit was presented with one issue: "whether the State of New Jersey would impose a common law duty on a tenant in a multi-tenant shopping center to maintain the parking lot owned by the landlord."¹⁵ The Third Circuit noted that this precise question had "not been addressed by the New Jersey Supreme Court"¹⁶ and that courts that have considered the question under New Jersey law had reached varying conclusions.¹⁷ Accordingly, as both the majority (three times)¹⁸ and dissent (twice)¹⁹

10. *Id.* at 117.

11. *Id.* In return, Lowe's was required to pay a *pro rata* share of common area maintenance costs. *Id.*

12. *Id.*

13. *Id.*

14. *Holmes*, 598 F.3d at 118.

15. *Id.* at 116.

16. *Id.* at 118.

17. Compare *Kantonides v. KLM Royal Dutch Airlines*, 802 F. Supp. 1203, 1216 (D.N.J. 1992) (finding airline does not have duty to maintain common areas of airport terminal) and *Barrows v. Trs. of Princeton Univ.*, 581 A.2d 913, 914-15 (N.J. Super. Ct. Law Div. 1990) (declining to extend liability to commercial tenants in multi-tenant shopping complex) with *Antenucci v. Mr. Nick's Mens Sportswear*, 514 A.2d 75, 77 (N.J. Super. Ct. App. Div. 1986) (extending liability for injury occurring on sidewalk adjacent to business where commercial tenant was in entire possession of premises) and *Jackson v. K-Mart Corp.*, 442 A.2d 1087, 1090 (N.J. Super. Ct. Law Div. 1981) (holding that business tenants had same sidewalk duty as owner); see also Charles Toutant, *Shopping Center Tenant Not Liable for Slip and Fall on Landlord-Owned Lot*, 199 N.J.L.J. 810 (Mar. 22, 2010) (noting divergence of authority).

18. *Holmes*, 598 F.3d at 116, 118, 124. In the absence of authoritative guidance, the Third Circuit is required to "predict how the New Jersey Supreme Court would rule if presented with" this question of unsettled New Jersey state law. *Id.* at 118 (quoting *Repola v. Morbank Indus., Inc.*, 934 F.2d 483, 489 (3d Cir. 1991)). The District Court

noted, the Third Circuit was required to “predict” how the Supreme Court of New Jersey would rule if presented with this unsettled question of state law.²⁰ In so forecasting, the majority concluded that “New Jersey would not impose a duty on an individual tenant for snow removal from the common areas of a multi-tenant parking lot when the landlord has retained and exercised that responsibility.”²¹ Dissenting Judge D. Michael Fisher disagreed, predicting that the Supreme Court of New Jersey would find the existence of a duty of care.²²

But rather than “predict” what rule of law the Supreme Court of New Jersey would have applied, the Third Circuit could have “asked.”²³ Pursuant to New Jersey Court Rule 2:12A-1—New Jersey’s decade-old certification rule—the Third Circuit could have petitioned the Supreme Court of New Jersey seeking certification of this question of unsettled state law on which “there [was] no controlling appellate decision, constitutional provision, or statute.”²⁴ Assuming that the Supreme Court of New Jersey would have, in an exercise of its discretion, accepted the certified question, the certification procedure would have provided the Third Circuit with “an authoritative ruling on [an] unsettled question[] of

similarly noted that it was required to “predict what the New Jersey Supreme Court would do. . . .” *Id.* at 118.

19. *Id.* at 125, 128 (Fisher, J., dissenting).

20. Courts and scholars refer to the practice of federal courts sitting in diversity predicting the applicable state law as an “Erie guess.” See *Garlick v. Quest Diagnostics, Inc.*, No. 06-cv-6244, 2009 U.S. Dist LEXIS 116452, *28 (D.N.J. Dec. 14, 2009) (quoting *Willis v. Roche Biomedical Labs.*, 61 F.3d 313, 316 (5th Cir. 1995)); Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 210 (2003) (quoting Allen Chase, *A State Court’s Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN’S L. REV. 407, 408 n.4 (1992)).

21. *Holmes*, 598 F.3d at 124.

22. *Id.* at 125 (Fisher, J., dissenting).

23. It goes without saying that certification is “manifestly inappropriate” where “there is no uncertain question of state law whose resolution might affect the pending federal claim.” *City of Houston v. Hill*, 482 U.S. 451, 471 (1987). Indeed, certification of unsettled questions of state law should be reserved for matters where a federal court sitting in diversity is “genuinely uncertain about a question of state law that is vital to a correct disposition of the case before it.” *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (continuing to note that “[w]here the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow”).

It should also be noted that the plaintiffs in *Holmes* did not request certification of the state law question at issue to the Supreme Court of New Jersey.

24. N.J. CT. R. 2:12A-1. Although New Jersey’s intermediate appellate court held that a commercial tenant in exclusive possession of business premises has a duty to maintain adjacent sidewalks, the Appellate Division declined to opine on multi-tenant facilities. *Antenucci v. Mr. Nick’s Mens Sportswear*, 514 A.2d 75, 76-78 (N.J. Super. Ct. App. Div. 1986).

law without recourse to prediction and without abdicating its obligation to provide a federal forum to the parties who have properly invoked federal jurisdiction,”²⁵ thereby avoiding the potential hazards of predicting legal outcomes.²⁶

This Article explores the United States Court of Appeals for the Third Circuit’s discretionary use of state certification procedures to obtain authoritative determinations of unsettled questions of state law by state high courts. Specifically, this Article focuses on the willingness of the high courts in New Jersey, Pennsylvania, and Delaware—the three states comprising the Third Circuit—to exercise their discretion and grant the Third Circuit’s petitions for certification. Part I of this Article examines the relatively short—albeit sixty-five-year-long—tradition of certification of questions of unsettled state law by federal courts sitting in diversity to state high courts.²⁷ Part II focuses on the Third Circuit’s experience with certification procedures. After discussing the Third Circuit’s Internal Operating Procedure with respect to certification,²⁸ Part II is then divided into three subsections, each analyzing the respective experiences with certification procedures in New Jersey,²⁹ Pennsylvania,³⁰ and Delaware,³¹ focusing on the development of their certification procedures, important provisions of those certification procedures, and the state high courts’ recent application of those procedures. Those sections take specific note of the common threads running through each state’s certification tapestry.

The Third Circuit’s experience with certification of unsettled questions of state law to state high courts is particularly instructive because New Jersey, Pennsylvania, and Delaware are, relatively speaking, newcomers to the certification process. Indeed, Pennsylvania and New Jersey were two of the most recent three states to establish

25. 32 Am. Jur. 2d Federal Courts § 1341 (citing *Fiat Motors of N. Am., Inc. v. Wilmington*, 619 F. Supp. 29 (D. Del. 1985)).

26. Caselaw and scholarship are replete with instances where federal courts sitting in diversity are later overruled by state high courts. See, e.g., *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 264-65 nn.11-16 (10th Cir. 1967) (collecting cases); *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-87, nn.5-9 (5th Cir. 1964) (collecting cases); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673 n.3 (2003) (collecting cases); Jerome A. Braun, *A Certification Rule for California*, 36 SANTA CLARA L. REV. 935, 937-40 (1996) (collecting cases); see also *infra* note 88 and *infra* notes 146-155 and accompanying text.

27. See *infra* notes 34-73 and accompanying text.

28. See *infra* notes 77-81 and accompanying text.

29. See *infra* notes 82-142 and accompanying text; see also N.J. CT. R. 2:12A.

30. See *infra* notes 143-186 and accompanying text; see also 204 PA. CODE § 29.451; PA. SUP. CT. INTERNAL OPERATING PROC. 10.

31. See *infra* notes 187-205 and accompanying text; see also D.E. CONST. art. IV, § 11(8); DEL. SUP. CT. R. 41.

certification procedures,³² doing so in 1999.³³ And Delaware, whose modern certification procedure was established in 1993 is also far from an old-hand when it comes to certification.

II. THE HISTORY OF CERTIFICATION

The history of certification can be traced back to the mid-nineteenth century in Great Britain. Indeed, Great Britain first provided for the certification of unsettled questions of law to courts within a federal system in the British Law Ascertainment Act of 1859.³⁴

The certification of unsettled questions of state law by federal courts sitting in diversity to state high courts, however, has a relatively short history in American jurisprudence—a history precipitated by the *Erie* doctrine. In its landmark *Erie Railroad v. Tompkins* decision,³⁵ the Supreme Court of the United States famously held that, except in matters governed by federal law, federal courts exercising diversity jurisdiction must apply applicable state substantive law.³⁶ However, as Judge William B. Bassler of the United States District Court for the District of New Jersey aptly noted—and as any first-year law student in the midst of a civil procedure final exam can attest—“the *Erie* decision is easier stated than applied.”³⁷ Such difficulties arise, in part, because, “[w]hereas 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.”³⁸

32. See *infra* note 57-58 and accompanying text.

33. See *infra* note 95-99 and accompanying text and notes 143-144 and accompanying text.

34. See Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127 (1992) (tracing origins of certification procedure to British Law Ascertainment Act of 1859); see also Jona Goldschmidt, *Studies of the Justice System: Certification of Questions of Law: Federalism in Practice*, 4-5 (American Judicature Society 1995) (citing 9 HALSBURY’S STATUTES OF ENGLAND 58206 (2d ed. date unknown) (noting that Foreign Law Ascertainment Act of 1861 provided for certification of questions of law to foreign nations)).

35. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

36. *Id.* at 79.

37. The Honorable 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).

38. THE HONORABLE 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)) (authored by Second Circuit Court of Appeals judge); see also Arthur L. Corbin, *The Common Law of the United States*, 47 YALE L.J. 1351, 1352 (1938) (noting that federal judges are “limited in a way in which the [state] judges are not themselves limited.”).

Accordingly, federal judges, such as those on the *Holmes v. Kimco Realty Corp.* panel, must, on occasion, “predict” the law that a state high court would apply in a diversity case by, among other things, examining “analogous state court cases . . . scholarly treatises, the Restatement of Law, and germane law review articles.”³⁹ The Third Circuit has stated:

As *Erie* and its progeny have held, the substantive, or outcome-determinative law, of the state in which the federal court sits in diversity can be definitively determined only through controlling decisions of the supreme court of that state. Since courts often do not speak clearly or precisely to the issue in question, 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.⁴⁰

In 1945 Florida became the first state to enact a statute enabling the Supreme Court of the United States and any federal court of appeals to certify questions of unsettled⁴¹ state law to the Florida Supreme Court.⁴² Although that statute laid moribound for over a decade,⁴³ in 1960 in *Clay v. Sun Insurance Office, Ltd.*,⁴⁴ Justice Felix Frankfurter lauded the Florida Legislature’s “rare foresight” in authorizing the Florida Supreme

39. See *Holmes v. Kimco Realty Corp.*, 598 F.3d 115, 118 (3d Cir. 2010) (internal citations and quotations omitted). In examining state court precedent, the Third Circuit “scrutinize[s]” such “with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince.” *Id.* (quoting *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662 (3d Cir. 1980)).

40. *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1264 (3d Cir. 1991); accord *Walters v. Inxco Oil Co.*, 670 F.2d 476, 478 (5th Cir. 1982) (“We should hesitate to trade our judicial robes for the garb of prophet when the procedure of certification . . . renders the crystal ball unnecessary.”); *Perez-Trujillo v. Volvo Car Corp. (Swed.)*, 137 F.3d 50, 55 (1st Cir. 1998) (stating that *Erie* doctrine requires federal courts to make “informed prophecy” of how state high court would rule (quoting *Rodriguez-Suris v. Montesinos*, 123 F.3d 10, 13 (1st Cir. 1997))).

41. Pursuant to Florida’s certification procedures, a certified question must be “determinative” of the litigation and there must be “no clear controlling precedents in the decisions of the [Florida] Supreme Court.” FLA. STAT. ANN. § 25.031 (West 1997).

42. See 1945 Fla. Laws ch. 23098 § 1 (codified at FLA. STAT. ANN. § 25.031 (West 1997)).

43. The Honorable Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 680 (1995).

44. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).

Court to adopt a certification procedure.⁴⁵ The Supreme Court of Florida took the hint and promptly implemented a certification procedure in 1961 by enacting Florida Appellate Rule 8.150.⁴⁶ Certification was born.

Other states, however, did not quickly follow suit. By 1967, when the Uniform Certification of Questions of Law Act was first created,⁴⁷ only four states had promulgated certification procedures.⁴⁸ By 1971, only seven states had adopted a certification procedure.⁴⁹ But, in 1973, certification again achieved national recognition when the Supreme Court of the United States, in *Lehman Brothers v. Schein*,⁵⁰ reaffirmed its endorsement of certification. There, the United States District Court for the Southern District of New York, exercising diversity jurisdiction and interpreting Florida law, found no liability in a shareholder's derivative suit.⁵¹ On appeal, the United States Court of Appeals for the Second Circuit reversed, finding that the Florida Supreme Court would "probably" find the defendants liable.⁵² The Supreme Court—in none too subtle terms—vacated and remanded to the Second Circuit to consider utilizing Florida's certification procedure.⁵³

45. *Id.* at 212. To that point, the Supreme Court of Florida had ignored the certification statute and had yet to adopt certification rules.

Interestingly, in 1959, Philip B. Kurland, Dean of the University of Chicago Law School and a former law clerk to Justice Frankfurter, praised the statute in a speech to the Conference of Chief Justices. See Philip B. Kurland, *Toward A Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, Speech Before the Conference of Chief Justices* (Aug. 20, 1959), 24 F.R.D. 481, 489-90 (1959). In addressing the problems inherent in abstention, Dean 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. . . . [By utilizing Florida's certification procedure] 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.

Id.

46. See *In re Florida Appellate Rules*, 127 So. 2d 444, 444-45 (Fla. 1961).

47. See, generally Unif. Certification of Questions of Law Act 1967, 12 U.L.A. 82 (1996).

48. See *id.*(prefatory note) (noting that Florida, Maine, Washington, and Hawaii had adopted certification procedures). Soon after the first Uniform Certification of Questions of Law Act was created in 1967, see Unif. Certification of Questions of Law Act 1967, 12 U.L.A. 86 (1996), the American Law Institute voiced its support of certification procedures. American Law Institute, Study of Jurisdiction Between State and Federal Courts, Official Draft 1371(e) (1969).

49. See Richard B. Lillich & Raymond T. Munday, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888, 888 (1971).

50. *Lehman Bros. v. Schein*, 416 U.S. 386 (1973).

51. *Id.* at 388.

52. *Schein v. Chasen*, 478 F.2d 817, 822-23 (2d Cir. 1973).

53. *Lehman Bros.*, 416 U.S. at 390-91.

Here resort to [the certification procedure] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as “outsiders” lacking the common exposure to local law which comes from sitting in the jurisdiction.⁵⁴

The Supreme Court, however, cabined its advice, noting that it did “not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.”⁵⁵

In *Lehman Brothers*’s wake, there was an appreciable uptick in the establishment of certification procedures. Indeed, by 1976, fifteen states permitted certification.⁵⁶ By 1998, forty-six states, the District of Columbia, and the Commonwealth of Puerto Rico provided for the certification of unsettled questions of state law.⁵⁷ At the time, two of the five hold-outs—New Jersey and Pennsylvania—were states within the Third Circuit.⁵⁸ Today, every state⁵⁹ other than North Carolina,⁶⁰

54. *Id.*

55. *Id.* at 391.

56. See Note, *Civil Procedure—Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155, 1155-56 n.6 (1976). In 1977, the American Bar Association indicated its support for certification procedures. A.B.A., Jud. Admin. Div., Standards Relating to Appellate Courts 3.33(c) (1977). Sixteen years later, support was similarly expressed by the National Conference on State-Federal Judicial Relationships. See William Schwarzer, “Letter to Our Readers,” in FJD Directions: Special State-Federal Issue (A Distillation of Ideas from the National Conference on State-Federal Judicial Relationships) 1, 6 (1993). In 1995, the Committee on Long Range Planning of the United States Judicial Conference recommended that states without certification procedures adopt them. See Judicial Conference of the United States, Long Range Plan of the Federal Courts 32-33 (Dec. 1995).

57. See Bassler & Potenza, *supra* note 37 at 493 n.9, 495 n.18. The Uniform Certification of Questions of Law Act was revised in 1996. Revisions included, among other things, an expansion of courts that could seek certification, permitting a receiving court to reformulate the proposed certified questions, and requiring the receiving court to accept or reject certification with “all deliberate speed.” See Sandra Schultz Newman, *Certification of State Law Questions: Pennsylvania’s Experience in the First Five Years*, 75 PA. BAR ASS’N QUARTERLY 47, 50-51 (2004) (quoting Unif. Certification of Questions of Law (Act) (Rule) 1995 § 7, 12 U.L.A. 74 (1996)) (authored by Justice of the Supreme Court of Pennsylvania).

The Uniform Act currently provides:

The [Supreme Court] of this state may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court off another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state], if the answer may be determinative of an issue pending in the litigation in certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

Unif. Certification of Questions of Law (Act) (Rule) 1995 § 3, 12 U.L.A. 74 (1996).

58. The other three holdouts were Arkansas, North Carolina and Vermont. See Bassler & Potenza, *supra* note 37 at 493 n.9.

provides for some form of certification of unsettled questions of state law.⁶¹

The benefits of certification have been recounted by courts⁶² and commentators⁶³ alike and need not be fully detailed here. Suffice it to

59. See ALA. R. APP. P. 18; ARK. APP. P. 407; ARIZ. REV. STAT. ANN. § 12-1861 (West 1994); ARIZ. SUP. CT. R. 27; ARK. CONST. amend LXXX, § 2(D)(3); ARK. SUP. CT. R. 6-8; CAL. R. CT. 29.5; COLO. R. APP. P. 21.1; CONN. GEN. STAT. ANN. § 51-199b (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 & 1987 Supp.); D.C. CT. APP. R. 54; FLA. CONST. art. V, § 3(b)(6); FLA. STAT. ANN. § 25.031 (West 1997); FLA. R. APP. P. 9.150; GA. CODE ANN. § 15-2-9 (1998); GA. R. S. CT. 46; HAW. R. APP. P. 13; IDAHO APP. R. 12.3; ILL. SUP. CT. R. 20; IND. CODE ANN. § 33-2-4-1 (West 1996); IND. R. APP. P. 15(O); IOWA CODE ANN. §§ 684.A.1-A.11 (West 1998); KAN. STAT. ANN. §§ 60-3201-60-3212 (1994); KY. R. CIV. P. 76.37; LA. REV. STAT. ANN. § 13:72.1 (West 1993 & Sup. 1998); LA. SUP. CT. R. XII; ME. R. APP. P. 25; ME. R. CIV. P. 76B; MD. CODE ANN., CTS. & JUD. PROC. §§ 12-601 to -609 (1997); MASS. R. CT. 1:03; MICH. CT. R. 7.305; MINN. STAT. ANN. § 480.065 (West 1993); MISS. SUP. CT. R. 20; 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.J. CT. R. 2:12A-1; N.M. STAT. ANN. §§ 39-7-1 to 7-13 (Michie 1997); 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, §§ 1601-1611 (West 1991); OR. REV. STAT. §§ 28.200-.255 (1997); OR. R. APP. P. 12.20; P.R. LAWS ANN. Tit. 4, § 24s(f) (2003); P.R. SUP. CT. 27; PA. CODE § 29.451; R.I. SUP. CT. R. 6; S.C. R. APP. P. 228; S.D. CODIFIED LAWS §§ 15-24A-1 to 15-24A-11 (Michie 1994); S.D. SUP. CT. R. 85-7; TENN. SUP. CT. R. 23; TEX. R. APP. P. 58.1-58.10; UTAH R. APP. P. 41; VA. SUP. CT. R. 5:42; VT. R. APP. P. 14; WASH. REV. CODE §§ 2.60.010 to 2.60.900 (West 1998); WASH. SUP. CT. R. 16.16; W. VA. CODE §§ 51-1A-1 to -13 (1994); WIS. STAT. ANN. §§ 821.01 to 821.12 (West 1994); WYO. STAT. ANN. § 1-13-106 (Michie 1994); WYO. R. APP. P. 11.01-.07.

Missouri's certification procedure, MO. ANN. STAT. § 477.004 (West 1993), was held unconstitutional. *Grantham v. Missouri Dept. of Corrections*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc). However, in 2000, the Missouri General Assembly reinstated certification, expressly limiting the holding of *Grantham* to that case. See Schultz Newman, *supra* note 57 at 51-52 & nn. 34-36.

The Northern Mariana Islands and Guam also provide for certification. See N. MAR. I. R. APP. P. 5, available at [http://www.cnmilaw.org/pdf/court rules/RO2.pdf](http://www.cnmilaw.org/pdf/court%20rules/RO2.pdf); GUAM R. APP. P. 20(b), available at <http://guamsupremecourt.com/Rules/images/GRAP%2002212007.pdf>.

60. Eric Eisenberg, Note, *A Divine Comity, Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 71-72 (2008).

61. Also, there is a great amount of diversity in states' certification procedures, including varying scopes with respect to what courts and/or entities may seek certification to the standard pursuant to which certification may be granted. An analysis of those differences is beyond the scope of this Article.

62. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("The complexity [of this litigation] might have been avoided had the District Court, more than eight years ago, accepted the certification suggestion made by Arizona's Attorney General."); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395-97 (1988) (certifying two questions to the Virginia Supreme Court); *City of Houston v. Hill*, 482 U.S. 451, 470-71 (1987) (observing that certification is "an important factor" in making abstention decisions); *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982) (certifying question to Supreme Court of Georgia); *Bellotti v. Baird*, 428 U.S. 132, 150-52 (1976) (holding that district court "should have certified" questions of state law to the Supreme Judicial Court of Massachusetts).

say that certification's supporters contend that certification: promotes comity and cooperative federalism,⁶⁴ avoids the problems associated with federal courts sitting in diversity "predicting" state law and the concomitant risk that such predictions will prove incorrect,⁶⁵ and furthers the underlying principles of *Erie*, such as eliminating forum shopping by developing uniform statements of state law.⁶⁶ Moreover, the Supreme Court of the United States has observed that, in appropriate circumstances, certification of unsettled questions of state law may "sav[e] time, energy and resources and help[] build a cooperative judicial federalism."⁶⁷

However, like all aspects of the law, certification is not without its detractors. Its opponents argue that certification causes unnecessary

See also Ageloff v. Delta Airlines, Inc., 860 F.2d 379, 388 (11th Cir. 1988) ("[T]he course that the Supreme Court of Florida would take is sufficiently unclear that, rather than risk pronouncing a result which that court might ultimately elect not to follow, we follow the course—often pursued by this and our predecessor court, with enthusiastic support of the U.S. Supreme Court—of certifying the significant issues to the Supreme Court of Florida for an authoritative answer." (footnote omitted)); Martinez v. Rodriguez, 410 F.2d 729, 730 (5th Cir. 1969) (remarking on "the effectiveness—both substantive and administrative—of Florida's remarkably helpful certification procedure"); W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 263 (10th Cir. 1967) (Brown, J., concurring and dissenting) (advocating certification because federal courts do injustice by making decisions later overruled by state court, stating that "[f]ederal Judges . . . do not have the Keys to the Kingdom to determine for a sovereign state the internal domestic policies which it desires to follow"); Green v. Am. Tobacco Co., 325 F.2d 673, 674 (5th Cir. 1963) (noting that state court's answer to certified question "saved this Court . . . from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice"); *see also* Braun, *supra* note 26 at 935-40 (collecting cases lauding certification).

63. Braun, *supra* note 26 at 937-42; 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, 727 (1995) (encouraging Pennsylvania to adopt certification procedures); J. Michael Medina, *The Interjurisdictional Certification of Questions of Law Experience: Federal, State and Oklahoma—Should Arkansas Follow?*, 45 ARK. L. REV. 99 (1992) (encouraging Arkansas to adopt certification procedure); Robbins, *supra* note 34, at 129 (encouraging "universal enactment" of uniform certification law); Vincent L. McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33, 33 (1964) (encouraging Maine and other states to adopt certification procedure); *see also* Bassler & Potenza, *supra* note 37, at 497 n.26 (collecting authority).

64. Bassler & Potenza, *supra* note 37 at 497 (citing John R. Brown, *Fifth Circuit Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 455 (1977); Paul A. LaBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985); McKusick, *supra* note 63 at 33; Medina, *supra* note 63 at 164; & Robbins, *supra* note 34, at 134).

65. *Id.*; *see also* 32 AM. JUR. 2d FEDERAL COURTS § 1341 (citing Fiat Motors of N. Am., Inc. v. Wilmington, 619 F. Supp. 29 (D. Del 1985)).

66. *Id.* (citing John A. Scanelli, *The Case for Certification*, 12 WM. & MARY L. REV. 627, 641 (1971)).

67. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

expense and delay,⁶⁸ while frustrating the beneficial effects of diversity jurisdiction on the development of state law.⁶⁹ According to Judge Bruce Selya of the United States Court of Appeals for the First Circuit, certification “has been plagued by theoretical and practical difficulties since its inception . . . [it] often does not provide a means of achieving its anticipated goals, and frequently adds time and expense to litigation that is already overlong and overly expensive.”⁷⁰

Although the merits and detriments of certification are beyond the scope of this Article, it is important to note that judges—both at the federal and state level—have expressed substantial support for the certification process.⁷¹ Particularly telling are the voluminous empirical studies demonstrating widespread approval of certification procedures among both state and federal judges.⁷² For example, a 1988 study by

68. Bassler & Potenza, *supra* note 37 at 509 (citing Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 332-33 (1994)).

69. *Id.* at 510 (citing Yonover, *supra* note 68 at 334-42). See, e.g., Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 165-70 (2009) (criticizing certification on federalism grounds); Geri J. Yonover, *supra* note 68 at 316-17 (1994) (noting criticisms of certification and proposing limitations on its use).

70. Selya, *supra* note 43 at 691. According to Judge Selya, opposition to certification is not “confined to a handful of benighted curmudgeons. . . . [T]he beauty of certification, like the beauty that Hollywood cherishes, is only skin-deep; even in those jurisdictions that permit certification in theory, it may be discouraged in practice—sometimes overtly, sometimes subliminally.” *Id.* at 681 (contending that state high courts “inordinately long time” in responding to certified questions or “terse refusals to answer” implicitly indicate objections to certification).

71. See, e.g., The Honorable Guido Calabresi, *Speech: Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1298-1307 (2003) (authored by Second Circuit Court of Appeals judge and discussing various uses of certification procedures by and among federal and state courts); The Honorable Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 373 (2000) (co-authored by chief judge of New York Court of Appeals and calling certification “an increasingly important tool for federal courts seeking to ascertain [state law] where [the state high court] has not previously spoken”); The Honorable Karen LeCraft Henderson, *Certification: (Over)due Deference?*, 63 GEO. WASH. L. REV. 637, 637 (1995) (authored by United States Court of Appeals for the District of Columbia Circuit judge and observing that certification furthers goals of comity and federalism); The Honorable Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 774-75 (1989) (authored by Second Circuit Court of Appeals judge and labeling certification a “helpful innovation”); The Honorable John D. Butzner, Jr. & Mary Nash Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 WASH. & LEE L. REV. 449, 450 (1985) (authored by Fourth Circuit Court of Appeals judge and observing that certification “increases the quality of judicial decision-making”); Brown, *supra* note 64 at 464 (authored by Fifth Circuit Court of Appeals judge and opining that lone regret regarding certification is that “it is not more widespread”). *But see* Selya, *supra* note 43 at 691 (criticizing certification).

72. In 1983, Carroll Seron of the Research Division of the Federal Judicial Center conducted a poll of forty-nine district and appellate judges from nine circuits encompassing twenty-four states and the commonwealth of Puerto Rico. The study

Professors John B. Corr and Ira Robbins found that surveyed federal and state judges “generally indicated overwhelming judicial support for the certification process. A large majority of the federal judges found the process to be a convenient and appropriate method for ascertaining controlling state law.”⁷³

III. THE THIRD CIRCUIT EXPERIENCE

With that backdrop, we now turn to the Third Circuit’s experience in certifying unsettled questions of state law to the three state high courts within its jurisdiction: the Supreme Court of New Jersey,⁷⁴ the Supreme Court of Pennsylvania,⁷⁵ and the Delaware Supreme Court.⁷⁶ According to the Third Circuit’s Local Appellate Rule § 110.1, where the procedures of a state high court provide for certification and the question of state law “will control the outcome of a case,” the Third Circuit may “*sua sponte* or on motion of a party” certify a question to any state high court—not just those state high courts within its jurisdiction.⁷⁷ While not required, a party seeking certification of an unsettled question of state law is well served to “specifically request” certification and to “set forth proposed questions for certification or argue why certification would be appropriate.”⁷⁸

The Third Circuit will not seek to certify a question of unsettled state law to a state high court until “after the briefs are filed” with the Third Circuit.⁷⁹ The decision to seek certification “rests in the sound

found that a large majority of surveyed judges found certification procedures when “appropriately used” are “a useful and effective mechanism for resolving state questions that arise in federal courts.” Carroll Seron, *Certifying Questions of State Law: Experience of Federal Judges* at 10-13 (Federal Judicial Center Staff Paper 1983).

And, in a 1994 study conducted by the American Judicature Society, eighty percent of state high court jurists surveyed stated that they were “willing” or “very willing” to answer certified questions posed by federal courts. Goldschmidt, *supra* note 34 at 74.

73. John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 457 (1988).

74. *See infra* notes 82-142 and accompanying text.

75. *See infra* notes 143-186 and accompanying text.

76. *See infra* notes 187-205 and accompanying text.

77. 3d Cir. L.A.R. 110.1. If a party moves for certification of a question of state law, such motion must be included in the moving party’s brief to the Third Circuit. *Id.*

With respect to the “will control the outcome of the case” requirement of the Local Appellate Rule, the Third Circuit has declined to certify a question of unsettled state law where the question of state law was not central to the court’s disposition. *See Francisco v. United States*, 267 F.3d 303, 308 n.5 (3d Cir. 2001).

78. *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 152 n.12 (3d Cir. 2000) (declining to certify question to Supreme Court of New Jersey despite submission of letter pursuant to Federal Rule of Appellate Procedure 28(j) notifying court of New Jersey’s recently enacted certification procedure).

79. 3d Cir. L.A.R. 110.1.

discretion of the federal court[.]”⁸⁰ If the Third Circuit certifies a question of unsettled state law to a state high court, the Third Circuit “will stay the case . . . to await the state court’s decision whether to accept the question certified.”⁸¹

A. *The New Jersey Experience*

New Jersey was one of the last states to create a certification procedure, not doing so until 1999.⁸² However, in the years prior to the enactment of Rule 2:12A, a chorus of federal judges called for the creation of a certification procedure in New Jersey, with Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit taking the lead. In *Hakimoglu v. Trump Taj Mahal Associates*,⁸³ the Third Circuit was presented with “the question whether under New Jersey law a casino patron may recover from a casino for gambling losses caused by the casino’s conduct in serving alcoholic beverages to the patron and allowing the patron to continue to gamble after it becomes obvious that the patron is intoxicated.”⁸⁴ Saddled with the “unfortunate[.]” task of “predict[ing]” the outcome “without specific guidance from the New Jersey appellate courts” the majority concluded that it was “more likely that the New Jersey Supreme Court would not recognize claims such as those” asserted by the plaintiff.⁸⁵ Judge Becker dissented, and in so doing strongly “urge[d] New Jersey to adopt” a certification procedure.⁸⁶ He wrote:

The lack of a certification procedure disadvantages both New Jersey and the federal judiciary. Especially in cases such as this where little authority governs the result, the litigants are left to watch the federal court spin the wheel. Meanwhile, federal judges, by no means a high-rolling⁸⁷ bunch are put in the uncomfortable position of making

80. *Afran v. McGreevey*, 115 Fed. App’x 539, 543 (3d Cir. 2004) (non-precedential) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (Rehnquist, J., concurring)).

81. 3d Cir. L.A.R. 110.1.

82. See *supra* notes 57-58 and accompanying text.

83. *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3d Cir. 1995).

84. *Id.* at 291.

85. *Id.* at 292-93.

86. *Id.* at 302 (Becker, J., dissenting). Importantly, both then-Judge Samuel A. Alito (the author of the majority opinion) and Judge Richard L. Nygaard joined and “enthusiastically endorse[d]” this portion of Judge Becker’s dissent. *Id.* at 293 n.2. Judge Becker requested that the Clerk of the Third Circuit “mail copies of this opinion, referencing [this portion of his] dissent to the Chief Justice of the New Jersey Supreme Court, the Director of the Administrative Office of New Jersey Courts, the Chair of the Judiciary Committees of the New Jersey House and Senate, and the Attorney General of New Jersey.” *Id.* at 304 n.14.

87. Judge Becker’s allusions to gambling in a case involving a casino are not lost on the Author.

a choice. In effect, we are forced to make important state policy, in contravention of basic federalism principles. The possibility that federal courts may make interpretive assumptions that differ from those of the state court further complicates the process. States like New Jersey lacking certification procedures face the threat that federal courts will misanalyze the state's law, already open to varied interpretations, by inadvertently viewing it through the lens of their own federal jurisprudential assumptions.⁸⁸

Judge Becker's call for the creation of a certification procedure in New Jersey was echoed by judges in the District of New Jersey. For example, according to Judge Joseph E. Irenas, *Tyson v. Cigna Corporation*,⁸⁹ a case requiring analysis of New Jersey's Law Against Discrimination,⁹⁰ provided "yet another example of the desirability of implementing a procedure which would permit New Jersey's federal courts to certify important, unresolved issues of state law to state courts so that New Jersey itself is given the opportunity to resolve the ambiguities of its laws."⁹¹ That position was seconded on numerous occasions in published opinions by Judge Stephen M. Orlofsky⁹² and discussed in great detail by Judge Bassler in a *Seton Hall Law Review* article.⁹³ Those calls for the creation of a certification procedure in New

88. *Hakimoglu*, 70 F.3d at 302 (Becker, J., dissenting) (internal citation omitted). Indeed, Judge Becker's concerns have been borne out as, on occasion, New Jersey courts have overruled prior legal determinations made by federal courts. See *Gottlob v. Lopez*, 501 A.2d 176, 177 (N.J. Super. Ct. App. Div. 1985) (finding that "N.J. STAT. ANN. § 2A:40-3 renders unenforceable only those loans which are made for the purpose of facilitating gambling prohibited by N.J.S.A. § 2A:40-1" and declining to follow *Nemtin v. Zarin*, 577 F. Supp. 1135 (D.N.J. 1983) which "construed the Casino Control Act differently").

89. *Tyson v. Cigna Corp.*, 918 F. Supp. 836 (D.N.J. 1996).

90. N.J. STAT. ANN. § 10:5-1 to -49.

91. *Tyson*, 918 F. Supp. at 839 n.3. This was not the first time Judge Irenas implored New Jersey to create a certification procedure. See *Tose v. Grete Bay Hotel & Casino*, 819 F. Supp. 1312, 1316 n.7 (D.N.J. 1993).

92. *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 963 F. Supp. 395, 408 n.13 (D.N.J. 1997); *Singer v. Land Rover N. Am., Inc.*, 955 F. Supp. 359, 360 n.2 (D.N.J. 1997); *Hulmes v. Honda Motor Co.*, 936 F. Supp. 195, 211 (D.N.J. 1996); *Hulmes v. Honda Motor Co.*, 924 F. Supp. 673, 678 (D.N.J. 1996).

93. Bassler & Potenza, *supra* note 37. In addition, in its Fourth Annual Assessment (1995) of the Civil Justice Expense and Delay Reduction Plan for the Implementation of the Civil Justice Reform Act of 1990, the United States District Court for the District of New Jersey recommended that the Supreme Court of New Jersey adopt a certification procedure. Bassler & Potenza, *supra* note 37 at 507. Chief Judge Anne Thompson of the United States District Court for the District of New Jersey submitted this recommendation to Chief Justice Robert Wilentz of the Supreme Court of New Jersey and subsequently discussed it with his successor, Chief Justice Deborah Poritz. *Id.*

In late 1996, the United States District Court adopted a resolution urging the Supreme Court of New Jersey to establish a certification procedure. *Id.* That resolution too was transmitted to the Supreme Court of New Jersey. *Id.*

Jersey were not limited to the federal bench. In 1996, the New Jersey State Bar Association urged the Supreme Court of New Jersey to adopt a certification procedure.⁹⁴

Thereafter, the Supreme Court of New Jersey asked the Civil Practice Committee to consider whether New Jersey should adopt a certification procedure.⁹⁵ A majority of the subcommittee appointed to study the issue concluded that New Jersey should follow the overwhelming majority of states and adopt a certification procedure, which the experience of other states demonstrated was both “used sparingly” and was “beneficial.”⁹⁶ A minority report, however, questioned the constitutionality and benefits of a certification procedure.⁹⁷ The minority report also expressed concerns regarding the needless overburdening of the Supreme Court of New Jersey.⁹⁸

The foregoing efforts culminated in 1999 when the Supreme Court of New Jersey adopted New Jersey Court Rule 2:12A, providing for certification of questions of state law by the Supreme Court. Unlike the certification procedures in other states,⁹⁹ New Jersey’s certification procedure is limited to “determinative” issues in “litigation pending in the Third Circuit” only.¹⁰⁰ The Supreme Court of New Jersey is permitted to “reformulate” the certified question of unsettled state law as presented by the Third Circuit.¹⁰¹ Moreover, the Supreme Court of New

94. *Id.* at 509.

95. 1998 Report of the Supreme Court Committee on Civil Practice, 151 N.J.L.J. 689, 703 (Feb. 16, 1998). Professor Robert Carter of Rutgers School of Law, Newark, chaired the subcommittee appointed to study the issue. *Id.*

96. *Id.*

97. *Id.*

98. *See Bassler & Potenza, supra* note 37, at 509.

99. New Jersey’s certification rule is particularly limited. Indeed, few states limit their certification rule to questions posed by only one federal court of appeals. *See also* ILL. SUP. CT. R. 20(A) (limiting certification to questions raised solely by the United States Court of Appeals for the Seventh Circuit, in which Illinois sits). Rather, many states permit certified questions from various courts, including the Supreme Court of the United States, all federal courts of appeals, and all federal district courts, while some even permit other state appellate courts to petition for certification of legal questions. *See* Schultz Newman, *supra* note 57 at 52-53 (discussing varied scopes of certification procedures); Cochran, *supra* note 20 at 167 and Appendix A (same). The revised Uniform Certification of Questions of Law Act similarly provides for a variety of courts to petition for certification of unsettled questions of state law. UNIF. CERTIFICATION OF QUESTIONS OF LAW (ACT) (RULE) 1995 § 3, 12 U.L.A. 74 (1996).

While Rule 2:12A was being considered, some, including Judge Bassler, recommended that the New Jersey certification procedure provide federal district courts with the authority to propound questions to the Supreme Court of New Jersey. *See* Bassler & Potenza, *supra* note 37 at 548.

100. *See* N.J. CT. R. 2:12A-1.

101. N.J. CT. R. 2:12A-2. The Supreme Court of New Jersey modified the certified question on one occasion. *See* Delta Funding Corp. v. Harris, 883 A.2d 1055, 1055 (N.J. 2005).

Jersey's sole function is to "answer the question of law submitted" and "not to resolve . . . factual differences."¹⁰²

Following the Third Circuit's issuing of a "certification order"¹⁰³ and the forwarding of such order to the Supreme Court of New Jersey, the parties may submit a five-page brief addressing the certification order.¹⁰⁴ The Supreme Court of New Jersey shall notify "the Third Circuit of its acceptance or rejection of the question and shall respond to an accepted certified question as soon as practicable."¹⁰⁵

What Rule 2:12A does not provide, however, is any standard for what certified questions of law the Supreme Court of New Jersey will accept, other than noting that the question must be "determinative" of the litigation.¹⁰⁶ And, on the six occasions in which the Third Circuit has asked the Supreme Court of New Jersey to certify a question of unsettled state law, the Supreme Court has not enumerated any standards for acceptance or rejection of a certified question,¹⁰⁷ leaving the federal

102. *Delta Funding Corp. v. Harris*, 912 A.2d 104, 108 (N.J. 2006).

103. [The] certification order must contain:

(a) The question of law sought to be answered;

(b) The facts relevant to the question, showing fully the nature of the controversy out of which the question arose. If the parties cannot agree on a statement of facts, the certifying court shall set forth what it believes to be the relevant facts;

(c) A statement acknowledging that the Supreme Court, acting as the receiving court, may reformulate the question; and

(d) The names and addresses of counsel of record and all parties appearing without counsel.

N.J. Ct. R. 2:12A-4.

104. N.J. Ct. R. 2:12A-3.

105. N.J. Ct. R. 2:12A-5.

106. N.J. Ct. R. 2:12A-1. To be sure, the Third Circuit and litigants would benefit greatly from authoritative guidance from the Supreme Court of New Jersey with respect to its standards for accepting certified questions, be it through an amendment to Rule 2:12A or in a judicial opinion.

107. In all six cases involving a question certified by the Third Circuit, the Supreme Court of New Jersey has either accepted or denied the question without indicating its rationale. *Knoepfler v. Guardian Life Ins. Co. of Am.*, 889 A.2d 1063, 1063 (N.J. 2005); *Delta Funding Corp.*, 883 A.2d at 1055; *Brennan v. Norton*, 803 A.2d 1159, 1159 (N.J. 2002); *Musikoff v. Jay Parrino's The Mint L.L.C.*, 785 A.2d 432, 432 (N.J. 2001); *In re Prof'l Ins. Mgmt.*, 779 A.2d 421, 421 (N.J. 2001); *Pittston Co. v. Sedgwick James of New York, Inc.*, 754 A.2d 1207, 1207 (N.J. 2000).

According to former Chief Justice James R. Zazzali, "[t]he plain language of [Rule 2:12A] indicates that the drafters intended to vest the Supreme Court [of New Jersey] with unfettered discretion to accept or reject a Third Circuit request." The Honorable James R. Zazzali & Adam N. Subervi, *Using Rule 2:12A to Certify Questions of Law*, 195 N.J.L.J. 375, 375 (2009).

The Supreme Court of New Jersey's silence on the issue must be juxtaposed against published opinions of the New York Court of Appeals offering explanations of the grounds for acceptance and denial of certified questions. *See, e.g.*, *Tunick v. Safir*, 731 N.E.2d 597, 598-600 (N.Y. 2000); *Yesil v. Reno*, 705 N.E.2d 655, 655-56 (N.Y. 1998); *Grabois v. Jones*, 667 N.E.2d 307, 307 (N.Y. 1996); *Retail Software Servs., Inc. v.*

judiciary and the bar to “wonder not only when the Supreme Court [of New Jersey] will consider a question, but also exactly what factors influence that decision.”¹⁰⁸ However, former Chief Justice James R. Zazzali¹⁰⁹ of the Supreme Court of New Jersey noted that the Supreme Court’s “practice of certifying questions” from its own Appellate Division—provided for in New Jersey Court Rule 2:12-4—“provide[s] guidance in discerning what questions [the Supreme Court of New Jersey] will seek to answer on a certification from the Third Circuit.”¹¹⁰ Pursuant to Rule 2:12-4, the Supreme Court may, in its discretion, grant review of a state case where: (1) “the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court”; (2) “if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court’s supervision”; or (3) “if the interest of justice requires.”¹¹¹

Despite that lack of clarity, in the decade since the Supreme Court of New Jersey adopted Rule 2:12-4, it has accepted three¹¹² of the six questions certified to it by the Third Circuit.¹¹³ The Third Circuit’s restraint in utilizing Rule 2:12-4 combined with the Supreme Court’s judicious use of its discretion has disproved the predictions that a certification procedure would needlessly overburden the Supreme Court of New Jersey.¹¹⁴

The six matters in which the Third Circuit petitioned the Supreme Court of New Jersey for certification, as a general matter, involved complex, commercial litigation with sophisticated parties¹¹⁵ concerning

Lashlee, 525 N.E.2d 737, 737-38 (N.Y. 1988); *Rufino v. United States*, 506 N.E.2d 910, 910-11 (N.Y. 1987). Those opinions—all of which denied certification—were relatively brief, but nonetheless addressed the criteria for certification that was lacking. Indeed, former Chief Judge of the New York Court of Appeals Judith S. Kaye stated that those decisions were “mutually beneficial” and “have helped certifying federal courts to avoid similar pitfalls in the future.” Kaye & Weissman, *supra* note 71, at 405, 420.

108. Zazzali & Subervi, *supra* note 107, at 375.

109. Former Chief Justice Zazzali is now of counsel to Gibbons, P.C. and Zazzali, Fagella, Nowak, Kleinbaum & Friedman.

110. Zazzali & Subervi, *supra* note 107, at 375 (referring to Supreme Court of New Jersey’s certification process of state court litigation as “a logical reference point”).

111. N.J. Ct. R. 2:12-4.

112. See *Delta Funding Corp.*, 883 A.2d at 1055 (granting certification); *Musikoff*, 785 A.2d at 432 (same); *Pittston Co.*, 754 A.2d at 1207 (same).

113. See *Knoepfler v. Guardian Life Ins. Co. of Am.*, 889 A.2d 1063, 1063 (N.J. 2005) (denying certification); *Brennan v. Norton*, 803 A.2d 1159, 1159 (N.J. 2002) (same); *In re Prof’l Ins. Mgmt.*, 779 A.2d 421, 421 (N.J. 2001).

114. See *supra* note 98 and accompanying text.

115. By way of example, parties involved in these matters included: insurers and insurance brokers, see *Knoepfler v. Guardian Life Ins. Co. of Am.*, 438 F.3d 287, 287 (3d

issues likely to recur.¹¹⁶ The topics included whether an arbitration clause in a subprime mortgage loan agreement was unconscionable,¹¹⁷ the appropriate procedure for enforcing an attorney's lien,¹¹⁸ statutory interpretations of the proof of loss provisions statutorily required in disability insurance policies¹¹⁹ and of New Jersey's Agency Termination Statute,¹²⁰ a reconciliation of New Jersey's Tort Claims Act's ninety-day notice of claim requirement¹²¹ with New Jersey's Conscientious Employee Protection Act,¹²² and choice of law questions regarding statutes of limitations arising out of an insurance broker's purported failure to obtain proper environmental liability.¹²³

Cir. 2006); *In re Prof'l Ins. Mgmt.*, 285 F.3d 268, 288 (3d Cir. 2002); *Pittston Co. v. Sedgwick James of New York, Inc.*, No. 97-5582 (3d Cir.) (docket sheet); mortgage lenders, *see Delta Funding Corp.*, 912 A.2d at 35; and parties seeking to enforce attorneys' liens, *Musikoff v. Jay Parrino's The Mint, L.L.C.*, 796 A.2d 866, 868 (N.J. 2002).

The most notable exception to this is the borrower in *Delta Funding Corp.*, a party the Supreme Court of New Jersey described as "a seventy-eight-year-old woman with only a sixth-grade education and little financial sophistication." *Delta Funding Corp.*, 912 A.2d at 108. However, any lack of sophistication on her part was made up for by the Supreme Court's granting of amici curiae status to, among others, the American Civil Liberties Union of New Jersey, the Seton Hall School of Law Center for Social Justice, Legal Services of New Jersey, the Attorney General of New Jersey, the New Jersey Division of Consumer Affairs, and the Chamber of Commerce of the United States. *Id.* at 107.

116. Obviously, this statement is a generality. There is no prerequisite for the Third Circuit to petition for certification of an unsettled question or state law, nor for the Supreme Court of New Jersey to grant such a petition. The same is true for the similar generalities expressed with respect to recently certified questions in Pennsylvania and Delaware.

117. *See Delta Funding Corp.*, 912 A.2d at 108.

118. *See Musikoff*, 796 A.2d at 867-68.

119. *See Knoepfler*, 438 F.3d at 289 (addressing N.J. STAT. ANN. § 17B:26-10).

120. *See Prof'l Ins. Mgmt.*, 285 F.3d at 268 (addressing N.J. STAT. ANN. § 17:22-6.14a).

121. *See* N.J. STAT. ANN. § 59:8-3.

122. *Brennan v. Norton*, 350 F.3d 399, 399 (3d Cir. 2003). New Jersey's Conscientious Employee Protection Act is found at N.J. STAT. ANN. § 34:19-1 to 19-9.

123. *Pittston Co. v. Sedgwick James of New York, Inc.*, No. 97-5582 (3d Cir. filed Sept. 17, 1997). In addition, in a dissenting opinion in *Levine v. United Healthcare Corp.*, a complex civil matter concerning insurance subrogation in the context of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.*, Judge Leonard Garth stated that he would have sought certification to the Supreme Court of New Jersey to determine whether that high court's precedent "which held that the statutory collateral source rule prohibits health insurers from filing reimbursement or subrogation liens against individual settlements or recoveries from third-party tortfeasors, applies *retroactively* to the health insurance plans at issue in this appeal." *Levine v. United Healthcare Corp.*, 402 F.3d 156, 171 n.20 (3d Cir. 2005) (Garth, J., dissenting).

It should further be noted that in the years preceding the adoption of Rule 2:12A, as already described, federal judges sitting on both the Third Circuit and the District of New Jersey called for New Jersey to adopt a certification procedure for litigation involving casinos, specifically cases addressing casino liability where an intoxicated patron suffers

The Supreme Court of New Jersey has granted the Third Circuit's petition for certification on three occasions, the first being *Pittston Company v. Sedgwick James of New York, Inc.*¹²⁴ The dispute in *Pittston Company* arose out of Pittston Company's allegation that Sedgwick James of New York, Inc., an insurance broker, "negligently failed to obtain proper environmental liability insurance" on its behalf.¹²⁵ Sedgwick argued that Pittston's claim was time barred, and, accordingly, "[t]he threshold issue to be decided . . . [was] whether the New York or the New Jersey statute of limitations period applie[d]."¹²⁶ On appeal, the Third Circuit petitioned for, and the Supreme Court of New Jersey granted, certification of two questions related to that threshold matter. The Supreme Court of New Jersey, however, never answered the certified questions¹²⁷ because the parties stipulated to dismiss the appeal with prejudice.¹²⁸

The Supreme Court next granted certification in *Musikoff v. Jay Parrino's The Mint L.L.C.*,¹²⁹ a case arising from a dispute over

gambling losses, *see* *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3d Cir. 1995); *Tose v. Greate Bay Hotel & Casino*, 819 F. Supp. 1312 (D.N.J. 1993), and in a complex dispute where a casino sought a declaratory judgment and injunction barring the construction of a highway and tunnel project in Atlantic City, *Trump Hotels & Casino Resorts v. Mirage Resorts*, 963 F. Supp. 395 (D.N.J. 1997). Those pre-Rule 2:12A cases indicate that federal judges may be more willing to certify questions of state law where, as in the case of New Jersey gaming, a decision may have substantial economic reverberations. *See* Ronald J. Rychlak, *Cards and Dice in Smoky Rooms: Tobacco Bans and Modern Casinos*, 57 *DRAKE L. REV.* 467, 491 (2009) (noting that gaming in Atlantic City, New Jersey is a \$5 billion-a-year-industry).

124. *Pittston Co. v. Sedgwick James of New York, Inc.*, 754 A.2d 1207 (N.J. 2000).

125. *Pittston Co. v. Sedgwick James of New York, Inc.*, 971 F. Supp. 915, 916-17 (D.N.J. 1997).

126. *Id.* at 922.

127. Specifically, the questions certified were:

In determining whether to apply a New Jersey statute of limitations or the statute of limitations of another jurisdiction, does a court: (1) apply New Jersey's statute of limitations unless each of the five factors set out in *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973), is satisfied; (2) apply New Jersey's statute of limitations if New Jersey is found to have a substantial interest in the case; (3) engage in the same balancing-of-interest analysis used to determine whether to apply the substantive law of New Jersey or a foreign jurisdiction; or (4) apply some other standard. 2. In determining whether New Jersey has a "substantial interest" for purposes of applying its statute of limitations to a claim of alleged insurance broker malpractice arising from the alleged failure to provide for pollution coverage in policies placed by the broker, does a court consider the identified interests New Jersey has in environmental cleanup cases. *See* *Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634, 641 (N.J. 1998).

Pittston Co., No. 97-5582.

128. *Id.*

129. *Musikoff v. Jay Parrino's The Mint L.L.C.*, 785 A.2d 432 (N.J. 2001). In light of the disposition of *Pittston Co.*, the Supreme Court noted in its *Musikoff* opinion that it

attorneys' fees among successor attorneys¹³⁰ and hinging on the proper interpretation of New Jersey's Attorney Lien Act.¹³¹ Specifically, the certified question was:

Whether under New Jersey law, in order to enforce a lien under [N.J. Stat. Ann. §] 2A:13-5, an attorney must file a petition to acknowledge and enforce the lien prior to any settlement or final judgment in the underlying matter in which the attorney provided services giving rise to the lien? In other words, is the last sentence of N.J. Stat. Ann. § 2A:13-5 ("The court in which the action or other proceeding is pending, upon the petition of the attorney or [counsellor] at law, may determine and enforce the lien") intended to control the forum where the petition is brought or the timing of the petition?¹³²

The Supreme Court concluded that the Attorney Lien Act "does not require an attorney to file a petition to acknowledge and enforce an attorney's lien prior to settlement or judgment in the matter that has given rise to the lien itself."¹³³ In so holding, the Supreme Court noted the confines of its opinion, stating that it did "not intend to address any issue beyond the scope of the certified question."¹³⁴

Most recently, the Supreme Court of New Jersey granted certification in *Delta Funding Corp. v. Harris*,¹³⁵ a dispute concerning an arbitration clause in a sub-prime mortgage loan agreement.¹³⁶ The Supreme Court was "asked whether an arbitration agreement found in a consumer loan contract is unconscionable, in whole or in part, under New Jersey contract law."¹³⁷ Amid a flurry of opinions,¹³⁸ the Supreme Court held that an arbitrator's interpretation of numerous provisions was "necessary before there can be a final resolution of this dispute," due to

was "the first time" that the Court would "answer" a certified question. *Musikoff v. Jay Parrino's The Mint L.L.C.*, 796 A.2d 866, 867 (N.J. 2002).

130. See *Musikoff*, 796 A.2d at 868-69.

131. See N.J. STAT. ANN. § 2A:13-5 (2010).

132. *Musikoff*, 796 A.2d at 867-68.

133. *Id.* at 868.

134. *Id.* at 874. The Court continued:

We express no view on whether appellant properly satisfied the applicable Rules of Court as a prerequisite to enforcement of its petition. Nor do we express an opinion in respect of the time period in which a petition must be filed, except to note that appellant filed its motion before the District Court within forty-five days of appellant's learning of that court's order dismissing respondent's action.

Id.

135. *Delta Funding Corp. v. Harris*, 883 A.2d 1055 (N.J. 2005).

136. *Delta Funding Corp. v. Harris*, 912 A.2d 104, 108 (N.J. 2006).

137. *Id.*

138. Justice Zazzali concurred in part, and dissented in part, while Justice Roberto Rivera-Soto dissented. See generally *id.*

the agreement's ambiguity.¹³⁹ However, the Supreme Court found that "several parts of the arbitration agreement may be unenforceable based on the unconscionability doctrine if interpreted by an arbitrator unfavorably to the consumer."¹⁴⁰ Accordingly, the Third Circuit remanded, directing the district court to enforce the arbitration agreement.¹⁴¹ In so doing, the Third Circuit expressed its "appreciation" to the Supreme Court of New Jersey, labeling certification "a useful vehicle for federal courts to give the state supreme courts an opportunity to elucidate an important issue of state law, thereby avoiding erroneous predictions that will confuse rather than clarify the issue."¹⁴²

B. *The Pennsylvania Experience*

Like New Jersey, Pennsylvania is one of the most recent states to enact certification procedures, not doing so until January 1, 1999, and then only on a one-year trial basis.¹⁴³ But, one year later, on January 12, 2000, the Supreme Court of Pennsylvania permanently established certification procedures by adopting Pennsylvania Code § 29.451.¹⁴⁴

Although the Supreme Court of Pennsylvania was never the subject of a public request from a Third Circuit judge in a published opinion akin to Judge Becker's dissent in *Hakimoglu*,¹⁴⁵ a Third Circuit judge still contributed greatly to Pennsylvania's adoption of a certification rule. Specifically, in an April 1992 speech delivered at the National Conference on State/Federal Judicial Relationships, Judge Dolores K. Sloviter noted that Pennsylvania courts "have found fault with a not insignificant number of past 'Erie guesses' made by the Third Circuit and our district courts."¹⁴⁶ Judge Sloviter noted that, with respect to Pennsylvania law, "we have guessed wrong on questions of the breadth of arbitration clauses in automobile insurance policies . . .,"¹⁴⁷ the

139. *Id.* at 108.

140. *Id.*

141. *Delta Funding Corp. v. Harris*, 466 F.3d 273, 275–76 (3d Cir. 2006).

142. *Id.* at 273 n.1.

143. PA. SUPREME CT. INTERNAL OPERATING PROCEDURE X(A); *see also* Schultz Newman, *supra* note 57 at 54 (noting that Supreme Court of Pennsylvania's adoption of certification procedures on trial basis).

144. *See* Schultz Newman, *supra* note 57, at 57.

145. *See supra* notes 83-88 and accompanying text; *but see* *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1052 (3d Cir. 1997) (predicting questionable issue of Pennsylvania law, but hoping that Pennsylvania would soon rule definitively on the issue).

146. The Honorable Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679 (1992) (authored by Third Circuit Court of Appeals judge and noting New Jersey and Pennsylvania courts' disagreement with federal courts on state law questions).

147. *Compare* *Brennan v. Gen. Accident Fire & Life Assurance Corp.*, 574 A.2d 580, 583 (Pa. 1990) (holding that arbitration clause mandates arbitration of whether party is

‘unreasonably dangerous’ standard in products liability cases . . .,¹⁴⁸ and the applicability of the ‘discovery rule’ to wrongful death and survival actions.”¹⁴⁹ Judge Sloviter noted that those examples were “by no means exhaustive,”¹⁵⁰ and later scholarship¹⁵¹ proved the point by highlighting divergences between federal court predictions and later Pennsylvania state court pronouncements on areas including whether manufacturers are protected by a statute of repose¹⁵² pertaining to defects in improvements made to real property¹⁵³ and whether Pennsylvania’s two-year statute of limitations on personal injury actions¹⁵⁴ barred a suit initially filed as a negligence action but later amended to allege a breach of warranty.¹⁵⁵

With those incorrect predictions as backdrop, Pennsylvania made certification a permanent fixture in January 2000, adopting Rule 29.451.¹⁵⁶ Pennsylvania’s certification procedure differs from New Jersey’s in significant respects. First, unlike New Jersey’s certification

legally entitled to coverage) *with* *Myers v. State Farm Ins. Co.*, 842 F.2d 705, 708 (3d Cir. 1988) (holding that arbitration clause did not extend to disputes over existence or extent of coverage).

148. *Compare* *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1026-27 (Pa. 1978) (adopting holding and reasoning of plurality in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) on the “unreasonably dangerous” standard of Restatement (Second) of Torts § 402A) *with* *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1276-77 (E.D. Pa. 1975) (predicting Pennsylvania courts would reject plurality opinion in *Berkebile*).

149. Sloviter, *supra* note 146, at 1680. *Compare* *Pastierik v. Duquesne Light Co.*, 526 A.2d 323, 326 (Pa. 1987) (adopting holding and reasoning of plurality in *Anthony v. Koppers Co.*, 436 A.2d 181, 183-84 (Pa. 1981) with respect to common law “discovery rule” and its tolling effects on the statute of limitations applicable to wrongful death and survival actions) *with* *McGowan v. Univ. of Scranton*, 759 F.2d 287, 289-90 (3d Cir. 1985) (predicting that Supreme Court of Pennsylvania would reject *Anthony* plurality).

150. Sloviter, *supra* note 146, at 1680.

151. *See* *Smetanka*, *supra* note 63, at 733.

152. *See* 42 PA. CONS. STAT. ANN. § 5536 (2010).

153. *Compare* *McCormick v. Columbus Conveyor Co.*, 564 A.2d 907, 910 (Pa. 1989) (following Superior Court opinion, *Catanzaro v. Wasco Products, Inc.*, 489 A.2d 262 (Pa. Super. 1985)) *with* *Luzadder v. Despatch Oven Co.*, 834 F.2d 355, 360 (3d Cir. 1987) (refusing to follow *Catanzaro*).

154. *See* 42 PA. CONS. STAT. ANN. § 5524(2) (2004).

155. *Compare* *Williams v. W. Penn Power Co.*, 467 A.2d 811, 818 (Pa. 1983) (finding section 2-725 of Uniform Commercial Code applied to all breach-of-warranty actions including those claims seeking recovery for personal injury) *with* *Hahn v. Atl. Richfield Co.*, 625 F.2d 1095, 1104-05 (3d Cir. 1980) (predicting that two-year statute of limitations was applicable).

This is not to say that the Third Circuit is a bad predictor of state law. *See* *Smetanka*, *supra* note 63, at 734 and n.77 (acknowledging situations in which Third Circuit correctly predicted Pennsylvania law and collecting cases). Judge Sloviter put it best: “It is not that Third Circuit judges are particularly poor prognosticators. All of the circuits have similar problems in predicting state law accurately.” Sloviter, *supra* note 146, at 1680 (collecting cases).

156. *See supra* note 144 and accompanying text.

procedure which permits only the United States Court of Appeals for the Third Circuit to petition for certification,¹⁵⁷ Pennsylvania's certification rule permits the Supreme Court of the United States and *any* United States Court of Appeals to certify a question to it.¹⁵⁸ In addition, and unlike New Jersey's certification rule, Pennsylvania's rule enumerates standards for accepting a certified question, but expressly notes that certification is limited to cases "where there are special and important reasons" for granting certification.¹⁵⁹ The three enumerated—though not exhaustive¹⁶⁰—reasons for granting certification in Pennsylvania are:

- a. The question of law is one of first impression and is of such substantial public importance as to require prompt and definitive resolution . . . ;
- b. The question of law is one with respect to which there are conflicting decisions in other courts; or
- c. The question of law concerns an unsettled issue of the constitutionality, construction, or application of a statute of this Commonwealth.¹⁶¹

The Supreme Court of Pennsylvania will "not accept certification unless all facts material to the question of law . . . are undisputed,"¹⁶² and will determine whether certification is warranted without oral argument.¹⁶³ The Supreme Court of Pennsylvania will grant or deny certification within sixty days.¹⁶⁴

157. See N.J. CT. R. 2:12A-1.

158. See 204 PA. CODE § 29.451(1)(a-b) (2010); see also PA. SUP. CT. INTERNAL OPERATING P. 10(A)(1-2). According to § 29.451, a petition for certification may be made on a party's request or *sua sponte* by the court seeking certification. 204 PA. CODE § 29.451(2). The certification petition must include: (1) a brief statement of the nature and stage of the proceeding in the petitioning court; (2) a brief statement of material facts; (3) the question(s) of Pennsylvania law to be determined; (4) a statement of reasons why certification should be granted; (5) a recommendation regarding which party should be designated appellant; and (6) copies of any papers filed by the parties regarding certification. See 204 PA. CODE § 29.451(3)(a-f).

159. PA. SUP. CT. INTERNAL OPERATING P. 10(B). The rule provides that certification "is a matter of judicial discretion." *Id.*

160. See PA. SUP. CT. INTERNAL OPERATING P. 10(B) (noting that enumerated reasons "includ[e], but [are] not limited to . . .").

161. PA. SUP. CT. INTERNAL OPERATING P. 10(B)(1-3).

162. PA. SUP. CT. INTERNAL OPERATING P. 10(B)(4).

163. PA. SUP. CT. INTERNAL OPERATING P. 10(B)(5).

164. PA. SUP. CT. INTERNAL OPERATING P. 10(C). The Supreme Court of Pennsylvania's Internal Operating Procedures require the prothonotary to refer all certification petitions to the Chief Justice, who thereafter prepares memoranda

Where certification is granted, the Supreme Court of Pennsylvania is unwilling to address tangential legal issues or questions not expressly certified.

[T]he resolution of certified issues by this Court is an unusual practice through which, for the sake of comity, we undertake to address legal issues outside the familiar setting of a case over which we maintain conventional jurisdiction. In such a landscape, proceeding beyond the matters we are expressly asked to address raises both jurisdictional and prudential concerns which would immeasurably compound the difficulties already associated with deciding multiple issues within a single case in a Court of seven members. Therefore, it will be our practice to confine ourselves as closely as possible to the certified questions, including in our treatment only subsidiary legal matters fairly subsumed within those certified questions.¹⁶⁵

In its approximate decade of existence, the Third Circuit has certified questions of state law to the Supreme Court of Pennsylvania in eleven cases¹⁶⁶—nearly double the amount of cases in which the Third Circuit has petitioned the Supreme Court of New Jersey.¹⁶⁷ And, the Supreme Court of Pennsylvania has been more willing to accept petitions for certification than the Supreme Court of New Jersey. Indeed, the Supreme Court of Pennsylvania accepted the Third Circuit's petition for certification in nine¹⁶⁸ of eleven cases¹⁶⁹—or approximately eighty-two

recommending a disposition of the petition. A majority vote of the Supreme Court is required to implement the Chief Justice's proposed disposition. *Id.*

165. Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. Pricewaterhousecoopers, LLP, 989 A.2d 313, 327-28 (Pa. 2010).

166. The Supreme Court of Pennsylvania has also accepted certification petitions from the Supreme Court of the United States, *Fiore v. White*, 757 A.2d 842, 843 (Pa. 2000), and the United States Court of Appeals for the District of Columbia, *City of Phila. v. Consol. Rail Corp.*, 747 A.2d 352, 352 (Pa. 2000).

167. See *supra* note 107 and accompanying text.

168. See *Official Comm. of Unsecured Creditors*, 989 A.2d at 318-19 (granting certification of two questions); *Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 116 (Pa. 2007); *Kendrick v. Dist. Att'y of Phila. County*, 916 A.2d 529, 531 (Pa. 2007); *Wirth v. Aetna U.S. Healthcare*, 904 A.2d 858, 859 (Pa. 2006); *Witco Corp. v. Herzog Bros. Trucking, Inc.*, 863 A.2d 443, 444 (Pa. 2004) (granting certification of three questions); *Prudential Prop. & Cas. Ins. Co. v. Colbert*, 813 A.2d 747, 748-49 (Pa. 2002) (granting certification of two questions); *Rupert v. Liberty Mut. Ins. Co.*, 781 A.2d 132, 133 (Pa. 2001); *Jacobs v. CNG Transmission Corp.*, 772 A.2d 445, 446 (Pa. 2001) (granting certification of two questions); *Coady v. Vaughn*, 770 A.2d 287, 288 (Pa. 2001).

In *Rupert*, because one justice did not participate in the matter, the Supreme Court of Pennsylvania was evenly divided and, accordingly, was unable to provide an authoritative answer to the certified question. See *Rupert*, 781 A.2d at 136.

169. The Supreme Court of Pennsylvania denied petitions for certification in two cases. See *United States v. Baker*, 221 F.3d 438, 440 (3d Cir. 2000); *Kirleis v. Dickie*,

percent of the time.¹⁷⁰ Similar to the New Jersey experience, the matters in which the Third Circuit has sought certification—and those matters in which the Supreme Court of Pennsylvania has granted certification—generally involved complex, commercial litigation among sophisticated parties.¹⁷¹

And, like the questions of state law certified by the Supreme Court of New Jersey, the questions certified by the Supreme Court of Pennsylvania typically involved questions likely to recur, such as interpreting commonplace contractual terms. Again, as in New Jersey, insurance litigation was a common subject matter.¹⁷² Proving the point is *Rupert v. Liberty Mutual Insurance Company*¹⁷³ where the Supreme Court certified the following question:

Does the requirement in 75 Pa.C.S. § 1738(e) that a valid stacking waiver ‘must be signed by the first named insured’ mean that a valid waiver must be signed by the *current* first named insured on a policy, thus imposing a continuing obligation on insurers to acquire a new

McCamey & Chilcote, P.C., No. 50 WM 2008, 2008 Pa. LEXIS 2387, at *4 (Pa. Oct. 22, 2008) (perceiving no tension among Pennsylvania precedent).

170. The Supreme Court of New Jersey accepted only three of six petitions for certification filed by the Third Circuit in the last decade. *See supra* notes 112-113 and accompanying text.

The Third Circuit has expressed its gratitude to the Supreme Court of Pennsylvania for its acceptance of certified questions. In a recent precedential opinion, the Third Circuit acknowledged the substantial assistance provided by the Supreme Court of Pennsylvania and the “much-appreciated clarifying opinion” from the state high court for which the Third Circuit was “most grateful.” Official Comm. of Unsecured Creditors of Allegheny Health, Educ. & Research Found. v. Pricewaterhousecoopers, LLP, 607 F.3d 346, 348, 351 (3d Cir. 2010).

The foregoing statistical information is not to say, however, that the Third Circuit is more likely to certify an unsettled question of Pennsylvania state law than an unsettled question of New Jersey state law, nor that the Supreme Court of Pennsylvania is more likely to accept a certified question from the Third Circuit than the Supreme Court of New Jersey is. To be sure, a decade of experience is too small a sample size to support such a broad pronouncement.

171. By way of example only, parties in litigation in which questions were certified by the Supreme Court of Pennsylvania included: an HMO, *see Wirth*, 904 A.2d 858; insurance companies, *see Rupert*, 781 A.2d 132; *Prudential Prop. & Cas. Ins. Co.*, 813 A.2d 747; a non-profit organization that operated hospitals, medical schools, and physicians’ practices, *see Official Comm. of Unsecured Creditors*, 989 A.2d 313; an auditor, *see id.*; a sub-prime lender, *see Salley*, 925 A.2d 115; and an oil and gas company, *see Jacobs*, 772 A.2d 445.

172. *See generally Wirth*, 904 A.2d at 859 (“[W]hether a health maintenance organization (HMO) is exempt, by virtue of the Pennsylvania Health Maintenance Organization Act (HMO ACT), 40 P.S. § 1560(a), from complying with the anti-subrogation provision of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa.C.S. § 1720?”); *Prudential Prop. & Cas. Ins. Co.*, 813 A.2d at 748-49 (addressing definition of “insured” under automobile insurance policy and whether “other household vehicle” exclusion contained in policy violated public policy).

173. *Rupert*, 781 A.2d 132.

stacking waiver if the first named insured on a policy changes, or does § 1738(e) merely require that a valid waiver only must be signed by the first named insured at the time the waiver is signed.¹⁷⁴

The likely to recur theme is also demonstrated by *Salley v. Option One Mortgage Corporation*,¹⁷⁵ a case similar to *Delta Funding*, in which the Supreme Court of New Jersey accepted a certified question.¹⁷⁶ There, as in *Delta Funding*, the state high court was called on to consider the unconscionability of an arbitration clause. More specifically, the Supreme Court of Pennsylvania was asked “to consider whether an arbitration agreement, consummated in connection with a residential mortgage loan, which reserve judicial remedies related to foreclosure is presumptively unconscionable.”¹⁷⁷ Not only was that issue likely to recur as disputes materialized from the subprime lending industry, but interpretation and “application of arbitration agreements in the consumer lending industry present[ed] a range of policy issues” that were important for the high court to consider.¹⁷⁸

Indeed, policy considerations of state law are a common theme in the Pennsylvania experience with certification.¹⁷⁹ For example, in its most recent acceptance of a certified question, *Official Committee of Unsecured Creditors of Allegheny Health Education & Research Foundation v. Pricewaterhousecoopers, LLP*,¹⁸⁰ a complex commercial case arising out of the bankruptcy and liquidation of a nonprofit corporation that involved claims of collusion among the debtors’ officers to fraudulently misstate the debtor’s finances, the Supreme Court was asked, among other things, to enumerate the “proper test under Pennsylvania law for determining whether an agent’s fraud should be imputed to the principal when it is an allegedly non-innocent third-party that seeks to invoke the law of imputation in order to shield itself from

174. *Id.* at 133.

175. *See Salley*, 925 A.2d 115.

176. *See supra* notes 135-142 and accompanying text.

177. *Salley*, 925 A.2d at 116. Another similarity with *Delta Funding* was the abundance of amici curiae briefs filed in the matter. *See id.* at 118.

178. *Id.* at 123.

179. *See, e.g., Witco Corp. v. Herzog Bros. Trucking Inc.*, 863 A.2d 443, 451 (“[O]ur answer to the Third Circuit’s final certified question is simply this: the public policy of Pennsylvania prohibits a garnishee bank with notice of a judgment order from engaging in transactions with the judgment debtor that it knows or should know will facilitate the judgment debtor in attempts to avoid the lawful garnishment of its assets.”); *Prudential Prop. & Cas. Ins. Co. v. Colbert*, 813 A.2d 747, 752 (discussing policy considerations). *But see Wirth v. Aetna U.S. Healthcare*, 904 A.2d 858, 865-66 (declining to discuss public policy in light of “clearly worded” and ambiguity-free statute).

180. *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. Pricewaterhousecoopers, LLP*, 989 A.2d 313 (Pa. 2010).

liability.”¹⁸¹ With respect to the imputation question, the Supreme Court of Pennsylvania devoted significant attention to the “competing concerns” and “policy concerns” implicated by the dispute.¹⁸² This concern with broad policy questions demonstrated in *Salley* and *Official Committee of Unsecured Creditors* supports the observation, made by former Chief Judge of the New York Court of Appeals Judith S. Kaye, that “[c]ertification has had its greatest value where a policy choice among reasonable alternatives—the province of the state high court—is implicated.”¹⁸³

In Pennsylvania, however, certification of unsettled questions of state law has not been limited to purely commercial matters. Indeed, on two occasions, the Supreme Court of Pennsylvania has certified questions related to prisoner habeas corpus petitions.¹⁸⁴ In addition, the Third Circuit also petitioned for certification in a criminal matter, *United States v. Baker*,¹⁸⁵ but the Supreme Court denied certification, thereby requiring the Third Circuit to “predict” the appropriate rule of law.¹⁸⁶

C. *The Delaware Experience*

Delaware has the oldest and broadest certification procedure of the states within the Third Circuit. Since 1993,¹⁸⁷ Delaware Supreme Court Rule 41 has empowered the Delaware Supreme Court to accept certified questions from the Supreme Court of the United States, any federal court of appeals, any federal district court, the highest appellate court of any

181. *Id.* at 315, 318. In addition, the Supreme Court addressed a question related to the doctrine of *in pari delicto*. *Id.* at 318-19.

182. *Id.* at 335-36.

183. Kaye & Weissman, *supra* note 71, at 419.

184. *See* *Kendrick v. Dist. Att’y. of Phila. County*, 916 A.2d 529, 531 (Pa. 2007) (asking whether *Commonwealth v. Besch*, 674 A.2d 655 (Pa. 1996) “establishes a new rule of law that cannot be applied retroactively to cases on collateral review”); *Coady v. Vaughn*, 770 A.2d 287, 288 (Pa. 2001) (certifying “issues of whether a person who has been denied parole may obtain review from a Pennsylvania state court of a claim that the denial of parole violated the *ex post facto* clause of the United States Constitution, and, if so, what is the proper method for review”).

185. *United States v. Baker*, 221 F.3d 438 (3d Cir. 2000). The case raised a “vexing” and “important first-impression question: whether the standard Pennsylvania Board of Probation and Parole consent to search form, signed by Baker as a condition of his parole, authorized suspicionless searches of his person, property, and residence.” *Id.* at 441, 440.

186. *Id.*

187. Prior to 1993, the Delaware Constitution permitted certification of unsettled questions of state law by Delaware courts or the United States District Court for the District of Delaware only. *See* 1992 DEL. LAWS 375 (1993) (synopsis); DEL. SUP. CT. R. 41 Notes; *Rales v. Blasband*, 626 A.2d 1364, 1366 n.* (Del. 1993).

state, and Delaware courts.¹⁸⁸ And, in 2007, that expansive certification procedure was extended further when Delaware amended its rules and became the first state to permit the Securities and Exchange Commission to certify questions to its high court.¹⁸⁹

The Supreme Court of Delaware will grant certification “only where there exist[s] an important and urgent reason for an immediate determination . . . of the questions certified.”¹⁹⁰ Again, as in New Jersey and Pennsylvania, that determination is one of the high court’s discretion.¹⁹¹ And, as does Pennsylvania Supreme Court Internal Operative Procedure 10(B), Delaware Supreme Court Rule 41 provides an illustrative list¹⁹² of reasons for accepting certification, such as where: (1) “[t]he question of law is of first instance in” Delaware; (2) “[t]he decisions of the trial courts are conflicting upon the question of law;” and (3) “[t]he question of law relates to the constitutionality, construction or application of [Delaware law] which has not been, but should be, settled.”¹⁹³ Those three examples, however, are not exhaustive.¹⁹⁴

Certification will not be granted “if facts material to the issue certified are in dispute.”¹⁹⁵ In addition, the Delaware Supreme Court,

188. See DEL. CONST. art IV, § 11(8); DEL. SUP. CT. R. 41(ii); 1992 Del. Laws 375 (1993) (synopsis). The Delaware Supreme Court “will only accept certification from the state and federal courts specified in Rule 41.” *Brooks-McCollum v. Shareef*, 871 A.2d 1127, 1127 (Del. 2004). Accordingly, a litigant “has no right to request certification under Rule 41” and any such application “shall be stricken as a nonconforming document.” *Id.*

189. See Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 196 (2010) (noting that sparse legislative history merely noted fact that “more than half of the publicly traded companies in the United States are Delaware corporations” (footnote omitted)); see also Rolin P. Bissell, *Delaware High Court Empowered to Answer Formal Questions from SEC*, WASHINGTON LEGAL FOUNDATION, Legal Opinion Letter, Vol. 17 No. 24 (Dec. 14, 2007) available at <http://www.wlf.org/upload/12-14-07bissell.pdf> (last visited July 5, 2010) (noting “the unique role the Delaware courts hold in adjudicating corporate law disputes and the significance of Delaware corporation law generally”).

The Securities and Exchange Commission utilized the procedure soon thereafter, certifying a question, later accepted by the Delaware Supreme Court, in 2008. See *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 229 (Del. 2008).

190. The court seeking certification must “state with particularity the important and urgent reasons for an immediate determination” by the Delaware Supreme Court. DEL. SUP. CT. R. 41(b); see also *Kerns v. Dukes*, 153 F.3d 96, 107 (3d Cir. 1998) (enumerating “important and urgent reasons for an immediate determination” of certified questions).

191. DEL. SUP. CT. R. 41(b).

192. *Id.* (noting that three examples “illustrate reasons for accepting certification” but that they do not “limit[] the Court’s discretion to hear proceedings on certification”).

193. DEL. SUP. CT. R. 41(b)(i-iii).

194. DEL. SUP. CT. R. 41(b).

195. *Id.*

like the Supreme Court of Pennsylvania, expressly notes that it will determine whether to accept or reject certification without argument.¹⁹⁶

Although Delaware's certification procedure is older and more expansive than either New Jersey's or Pennsylvania's certification procedures, the Third Circuit has utilized it the least.¹⁹⁷ Indeed, the last time the Third Circuit petitioned the Delaware Supreme Court to certify a question was in 1998, before either New Jersey or Pennsylvania even had certification procedures in place. That case, *Kerns v. Dukes*,¹⁹⁸ involved the attempt of certain Delaware property owners to challenge assessments charged to them for the creation of a new sewer district.¹⁹⁹ Specifically, the certified questions were: "[t]o what extent does the jurisdiction of Delaware's courts (whether taken singly or in combination) encompass plaintiffs' claims, and to what extent are Delaware's courts able to provide such relief as those claims, if sustained, would entail?"²⁰⁰

Although the Third Circuit's use of Delaware's certification procedure is sparse, it included an insurance case, a fruitful area for certification of unsettled questions of state law in the Third Circuit due to the likelihood of recurrence. In *Penn Mutual Life Insurance Company v. Oglesby*,²⁰¹ the Supreme Court of Delaware granted certification of four questions from the Third Circuit in an insurance case relating to pre-existing conditions and fraudulent misstatement provisions of a disability income insurance policy, as well as an interpretation of the term "non-cancelable" under Delaware statutory law.²⁰²

196. DEL. SUP. CT. R. 41(c)(iv). With respect to procedure, a court seeking certification must submit "a certification substantially in the form set forth in Official Form K," DEL. SUP. CT. R. 41(c)(i), which requires the certifying court to state: (1) the nature and stage of proceedings; (2) undisputed facts; (3) proposed questions to be certified; (4) a statement of the important and urgent reasons for an immediate determination; and (5) a recommendation of which party should be appellant for purposes of the caption. See Sample Form K available at <http://forms.lp.findlaw.com/form/courtforms/state/de/de000005.pdf> (last visited June 8, 2010). Although, on its face, this rule applies only to "trial" courts, Sample Form K indicates that it is to be used by any certifying courts. See also *Kerns*, 153 F.3d at 107 (3d Cir. 1998) (Form K submitted to Delaware Supreme Court appended to opinion).

197. Other federal courts have utilized Delaware's certification procedures. See, e.g., *A.W. Fin. Services, S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1117 (Del. 2009) (United States District Court for the Southern District of New York); see *Farahpour v. DCX, Inc.*, 635 A.2d 894, 895 (Del. 1994) (Court of Appeals for the District of Columbia); see *Rales v. Blasband*, 626 A.2d 1364, 1365 (Del. 1993) (United States District Court for the District of Delaware).

198. *Kerns v. Dukes*, 707 A.2d 363 (Del. 1998).

199. *Id.* at 365.

200. *Id.*

201. *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146 (Del. 1997).

202. DEL. CODE ANN. tit. 18, § 3306(c) (2010).

Finally, in *Konstantopoulos v. Westvaco Corporation*²⁰³—the first occasion in which the Supreme Court of Delaware granted a question certified by the Third Circuit—the Supreme Court certified two questions arising out of the Delaware Workers’ Compensation Act.²⁰⁴ Both questions, however, boiled down to one dispositive issue: whether “the Delaware Workers’ Compensation Act . . . precludes an employee from asserting a common law tort claim against her employer for a claim of sexual harassment on the job by fellow employees.”²⁰⁵ Again, as with the insurance questions certified in *Penn Mutual Life Insurance Co.*, this question of workers’ compensation law presented a likelihood of recurrence.

IV. CONCLUSION

Over the last two decades, by certifying unsettled questions of state law to the state high courts in New Jersey, Pennsylvania, and Delaware, the Third Circuit has obtained authoritative guidance on areas as diverse as the unconscionability of arbitration clauses in sub-prime mortgage lending agreements,²⁰⁶ to whether a mandamus action is an appropriate vehicle to examine the *ex post facto* implications of statutory changes to parole law,²⁰⁷ to an interpretation of state workers’ compensation law.²⁰⁸ In so doing, the Third Circuit has been most willing to seek guidance on unsettled questions of state law—and the state high courts have been most willing to provide guidance—in complex, commercial litigation involving sophisticated parties and questions likely to recur.²⁰⁹ Proving the point is the abundant use of certification procedures to obtain authoritative pronouncements of state law on all manner of insurance

203. *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936 (Del. 1996).

204. *See* DEL. CODE ANN. tit. 19, § 2301 (2010) *et seq.*

205. *Konstantopoulos*, 690 A.2d at 937.

206. *See* *Salley v. Option One Mortgage Corp.*, 925 A.2d 115 (Pa. 2007); *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006).

207. *See* *Coady v. Vaughn*, 770 A.2d 287 (Pa. 2001).

208. *See* *Konstantopoulos*, 690 A.2d 936.

209. At least one commentator has stated that “[a] federal court . . . might refuse to certify a question of state law that it feels is either unlikely to recur or does not raise significant issues of public policy.” Nash, *supra* note 26, at 1692 n.77 (citing authority from United States Courts of Appeals for the Second and Seventh Circuits). Other factors that may impact a federal court’s willingness to certify questions of state law are the procedural posture, rulings below, forum selection, the timing of a certification request, and a balance of the benefits of certification against the potential for delay. *See id.* Ultimately, however, as Bradford Clark has noted, “[c]ertification patterns vary widely among federal courts and are largely ad hoc.” Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1549 (1997).

disputes.²¹⁰ Additionally, the Third Circuit has been willing to seek certification of unsettled questions of state law where state policy is particularly relevant to the appropriate legal outcome—an area where state courts are more adept.²¹¹

The recently enacted certification procedures in New Jersey, Pennsylvania, and Delaware demonstrate that the high courts in those states will not accept a certified question from the Third Circuit where material facts remain in dispute.²¹² In addition, where the state high courts accept a question certified by the Third Circuit, the state high courts will be careful to limit their legal pronouncements to the certified question, avoiding tangential legal issues.²¹³

By asking for—and receiving—guidance from state high courts on unsettled questions of state law, the Third Circuit has demonstrated that the much-lauded practice of certification has the potential to benefit state courts, federal courts, litigants, and those seeking authoritative guidance in the conducting of their businesses and lives.

210. New Jersey: *See, e.g.*, *Knoepfler v. Guardian Life Ins. Co. of Am.*, 438 F.3d 287 (3d Cir. 2006); *see also In re Prof'l Ins. Mgmt.*, 285 F.3d 268 (3d Cir. 2002); *see also Pittston Co. v. Sedgwick James of New York, Inc.*, No. 97-5582 (3d Cir.) (docket sheet). Pennsylvania: *See, e.g.*, *Wirth v. Aetna United States Healthcare*, 904 A.2d 858 (Pa. 2006); *see also Prudential Prop. & Casualty Ins. Co. v. Colbert*, 813 A.2d 747 (Pa. 2002); *see also Rupert v. Liberty Mut. Ins. Co.*, 781 A.2d 132 (Pa. 2001). Delaware: *See Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146 (Del. 1997).

211. *See, e.g.*, *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. Pricewaterhousecoopers, LLP*, 989 A.2d 313 (Pa. 2010); *see also Salley v. Option One Mortgage Corp.*, 925 A.2d 115 (Pa. 2007).

212. *See Delta Funding Corp. v. Harris*, 912 A.2d. 104, 108 (N.J. 2006); PA. SUP. CT. INTERNAL OPERATING PROC. 10(B)(4); DEL. SUP. CT. R. 41(b).

213. *See Official Comm. of Unsecured Creditors*, 989 A.2d at 327-28; *Musikoff v. Jay Parrino's The Mint L.L.C.*, 796 A.2d 866, 874 (N.J. 2002).