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. 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”). 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. 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.” While returning to his vehicle, Holmes fell on ice in the parking lot. He sued Lowe’s for negligent maintenance of the parking lot. 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, based on diversity jurisdiction.

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3. Id. at 116.
4. Id.
5. Id.
6. Id.
7. Id. at 117.
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. 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.” Holmes attempted to amend his complaint to include Price, as well as another entity suspected of owning the parking lot, Kimco Realty Corporation. But, because the statute of limitations had expired, the District Court granted summary judgment in favor of the potentially liable landlords. 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.

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.” The Third Circuit noted that this precise question had “not been addressed by the New Jersey Supreme Court” and that courts that have considered the question under New Jersey law had reached varying conclusions. Accordingly, as both the majority (three times) and dissent (twice)

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.
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. 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.” Dissenting Judge D. Michael Fisher disagreed, predicting that the Supreme Court of New Jersey would find the existence of a duty of care.

But rather than “predict” what rule of law the Supreme Court of New Jersey would have applied, the Third Circuit could have “asked.” 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.” 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.

9. Id. at 125, 128 (Fisher, J., dissenting).

21. Id., 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”).

24. 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.

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

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. 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, Part II is then divided into three subsections, each analyzing the respective experiences with certification procedures in New Jersey, Pennsylvania, and Delaware, 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


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, doing so in 1999. 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.

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, 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. 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." 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."

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.
36. Id. at 79.
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.” 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.

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 unsettled state law to the Florida Supreme Court. Although that statute lay moribund for over a decade, in 1960 in Clay v. Sun Insurance Office, Ltd., Justice Felix Frankfurter lauded the Florida Legislature’s “rare foresight” in authorizing the Florida Supreme Court...
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.\(^{48}\) But, in 1973, certification again achieved national recognition when the Supreme Court of the United States, in \textit{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.\(^{53}\)

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\(^{45}\) \textit{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. \textit{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.

\textit{Id.}

\(^{46}\) \textit{See In re Florida Appellate Rules}, 127 So. 2d 444, 444-45 (Fla. 1961).


\(^{51}\) \textit{Id.} at 388.

\(^{52}\) \textit{Schein v. Chasen}, 478 F.2d 817, 822-23 (2d Cir. 1973).

\(^{53}\) \textit{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 state\(^{59}\) other than North Carolina,\(^{60}\)

\(^{54}\). *Id.*

\(^{55}\). *Id.* at 391.


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 courts 62 and commentators 63 alike and need not be fully detailed here. Suffice it to


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.


60. Eric Eisenberg, Note, A Divine Comity, Certification (at Last) in North Carolina, 58 DUKELJ. 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.

say that certification’s supporters contend that certification: promotes comity and cooperative federalism;\textsuperscript{64} avoids the problems associated with federal courts sitting in diversity “predicting” state law and the concomitant risk that such predictions will prove incorrect;\textsuperscript{65} and furthers the underlying principles of\textit{Erie}, such as eliminating forum shopping by developing uniform statements of state law.\textsuperscript{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.”\textsuperscript{67}

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

\textit{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”); \textit{see also} Braun, supra note 26 at 935-40 (collecting cases lauding certification).


65. \textit{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)).


expense and delay,\textsuperscript{68} while frustrating the beneficial effects of diversity jurisdiction on the development of state law.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{71} Particularly telling are the voluminous empirical studies demonstrating widespread approval of certification procedures among both state and federal judges.\textsuperscript{72} For example, a 1988 study by

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

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

\textsuperscript{70} Selya, \textit{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.” \textit{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).


\textsuperscript{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
discretion of the federal court[]." 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

81. 3d Cir. L.A.R. 110.1.
82. See supra notes 57-58 and accompanying text.
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.\textsuperscript{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, \textit{Tyson v. Cigna Corporation},\textsuperscript{89} a case requiring analysis of New Jersey’s Law Against Discrimination,\textsuperscript{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.”\textsuperscript{91} That position was seconded on numerous occasions in published opinions by Judge Stephen M. Orlofsky\textsuperscript{92} and discussed in great detail by Judge Bassler in a \textit{Seton Hall Law Review} article.\textsuperscript{93} Those calls for the creation of a certification procedure in New

\textsuperscript{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. \textit{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”).

\textsuperscript{89} Tyson v. Cigna Corp, 918 F. Supp. 836 (D.N.J. 1996).

\textsuperscript{90} N.J. STAT. ANN. § 10:5-1 to -49.

\textsuperscript{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. \textit{See} Tose v. Greate Bay Hotel & Casino, 819 F. Supp. 1312, 1316 n.7 (D.N.J. 1993).


\textsuperscript{93} Bassler & Potenza, \textit{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, \textit{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. \textit{Id}.

In late 1996, the United States District Court adopted a resolution urging the Supreme Court of New Jersey to establish a certification procedure. \textit{Id}. That resolution too was transmitted to the Supreme Court of New Jersey. \textit{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 I.L.S. 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).
100. See N.J. CT. R. 2:12A-1.
Jersey’s sole function is to “answer the question of law submitted” and “not to resolve . . . factual differences.”

Following the Third Circuit’s issuing of a “certification order” 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. 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.”

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. 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, leaving the federal court.

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.
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.


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.” However, former Chief Justice James R. Zazzali 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.”

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.”

Despite that lack of clarity, in the decade since the Supreme Court of New Jersey adopted Rule 2:12-4, it has accepted three of the six questions certified to it by the Third Circuit. 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.

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

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.


123. Pittston Co. v. Sedgwick James of New York., 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.* 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. Sedgwick argued that Pittston’s claim was time barred, and, accordingly, “the threshold issue to be decided . . . [was] whether the New York or the New Jersey statute of limitations period applied.” 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 questions because the parties stipulated to dismiss the appeal with prejudice.

The Supreme Court next granted certification in *Musikoff v. Jay Parrino’s The Mint L.L.C.*, 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).

126. *Id.* at 922.
127. Specifically, the questions certified were:
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 attorneys\textsuperscript{130} and hinging on the proper interpretation of New Jersey’s Attorney Lien Act.\textsuperscript{137} 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?\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{134}

Most recently, the Supreme Court of New Jersey granted certification in \textit{Delta Funding Corp. v. Harris},\textsuperscript{135} a dispute concerning an arbitration clause in a sub-prime mortgage loan agreement.\textsuperscript{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.”\textsuperscript{137} Amid a flurry of opinions,\textsuperscript{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).

\textsuperscript{130} See Musikoff, 796 A.2d at 868-69.


\textsuperscript{132} Musikoff, 796 A.2d at 867-68.

\textsuperscript{133} Id. at 868.

\textsuperscript{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.

\textit{Id.}

\textsuperscript{135} Delta Funding Corp. v. Harris, 883 A.2d 1055 (N.J. 2005).

\textsuperscript{136} Delta Funding Corp. v. Harris, 912 A.2d 104, 108 (N.J. 2006).

\textsuperscript{137} Id.

\textsuperscript{138} Justice Zazzali concurred in part, and dissented in part, while Justice Roberto Rivera-Soto dissented. \textit{See generally id.}
the agreement’s ambiguity. 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.” Accordingly, the Third Circuit remanded, directing the district court to enforce the arbitration agreement. 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.”

**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. But, one year later, on January 12, 2000, the Supreme Court of Pennsylvania permanently established certification procedures by adopting Pennsylvania Code § 29.451.

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, 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.” 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 . . .”

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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).
‘unreasonably dangerous’ standard in products liability cases . . ., and the applicability of the ‘discovery rule’ to wrongful death and survival actions.’ Judge Sloviter noted that those examples were “by no means exhaustive,” and later scholarship 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 repose pertaining to defects in improvements made to real property and whether Pennsylvania’s two-year statute of limitations on personal injury actions barred a suit initially filed as a negligence action but later amended to allege a breach of warranty.


150. Sloviter, supra note 146, at 1680.

151. See supra note 63, at 733.

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


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. 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. 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. The three enumerated—though not exhaustive—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.

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

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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 “include[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

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167. See supra note 107 and accompanying text.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{172} Proving the point is \textit{Rupert v. Liberty Mutual Insurance Company}\textsuperscript{173} where the Supreme Court certified the following question:

\begin{quote}
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
\end{quote}

\textsuperscript{170}. The Supreme Court of New Jersey accepted only three of six petitions for certification filed by the Third Circuit in the last decade. \textit{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.’ \textit{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.

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

\textsuperscript{172}. \textit{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?’’); \textit{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).

\textsuperscript{173}. \textit{Rupert}, 781 A.2d 132.
The likely to recur theme is also demonstrated by Salley v. Option One Mortgage Corporation, a case similar to Delta Funding, in which the Supreme Court of New Jersey accepted a certified question. 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.” 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.

Indeed, policy considerations of state law are a common theme in the Pennsylvania experience with certification. 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, 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).
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.


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.

state, and Delaware courts. 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.

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.” Again, as in New Jersey and Pennsylvania, that determination is one of the high court’s discretion.

And, as does Pennsylvania Supreme Court Internal Operative Procedure 10(B), Delaware Supreme Court Rule 41 provides an illustrative list 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.” Those three examples, however, are not exhaustive.

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

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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.


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. Id.

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.\footnote{196}{DELSUPCT.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,” \textsc{DELSUPCT.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. \textit{See} Sample Form K \textit{available at} \url{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. \textit{See also Kerns}, 153 F.3d at 107 (3d Cir. 1998) (Form K submitted to Delaware Supreme Court appended to opinion).}

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.\footnote{197}{Other federal courts have utilized Delaware’s certification procedures. \textit{See}, e.g., \textit{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); \textit{see} Farahpour \textit{v. DCX, Inc.}, 635 A.2d 894, 895 (Del. 1994) (Court of Appeals for the District of Columbia); \textit{see} Rales \textit{v. Blasband}, 626 A.2d 1364, 1365 (Del. 1993) (United States District Court for the District of Delaware).}

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, \textit{Kerns v. Dukes},\footnote{198}{Kerns \textit{v. Dukes}, 707 A.2d 363 (Del. 1998).} involved the attempt of certain Delaware property owners to challenge assessments charged to them for the creation of a new sewer district.\footnote{199}{\textit{Id.} at 365.} 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?”\footnote{200}{\textit{Id.}}

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 \textit{Penn Mutual Life Insurance Company \textit{v. Oglesby}},\footnote{201}{\textit{Penn Mut. Life Ins. Co. \textit{v. Oglesby}}, 695 A.2d 1146 (Del. 1997).} 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.\footnote{202}{\textsc{DEL CODE ANN. tit. 18, § 3306(c)} (2010).}
Finally, in *Konstantopoulos v. Westvaco Corporation* — 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. 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.” 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, to whether a mandamus action is an appropriate vehicle to examine the *ex post facto* implications of statutory changes to parole law, to an interpretation of state workers’ compensation law. 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. Proving the point is the abundant use of certification procedures to obtain authoritative pronouncements of state law on all manner of insurance

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).
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. 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.


\(^{211}\) 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 A2d. 104, 108 (N.J. 2006); PA. SUP. CT. INTERNAL OPERATING PROC. 10(B)(4); DEL. SUP. CT. R. 41(b).