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Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts

Brian Mattis

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CERTIFICATION OF QUESTIONS OF STATE LAW: AN IMPRACTICAL TOOL IN THE HANDS OF THE FEDERAL COURTS

BRIAN MATTIS*

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INTRODUCTION

In *Clay v. Sun Insurance Office, Ltd.*¹ Justice Frankfurter credited the Florida Legislature with "rare foresight" in dealing with "the problem of authoritatively determining unresolved state law involved in federal litigation by [enacting] a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision."² That the foresight was rare is beyond question. Whether it was wise is still open to debate. In the interest of full disclosure it should be mentioned that this article focuses on the negative aspects of the certification procedure.³

* Member of the Florida Bar; J.D., U. of Miami; LL.M., Yale University; Associate Professor of Law, The University of Nebraska.

1. 363 U.S. 207 (1960).

2. *Id.* at 212.

3. The following articles are favorable to certification: Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962); Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959); McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 U. ME. L. REV. 33 (1964); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV.

I. THE PROBLEM

A. *Its Root*

Certification of questions of state law is a by-product of the "abstention doctrine," "that willful, perhaps even illegitimate, child of the Erie-Tompkins rule."⁴

The *Erie* rule requires federal courts to apply state law in many of the civil cases that come before them. This puts a burden on the court to determine what is the state law. Sometimes the burden is a light one, as it is when the matter is covered by a clearly written statute, or when the highest court of the state has recently declared its position regarding the issue in controversy. However, when the state statute under consideration is ambiguous, or when there are no clear and controlling precedents from the highest state court, the burden of determining state law becomes a heavy one. Often the federal court has to guess how the highest state court would decide the case.⁵ Compelling reasons may exist for wanting to refrain from making such a guess.

In *Railroad Commission of Texas v. Pullman Co.*⁶ the Supreme Court gave birth to the "abstention doctrine" whereby a federal court may refuse to exercise its jurisdiction to decide cases involving questions of state law.

B. *The Reasons for Abstention*

[A]bstention is variously recognized: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket. These various doctrines overlap at times⁷

The case law that has emerged under the abstention doctrine makes it fairly clear that abstention from the exercise of properly invoked jurisdiction is not proper when used merely to avoid the difficulty of ascertaining state law,⁸ nor is it proper when the state law is clearly settled.⁹ The most widely accepted uses of abstention are: to avoid deciding

1358 (1960); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Co-operative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963).

4. Clark, *Federal Procedural Reform and States' Rights: to a More Perfect Union*, 40 TEX. L. REV. 211, 218 (1961).

5. This situation occurs when there is no state law of any kind on the point being litigated.

The federal court must keep in mind, however, that its function is not to choose the rule which it would adopt for itself, if free to do so, but to choose the rule which it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt.

C. A. WRIGHT, *FEDERAL COURTS* § 58, at 206 (1963). [Hereinafter cited as WRIGHT.]

6. 312 U.S. 496 (1941).

7. WRIGHT § 52.

8. *McNeese v. Bd. of Educ.*, 373 U.S. 668, 673, n. 5 (1963); *Meredith v. City of Winterhaven*, 320 U.S. 228 (1943).

9. *Public Util. Comm'n v. United States*, 355 U.S. 534 (1958).

a federal constitutional question where the case may be disposed of on questions of state law which are unsettled, and to avoid needless conflict with the administration by a state of its own affairs.¹⁰

Although some of the court-made abstention rules are easily ascertainable,¹¹ the very fact that over fifty cases involving issues of abstention have reached the Supreme Court since 1940 makes it clear that the doctrine, as a whole, is unclear.

C. *The Cost of Abstention*

When a federal court abstains from exercising its jurisdiction because of perplexities relating to state law it may: (1) retain jurisdiction to decide the federal questions in the case; (2) totally release its jurisdiction, thereby allowing the state court to decide all of the issues; or (3) order the parties to seek state adjudication on some or all of the issues in the case, while retaining jurisdiction to decide any issue that cannot be promptly adjudicated in the state courts.

Whatever course is chosen, the cost of abstention to the litigants may prove to be very high in terms of time, money, and perhaps anguish and despair.¹² Once the federal court has abstained, the party seeking relief must often begin his lawsuit anew at the bottom of the state court hierarchy and struggle to reach the highest state court.¹³ He may be shuttled back and forth among various state and federal courts.¹⁴ Far too many abstention cases have dragged along for almost a decade or more,¹⁵ some of them never reaching a decision on the merits.¹⁶ For these reasons alone the abstention doctrine cannot be viewed as a particularly bright chapter in the history of American jurisprudence.

II. SOME ATTEMPTS TOWARD SOLUTION

A. *Codification of the Abstention Doctrine*

The American Law Institute has proposed that several new sections be added to Title 28 of the United States Code.¹⁷ Proposed section 1371¹⁸

10. WRIGHT § 52.

11. *E.g.*, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

12. One can easily see how the possibility of a large judgment, hanging in suspense over the years, could place a greater emotional strain on a litigant than if he had lost in the early stages of the case and ended the matter.

13. *See* *United States Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965).

14. *E.g.*, *Government and Civic Employees Organizing Comm., CIO v. Windsor*, 116 F. Supp. 354 (N.D. Ala. 1953), *aff'd*, 347 U.S. 901 (1954); *Government and Civic Employees Organizing Comm., CIO v. Windsor*, 262 Ala. 285, 78 So.2d 646 (1955); *Government and Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364 (1957); *American Fed'n of State, County and Municipal Employees v. Dawkins*, 268 Ala. 13, 104 S.2d 827 (1958).

15. *City of Thibodaux v. Louisiana Power & Light Co.*, 373 F.2d 870 (5th Cir. 1967); *England v. Louisiana State Bd. of Medical Examiners*, 384 U.S. 885 (1966).

16. *United States v. Leiter Minerals*, 381 U.S. 413 (1965).

17. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, (Tent. Draft No. 6, 1968) [hereinafter cited as ALI, STUDY].

18. *Id.* at 38-40.

deals with abstention and related problems, including certification of questions of state law.

Subsection 1371(c) is basically a codification of the abstention doctrine. It reads:

A district court may stay an action, otherwise properly commenced in or removed to a district court under this title, on the ground that the action presents issues of State law that ought to be determined in a State proceeding, if the court finds: (1) that the issues of State law cannot be satisfactorily determined in the light of the State authorities; and (2) that abstention from the exercise of federal jurisdiction is warranted either by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view which may be ultimately taken by the State court, or by other circumstances of a like character; and (3) that a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) that the parties' claims of federal right, if any, including any issues of fact material thereto, can be adequately protected by review of the State court decision by the Supreme Court of the United States.¹⁹

According to the ALI Commentary on section 1371(c), clause (1) is to insure that abstention will not take place where the court can reach a satisfactory conclusion as to state law "in light of related state authorities," even though the state court may not have ruled directly on the issue in controversy. The second condition reflects the court-made rule that abstention is to be reserved for exceptional circumstances. Condition three reflects policy already included in the Tax Injunction Act and the Johnson Act.²⁰ The fourth condition is to insure that federal rights are adequately protected.²¹

The proposed statute does contain other limitations and exceptions relating to the abstention doctrine.²² However, for purposes of this paper, the focus will be on subsections 1371(c) and 1371(e).

B. Certification of Questions of State Law

The Florida Legislature adopted its certification statute in 1945.²³ The statute lay dormant until the *Clay*²⁴ case breathed life into it with the United States Supreme Court's suggestion that Florida adopt a pro-

19. *Id.* at 38-39.

20. 28 U.S.C. §§ 1341, 1342(4) (1948).

21. ALI, *STUDY* at 210-12.

22. *E.g.*, abstention is not permitted in civil rights cases.

23. FLA. STAT. § 25.031 (1946).

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

cedure for its use. A procedure was adopted,²⁵ and the state law question in *Clay* was certified to the Supreme Court of Florida.²⁶

Since that time certification procedures have been adopted by statute in Hawaii,²⁷ Maine,²⁸ and Washington,²⁹ and the Commissioners on Uniform State Laws have recommended a certification statute.³⁰ Certification is permitted by court rule in Montana³¹ and New Hampshire.³² The statutes of Florida and Hawaii restrict certification to federal appellate courts. The other state statutes, as well as the proposed ALI statute, permit certification by any court of the United States.

There are arguments for and against allowing certification by federal trial courts. Restricting certification to the appellate courts might tend to encourage appeals that might not have been taken otherwise. Furthermore, certification by a trial court could avoid the time and expense of a trial in some cases. This would certainly be true if the issue in controversy was whether the complaint stated a cause of action under state law. On the other hand, the question to be certified is more likely to be ripe for decision after the case reaches an appellate court; and certification by federal district courts could well lead to congestion on the docket of the highest state court.

All of the state certification statutes require that the issue certified be dispositive of the case, either by the language of the statute³³ or by court interpretation.³⁴ Response to certification on the part of the state courts is optional.

Subsection 1371(e) of the ALI's proposed statute reads:

A court of the United States may certify to the highest court of a State a question of State Law, if (1) the State has established a procedure by which its highest court may answer questions certified from such court of the United States; (2) the question of State law may be controlling in the action and can-

25. FLA. APP. R. 4.61.

26. Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735 (Fla. 1961).

27. HAWAII REV. LAWS 1955, tit. 26, ch. 214, §§ 26, 27, *as amended*, HAWAII LAWS 1965.

28. ME. REV. STAT., tit. 4, § 57, *as amended*, ME. ACTS 1965, ch. 158.

29. WASH. REV. CODE, ch. 2.60 (1965).

30. UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT (1967).

31. MONT. SUP. CT. R. 1. The Montana Rule is quoted in *Lewis v. Mid-Century Ins. Co.*, 278 F. Supp. 238, 240, n.3 (D. Mont. 1967).

32. N.H. RSA 490: App R. 21.

33. The statutes of Florida and Hawaii permit certification of questions "which are determinative" of the cause. The Washington statute provides that any federal court may certify a question of local law "in order to dispose of such proceeding." However, the Florida court has not interpreted its statute strictly. In *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963), the court answered the certified question, but pointed out that it had not been asked to answer the ultimate question in the case.

34. The Maine statute permits certification of questions "which may be determinative of the cause . . ." ME. REV. STAT., tit. 4, § 57, *as amended*, ME. ACTS 1965, ch. 158. However, the Supreme Judicial Court of Maine has read "may be" to mean "will be" and has refused to answer a question which would not have disposed of the action. See *In re Richards*, 223 A.2d 827 (Me. 1966).

not be satisfactorily determined in the light of the State authorities; and (3) the court expressly finds that certification will not cause undue delay or be prejudicial to the parties.³⁵

The operation of the restrictions contained in section 1371(e) is explained in the Commentary thereto as follows:

The first condition is that the state must have an established procedure for answering questions certified by the federal court in question. This provision avoids any implication that Congress, by adopting this statute, is requiring all state courts to answer certified questions, and it makes it clear that a district court may not certify a question if, as in Florida and Hawaii, the local certification statute permits the state court to accept questions only from appellate courts.

The second condition describes the kinds of questions that may be certified. The question must be a controlling one, and it must be a question that cannot satisfactorily be answered in the light of state authorities. Cf. § 1371(c)(1). . . .

As presented in Tentative Draft No. 5, this would have allowed certification if the state issue "is controlling" rather than, as now proposed, "may be controlling." The federal court cannot know that a state issue "is controlling" since this often will depend on how the state court issue is answered. Thus, in *Clay v. Sun Insurance Office Ltd.*, 377 U.S. 179 (1964), the answer of the Florida court would have been controlling if it had said that the statute was inapplicable. Since, however, it held that the statute applied, its answer was not controlling and . . . [a] federal constitutional question . . . remained. What must really be meant is that at least one possible answer the state court can give to the question would determine the case. . . . This thought is better expressed by using "may be" rather than "is."

. . . .

The final condition requires the court to find that certification will not cause undue delay or be prejudicial to the parties. In some circumstances almost any delay may be prejudicial, as where suit is by a penniless tort claimant, or an impoverished widow is suing on a life insurance policy. In such cases the pressure to accept an inadequate settlement would be increased if certification were ordered. In applying the third condition the courts should also be especially reluctant to certify at the instance of a defendant who has removed a case to federal court. It is ordinarily undesirable to allow a defendant a federal determination of facts and a state determination of state law at the cost of delay to a plaintiff who was content to have the whole case promptly determined in the state courts.³⁶

35. ALI, *Study* at 39.

36. *Id.* at 216-18.

III. THE CONTROVERSY OVER CERTIFICATION

The United States Court of Appeals, Fifth Circuit, has had more experience with certification than any other federal court, yet even among its members there is division as to the desirability of the procedure. At the Forty-third Annual Meeting of the American Law Institute it was Judge Minor Wisdom, of the Fifth Circuit, who moved to delete the provision for certification from section 1371.³⁷ On the other hand, Chief Judge Brown favors certification,³⁸ and the frequent use of the device by the Fifth Circuit indicates that other members of that court agree with him. The Reporters for section 1371 of the ALI statute opposed certification,³⁹ but were overruled by a vote of the Institute.⁴⁰

In a recent case, the Supreme Court of Washington approved the use of certification by a vote of 6-3.⁴¹ The dissenting judges argued that certification was unlawful under the state constitution and unwise as a matter of policy.

Thus it can be seen that the controversy over certification is a live one, and at present the proponents of the procedure seem to be winning. In determining whether certification is desirable it is necessary to consider the problem in light of several different and conflicting policies and goals which must be separately evaluated and balanced against each other. Opinions will vary as to the relative importance of certain policies. The writer, firmly convinced that courts and court procedures are for the benefit of litigants rather than legal theoreticians, warns the reader of a strong bias against certification.

IV. THE CASE FOR CERTIFICATION

A. *Authoritative Answers and Protection of Federal Rights*

Certification allows the federal courts to obtain authoritative answers to difficult questions of state law, while preserving the right of the parties to a federal determination of the facts and of issues of law not certified. The form of the question and the record certified are under the control of the federal court, thus assuring that the facts will be determined correctly in light of the federal issues that may be involved in the case. Since the federal court retains jurisdiction over the entire case, it may vacate its stay and decide all of the issues, state and federal, if it appears that the state court is not acting with proper dispatch.⁴²

37. 43 ALI Proceedings 373 (1966).

38. See his concurring and dissenting opinion in *W. S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967), *rev'd sub nom.* *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 592 (1968).

39. ALI, *STUDY* at 214.

40. 43 ALI Proceedings 385 (1966).

41. *In re Elliot*, 446 P.2d 347 (Wash. 1968).

42. ALI, *STUDY* at 214.

B. Consistency in Results

Inaccuracy in forecasting state law developments has been a prime factor in motivating the Fifth Circuit toward the use of certification and abstention. Chief Judge Brown believes that injustice to litigants results when a state court subsequently disagrees with a federal court on an issue of state law, and that the delay involved in abstention and certification is a small price to pay to avoid the inconsistency which is a consequence of a federal court being ultimately "overruled" by a state court.⁴³

One of the best examples of the use of certification to avoid inconsistent results is the case of *Norton v. Benjamin*.⁴⁴ The issue was whether a general release barred a cross-claim for contribution and indemnity in an automobile accident case. The district court certified the question and the Supreme Judicial Court of Maine answered it affirmatively without much delay. Since there were no state precedents on point, the state court had to choose among decisions of other jurisdictions which were at variance with each other. The same federal district court had decided the same issue in an earlier case (before certification was possible)⁴⁵ and had reached a conclusion different from that of the state court in *Norton*. The case illustrates that certification can work in practice as well as in theory.

C. Certification May Be Preferable to Abstention

Certification avoids the time and cost of litigating a question through the lower state courts (as is often required when abstention is ordered)⁴⁶ because the question is certified directly to the highest state court. It also avoids the possibility of a redetermination of the facts by a state trial court which could render valueless an answer sought by a federal court.

D. Promotes Federalism

It would be hard to deny that there exists a certain amount of tension in the relationship between state and federal courts. Federal courts are constantly reviewing the propriety of state court criminal convictions. A federal district judge may order the release of a prisoner whose conviction has been affirmed by two levels of state appellate courts.

Certification permits the federal courts to defer to the judgment of the highest state court on uncertain issues of state law. "The feeling that the federal court [is] 'cooperating' in the search for state law rather than seeking to impose its will upon the state might even make state judges

43. See his concurring and dissenting opinion in *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967), *rev'd sub nom.* *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 592 (1968).

44. 220 A.2d 248 (Me. 1966).

45. *Buckley v. Basford*, 184 F. Supp. 870 (D. Me. 1960).

46. See, e.g., *United Services Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964).

more receptive to federal views, when federal questions [are] before state judiciaries."⁴⁷

V. THE CASE AGAINST CERTIFICATION

A. Delay

Probably the worst indictment of the certification procedure from the standpoint of delay is the drawn-out saga of *Green v. American Tobacco Co.*⁴⁸ The first trial started in December, 1957. The jury returned a general verdict for the defendant cigarette manufacturer and in answer to written interrogatories found that: (1) Mr. Green did have cancer in his left lung; (2) it was one of the causes of his death; (3) smoking the defendant's cigarettes was one of the proximate causes of his death; and (4) the defendant could not have known, even by the application of reasonable skill and foresight, that inhalation of the smoke from its cigarettes would endanger Mr. Green.⁴⁹

On May 2, 1962, the Court of Appeals, Fifth Circuit, affirmed a judgment for the defendant. On June 20, 1962, the same court granted a petition for rehearing to the extent necessary to certify a question of law to the Supreme Court of Florida.⁵⁰

The following question was certified:

Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes . . . when the defendant manufacturer and distributor could not . . . by reasonable application of human skill and foresight, have known that the users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?⁵¹

On June 5, 1963, the Supreme Court of Florida answered the certified question in the affirmative.⁵² However, in its opinion the court indicated that it had not been asked to determine the ultimate issue in the case, namely, whether the cigarettes were reasonably fit for human consumption.

Thus, on December 11, 1963, the Fifth Circuit remanded the case for a new trial. The court held that a jury instruction had been prejudicial to the plaintiff at the first trial in light of the answer by the Florida court.⁵³

47. Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850, 865 (1964).

48. 391 F.2d 97 (5th Cir. 1968), *rev'd on rehearing en banc* No. 22435 (5th Cir. Apr. 8, 1969).

49. *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

50. *Id.* at 86.

51. *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963).

52. *Id.*

53. *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963).

The issues determined by the written interrogatories in the first trial were not to be relitigated.

On May 25, 1964, the United States Supreme Court denied certiorari,⁵⁴ and the case proceeded toward its second trial. The result was another verdict and judgment for the defendant.

Early in 1968, the Fifth Circuit granted a judgment for the plaintiff and ordered a new trial on the issue of damages.⁵⁵ On petition for rehearing *en banc* the court receded from the decision of the majority of the panel and affirmed the judgment of the lower court for the defendant, eleven years having passed since the first trial.⁵⁶

The *Clay*⁵⁷ case presents another dim chapter in the relatively brief history of certification. The suit was brought on May 20, 1957, to recover \$6,800 on a personal property insurance policy. A decision on the merits was finally reached on May 18, 1964, after two trips to the United States Supreme Court,⁵⁸ two trips to the Court of Appeals, Fifth Circuit,⁵⁹ and one trip to the Supreme Court of Florida.⁶⁰ The conclusion was the same as that reached by the trial judge. In fairness, it must be added that part of the delay resulted because Florida had not yet adopted a procedure to use its certification statute. However, the delay caused by certification alone has been more than one year in most of the cases where the procedure has been used.

The delay caused by certifying questions to state courts is not limited to the immediate case in which a question has been certified. It also causes delay for litigants in the state court system who must await a decision on a certified question before they can have their own cases decided. This delay may not be long, but its effects must be multiplied by the number of litigants on the state court docket at the time that the state court turns from its normal work in order to answer a certified question. As Judge Hale pointed out in his dissenting opinion in *Thiry v. Atlantic Monthly Company*:⁶¹

The question of speed, of course, gives rise to another question of policy. At the time the instant case was argued . . . this court had pending a backlog of approximately 700 cases, some of which were of high precedential value and of exigent importance to the parties.

In federal courts it takes as long to determine that a case should be certified as it does to decide a case on its merits.

54. *American Tobacco Co. v. Green*, 377 U.S. 943 (1964).

55. *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968).

56. *Green v. American Tobacco Co.*, No. 22435 (5th Cir. Apr. 8, 1969). Three dissenting judges would have had the court certify a question once again to the Supreme Court of Florida, hoping perhaps, that the suit would not go on for another eleven years.

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

58. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964).

59. *Sun Ins. Office, Ltd. v. Clay*, 265 F.2d 522 (5th Cir. 1959); 319 F.2d 505 (5th Cir. 1963).

60. *Clay v. Sun Ins. Office, Ltd.*, 133 So.2d 735 (Fla. 1961).

61. 445 P.2d 1012, 1014-15 (Wash. 1968).

There have been cases where the delay caused by certification was less than one year.⁶² However, among those cases, it would seem that questions certified by the United States Supreme Court might well have been moved to the head of the state court docket out of respect for the Supreme Court. Such a procedure would not seem justified if the question was certified by a lower federal court.

B. Certification, as Presently Proposed and Practiced, Is Contrary to the Overall Policy of Section 1371 and Other Generally Recognized Policies

1. PIECEMEAL ADJUDICATION

If it is true, as contended by some proponents of certification, that state courts are sometimes less than adequate in making findings of fact and framing issues of law in light of federal law standards, then the reverse proposition must also be true to at least some extent. That is, federal courts may be less than adequate, at times, in framing issues of law and finding the correct facts for applying state law standards. The certification of the wrong question in the *Green* case illustrates this point.⁶³ The case went to the state court and back to the federal court, and the final solution was the same as that reached by Judge Choate at the first trial.

One of the purposes of section 1371 of the ALI statute is to prevent shuttling cases back and forth between state and federal courts in abstention cases. This policy is expressed in the Commentary and in the provisions of section 1371(c). If it was a factor to be weighed in determining whether to restrict the abstention doctrine, then certainly it must be a factor to be weighed in deciding whether to have a certification procedure.

If there ever was a way in which to delay a case as it moves slowly through the courts . . . it would be the very procedure whereby at one stage the case comes to a halt in the federal system, moves over into the state system to await docketing, briefing, hearing, writing, filing of the opinion and petition for rehearing and then moves back again into the system of origin to take its place on the judicial conveyor for resumption of proceedings in the federal system. . . . [T]he certification procedure is a dilatory one and in the long run compounds the very delays it is claimed to help curtail⁶⁴

62. *Aldrich v. Aldrich*, 375 U.S. 75 (1963); *Martinez v. Rodriquez*, 394 F.2d 156 (5th Cir. 1968), *question answered* in 215 So.2d 305 (Fla. 1968).

63. The Fifth Circuit has since sought to alleviate the difficulties encountered in phrasing the proper question to be asked by emphasizing, in its certificates, "that the particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified . . ." *Martinez v. Rodriques*, 394 F.2d 156, 159 n.6 (5th Cir. 1968). However, this approach would not work in states where the court may not give advisory opinions. See *In re Richards*, 223 A.2d 827 (Me. 1966).

64. *In re Elliot*, 446 P.2d 347, 371 (Wash. 1968) (dissenting opinion).

Piecemeal adjudication also increases the cost of litigation. This point was referred to by Justice Douglas, in his dissent, the first time the *Clay* case reached the Supreme Court:

I desire to give renewed protest to our practice of making litigants travel a long, expensive road in order to obtain justice. Congress has created federal courts with power to adjudicate controversies between citizens of different States. They are manned by judges drawn from the local Bars and fairly conversant with the laws of their respective areas

. . . . Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.⁶⁵

In *Clay*, the printing costs alone probably exceeded the \$6,800 in controversy.

All of the present certification procedures require that briefs be filed along with the question that is certified. It is usually necessary and desirable for the record on appeal to be transmitted to the court that is to answer the question. In effect, two appeals are created where only one existed before. This concept of two for one might be desirable when growing stalks of wheat, but its value is negative in the field of legal appeals.

2. CONTRARY TO THE MEREDITH DOCTRINE

Another policy underlying section 1371 of the ALI statute is to restrict the use of the abstention doctrine so that a federal court could not abstain merely to avoid deciding a difficult question of state law.⁶⁶ Although the three cases where the Supreme Court has used certification involved questions of state law which might have avoided the necessity of deciding federal constitutional questions,⁶⁷ the lower federal courts have used certification merely to avoid answering "difficult" questions of state law.⁶⁸

65. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 227-28 (1960).

66. ALI, *STUDY* at 203-20.

67. In *Clay* the issue was whether Florida could apply a statute which voided a clause in an insurance policy when the policy had been executed and delivered in Illinois. *Aldrich v. Aldrich*, 375 U.S. 75 (1963), 378 U.S. 540 (1964), involved a divorce decree granted in Florida, which, if valid, could be enforced in West Virginia. In *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), 378 U.S. 539 (1964), the question was whether the defendant could have had the constitutional issues in his appeal reviewed by a higher Florida court.

68. See, e.g., *Martinez v. Rodriguez*, 394 F.2d 156 (5th Cir. 1968).

In *Meredith v. City of Winter Haven*,⁶⁹ the court held:

[T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction

. . . In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts . . . to decide questions of state law whenever necessary to the rendition of a judgment. . . .⁷⁰

This doctrine was reaffirmed in *McNeese v. Board of Education*.⁷¹

During the Proceedings of the American Law Institute in 1966 a motion was made to delete any provision for certification from section 1371.⁷² It seemed that there would be considerable controversy over the issue of certification; therefore, Judge Friendly proposed a compromise between the opposing factions. His view was that it was "rather inconsistent to have a carefully limited provision as to abstention and an absolutely open-end permission on the certification."⁷³ He then proposed that certification be limited to those situations where abstention would be allowed under section 1371(c). If certification was restricted in such a manner federal courts could not use the procedure *merely* to avoid answering difficult questions of state law.

No vote was ever taken on Judge Friendly's proposed compromise. Judge Davis, who seconded the original motion to delete the certification provision altogether, refused to agree to a modification of the motion. His reason was that Judge Gignoux, of the United States District Court in Maine, had earlier spoken in favor of certification.⁷⁴ In doing so he described a case, then before him, that seemed to be an ideal situation for the use of Maine's newly adopted certification procedure. Judge Davis thought Judge Friendly's compromise would not include within its scope the case propounded by Judge Gignoux, and that it would be misleading, under those circumstances, to amend the original motion.⁷⁵ The original motion to delete certification altogether was voted on and soundly defeated.⁷⁶ Ironically, Judge Gignoux eventually did certify a question from the case he had described, and the Supreme Judicial Court of Maine refused to answer the question.⁷⁷

The availability of a certification procedure has resulted in the

69. 320 U.S. 228 (1943).

70. *Id.* at 234-35.

71. 373 U.S. 668, 673, n.5 (1963).

72. 43 ALI Proceedings 373 (1966).

73. *Id.* at 381.

74. *Id.* at 374-77.

75. *Id.* at 383.

76. *Id.* at 385.

77. *In re Richards*, 223 A.2d 827 (Me. 1966).

federal courts forgetting the teaching of *Meredith v. City of Winter Haven*,⁷⁸ and using the procedure merely to resolve difficult questions of state law. In *Life Insurance Co. of Virginia v. Shifflet*⁷⁹ the plaintiff submitted an application for insurance in which he unwittingly made some clearly incorrect statements on matters highly material to the risk. A Florida statute does not allow recovery on an insurance policy when incorrect statements on the application are either "(1) [f]raudulent; or (2) [m]aterial either to the acceptance of the risk, or to the hazard assumed by the insurer"⁸⁰ After initially affirming the judgment against the insurer, the court granted a rehearing and certified the issue to the Supreme Court of Florida. The state court found the statute unambiguous and subject to but one construction.⁸¹ Thus, fifteen months after its original decision, the Fifth Circuit reversed and ruled in favor of the insurer.⁸²

*Vandercook & Son, Inc. v. Thorpe*⁸³ is an example of a court's failure to analyze the state cases that were available at the time of the original decision. An employee who had been injured by a defective printing press brought suit against the manufacturer who sold the press to his employer. The cause of action was breach of implied warranty. On the first hearing of the appeal the court ruled for the defendant manufacturer.⁸⁴ On rehearing, the court asked the parties to brief the appropriateness of certification. The court then decided in light of the Florida cases it cited, that certification was unnecessary. The court concluded that in Florida an employee could recover and remanded the case for new trial on the issue of the defendant's liability.⁸⁵

An analysis of the very cases cited by the court in *Vandercook* show that the decision was probably wrong.⁸⁶ Furthermore, those cases were available, but not cited, during the first hearing of the case when the court had "guessed" right, apparently for no reason at all. Although no question was certified to the Florida court in *Vandercook*, the case does demonstrate the Fifth Circuit's willingness to use certification merely to avoid having to make a determination as to state law.

In *Thiry v. Atlantic Monthly Company*⁸⁷ the majority of the Supreme Court of Washington pointed out that the question certified was

78. 320 U.S. 228 (1943).

79. 359 F.2d 501 (5th Cir. 1966).

80. FLA. STAT. § 627.01081 (1959).

81. *Life Ins. Co. of Virginia v. Shifflet*, 201 So.2d 715 (Fla. 1967).

82. 380 F.2d 375 (5th Cir. 1967).

83. 344 F.2d 930 (5th Cir. 1965).

84. 322 F.2d 638 (5th Cir. 1963).

85. 344 F.2d 930 (5th Cir. 1965).

86. In *McBurnette v. Playground Equip. Corp.*, 137 So.2d 563 (Fla. 1962), a minor child was permitted to sue the retailer who sold a piece of playground equipment to her father. However, *Carter v. Hector Supply Co.*, 128 So.2d 391 (Fla. 1961), held that an employee could not sue, for breach of implied warranty, the retailer who had sold a defective sulky to his employer. *McBurnette* did not overrule *Carter*.

87. 445 P.2d 1012 (Wash. 1968).

clearly answered by prior state court precedents. Nevertheless, the court went on to answer the certified question. Judge Hale, in dissent, would have refused to answer the question, remarking that:

the law on [the] subject has been well settled, and I do not fully understand why learned counsel were unable to make this clear to the trial judge. . . . To me, the question appears to relate to one of the few areas where the law seems to be about as clear as it ever gets.⁸⁸

*Martinez v. Rodriguez*⁸⁹ and *Hopkins v. Lockheed Aircraft Corp.*⁹⁰ were both certified before the Fifth Circuit attempted to formulate its own opinion as to the result in those cases. These cases represent an abdication of the responsibility imposed by Congress to adjudicate cases when federal jurisdiction has properly been invoked. There would not have been any danger of embarrassing the effectuation of state policies in any of the cases cited under this heading, even if the Fifth Circuit had reached a different result than the state court. Nor were there any state or federal constitutional questions involved.

Before abstention would be permitted under section 1371(c) of the ALI statute, the court would have to find (among other things) that abstention "is warranted either [1] by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or [2] by a serious danger of embarrassing the effectuation of State policies"⁹¹

It is suggested that, if certification is to be permitted at all, one of these two circumstances must be found to exist. This could be accomplished by incorporating these restrictions along with those already contained in section 1371(e).

3. PLAIN, SPEEDY, AND EFFICIENT REMEDY

One of the expressed policies to be found in section 1371, and throughout the law generally, is that litigants should be provided with a plain, speedy, and efficient remedy. The history of certification has shown that it is capable of being neither plain, nor speedy, nor efficient. Although there are signs of improvement in the speed of the procedure, it can be argued that it is not worth *any* of the delay and cost inherent in its use.

Let us look at certification from the viewpoint of the litigant. Suppose that *P* and *D* have litigated a case in good faith before a federal district court, and that *P* lost. All of the facts were stipulated, and the only issue for decision was a question of state law that could not be

88. *Id.* at 1015 (dissenting opinion).

89. 394 F.2d 156 (5th Cir. 1968).

90. 358 F.2d 347 (5th Cir. 1966).

91. ALI, *STUDY* at 38.

satisfactorily determined in the light of the state authorities. *P* now wants to appeal, and the following facts are explained to him:

1. There is no way to tell how the federal appellate court will rule because there is no satisfactory way of telling how the state supreme court would rule on the question.
2. If there is some indication of how the state court would rule between now and the time that the appeal is decided, the federal court can be expected to follow that indication.
3. Both the federal court and the state court are composed of honest and able judges, but, the state judges are more familiar with state law.
4. The federal court is required to decide the issue as it thinks the state court would decide it.
5. The federal court might "guess wrong" as to how the state court would decide the issue, since there is no satisfactory way to determine how the state court would decide it.

Now we give *P* a choice. We tell him that he can either: (1) appeal to the federal court and let it decide the issue; or (2) appeal to the federal court and have it certify the question to the state court for its decision. If he chooses the second alternative it will delay the decision by six months and cost *P* sixty-four dollars extra.

Assuming that the delay would cause *P* little concern, the sixty-four dollar question is: *What logical reason would P have for choosing certification?*

The point to be made is that litigants expect no more than a fair hearing from honest and able judges who are doing the best job they can. They know nothing of the *Erie* doctrine and the intricate theoretical questions it can create. And, if the doctrine were explained to them, they would probably not choose to finance the answers to those intricate questions.

Congress has imposed upon the federal courts the duty to adjudicate cases whenever jurisdiction is properly invoked. Every time a federal court certifies a question of law to a state court, it is forcing the litigants to pay for having someone else do the job of the federal court. That the question is difficult to answer is not reason enough for exacting such payment.

C. *Forum Shopping*

One of the main purposes of the *Erie* doctrine is the elimination of forum shopping.⁹² The certification procedure may well produce a form of "eleventh-hour forum shopping."

The federal appellate courts have already demonstrated that they will consider certification even after they have reached a decision on the merits.⁹³ Thus, an attorney who loses an appeal that turns on an unclear

92. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73-75 (1938). *Erie* was cited for this proposition in *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965) (dicta).

93. See, e.g., *Green v. American Tobacco Co.*, 304 F.2d 70 (1962) and *Vandercook & Son, Inc. v. Thorpe*, 322 F.2d 638 (5th Cir. 1963), rehearing, 344 F.2d 930 (5th Cir. 1965).

issue of state law would seem almost duty bound to petition for a rehearing with the suggestion that the question be certified to the state court. Although certification would produce a theoretically correct answer, its effect in such a situation would be the same as if the referee in a basketball game gave the losing team enough points to produce a tie. The game would then go into *overtime*.

D. "*Guesses*" as to State Law Should Not Offend the State

Unless there is a "serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view which may be ultimately taken by the State court,"⁹⁴ it is difficult to see how a state could be offended when a federal court "guesses" what the state law will be. Without getting into the philosophical complexities of whether state law exists as a brooding omnipresence (even when it is not discernible to the eye of a federal judge), the very least that could be said is that undeclared state law has not yet been revealed. If the state law either does not exist, or has not yet been revealed, the state should not be offended when a federal court decision is at variance with the ultimate view taken by the state court.

Some would argue that such variance in decisions results in "injustice" to the litigants.⁹⁵ The answer to that argument is that no one court has a monopoly on justice. When state and federal courts reach different conclusions as to the law, who is to say which of them arrived at the "just" result?

It could also be argued that the variance itself is an injustice, and that *Erie* aims not only at forum shopping, but also at the "inequitable administration of the laws."⁹⁶ However, the pronouncements of the Supreme Court would seem to indicate that the inequities *Erie* seeks to cure are those that may occur *after* state law has been declared.⁹⁷ When state law is undeclared, all *Erie* requires is that the federal court do the best it can "to choose the rule which it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt."⁹⁸ The same principle should apply when state law is unclear or out of date.

It is quite possible that state courts might benefit by having federal court opinions on undeclared or out of date state law.⁹⁹ Whether or not they agree with the decision of a federal court, they might be aided in

94. ALI, STUDY at 38, § 1371(c)(2).

95. See Judge Brown's concurring and dissenting opinion in *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967).

96. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (dicta).

97. Cf. *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943).

98. WRIGHT § 58 at 206.

99. See, e.g., *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945), followed in *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E.2d 810 (1947).

arriving at their own decision from an analysis of the federal opinion. Law is a creative process, and judges can benefit from the mistakes, as well as the triumphs, of those who have faced similar problems.

Although Judge Brown laments over the number of times federal courts have been "reversed" by state courts,¹⁰⁰ he fails to take into account the times that state courts have ultimately agreed with federal courts. Is it not possible that such agreement may be, at least in part, the result of the reasoning and articulation of issues by the federal court?

E. Advisory Opinions

The courts of some states lack the power to give answers to questions certified by federal courts. This is because they are forbidden by their state constitutions from giving what would amount to an advisory opinion.¹⁰¹ Other state courts have proved quite willing to give advisory opinions.¹⁰²

Even if a state has a procedure for certification, the federal courts must be wary of the possibility of a rule against advisory opinions. In the case of *In re Richards*¹⁰³ the court refused to answer a question certified to it. The court indicated that an answer to a certified question would amount to an advisory opinion unless all the material facts had either been agreed upon or found by the federal court. It insisted that the case must be in such a posture that the state court's decision of the applicable Maine law would in truth and in fact be determinative of the cause.

VI. CONCLUSION

In deciding questions of state law, federal judges should be able to use the same processes as are available to state judges. In making their decisions they should not be restricted to past decisions of the state courts, nor should they be required or encouraged to seek answers to difficult questions of state law from state courts, except in extreme and rare circumstances. Although *Erie* requires that the federal courts use past state court decisions as a guidelight in reaching their decisions, federal judges should have available to them "the same sources as are available to state judges in deciding issues of state law"¹⁰⁴ This is especially true in areas where new trends have developed in other jurisdictions, and the state court of the forum has not reviewed the issue in question for many years.

100. He cites several examples in *United Services Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-87 nn. 5-9 (5th Cir. 1963) and in the opinion cited in note 95 *supra*.

101. See, e.g., *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965).

102. *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So.2d 845 (1961). Cf. *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735 (Fla. 1961).

103. 223 A.2d 827 (Me. 1966).

104. Clark, *Federal Procedural Reform and State's Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 224 (1961). See also, Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U.L. REV. 419 (1960), and Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941).

Although abstention may be justified in the rare instances circumscribed by the proposed ALI statute, this does not mean that certification is necessary or even desirable. The proposed statute allows abstention, but the policy of the statute is designed to let one court decide all of the issues. If the federal court thinks that the federal rights of a party are in jeopardy, it is called on to weigh that factor in deciding whether or not to abstain. If the federal judge reaches a decision to abstain, after carefully weighing all the factors, a state court determination of all the issues is *res judicata* and subject to review only by the Supreme Court.¹⁰⁵

The present certification provision of section 1371 is far too broad. It would not restrict certification in any of the cases discussed in this article. If the certification provision must be kept, it should at least be restricted within the same limits as abstention.

The Commentary to section 1371(e) suggests that a federal court should be loathe to certify a state law question at the request of a defendant who has removed a case to a federal court.¹⁰⁶ The same admonition should apply to the plaintiff who brings his claim to a federal court in the first place, loses at the trial level and at the appellate level, and then requests certification on rehearing at the appellate level.

It is also questionable whether certification is proper if neither party requests it.¹⁰⁷

Thus far six states have adopted certification procedures, and it is likely that many more will follow suit in the near future because of the adoption of the Uniform Certification of Questions of Law Act. If the use of the procedure is to be restricted to exceptional situations, such restriction will have to come from congressional legislation or from a decision of the Supreme Court. That restriction of the use of certification to exceptional situations is desirable is borne out by the fact that the recent use of certification has exacted too high a price for theoretically correct answers to *Erie*-posed problems.

105. ALI, *STUDY* at 39, 212-13.

106. *Id.* at 217-18.

107. *Cf. Hostetter v. Idlewilde Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), where the court gave this factor at least some weight in refusing to abstain.