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FOREWORD

CERTIFICATION: ASSURING THE PRIMACY OF STATE LAW IN THE FOURTH CIRCUIT

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In 1938 the Supreme Court held that federal courts in diversity cases must follow the substantive law of the state whose laws govern the case, "whether ... declared by its Legislature in a statute or by its highest court in a decision...."[1] In cases in which the state's law is not clear, the federal court must predict what the highest court of the state would decide if faced with the question.[2] If a federal court is mistaken, the result can harm one of the parties and confuse future litigants.[3]

Apart from the abolition of diversity jurisdiction, the best solution to the federal courts' difficulty in predicting uncertain state law is certification.[4] This procedure enables a federal court to send a specific, unresolved question

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1. Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938).

2. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 142-43 (1973); Note, *The Uniform Certification of Questions of Law Act*, 55 IOWA L. REV. 465, 466-69 (1969) (hereinafter Note, *Uniform Act*).

3. For example, in *Haynes v. James H. Carr, Inc.*, the Fourth Circuit decided that the Virginia long arm statute required more than a single act to give the court jurisdiction and affirmed the dismissal of the case for lack of jurisdiction. *See* Haynes v. James Carr, Inc., 427 F.2d 700, 704 (4th Cir. 1970). Less than a year later, the Virginia Supreme Court held that the Virginia long arm statute was a single act statute "requiring only one transaction in Virginia to confer jurisdiction on its courts." Kolbe, Inc. v. Chromoderm, Inc., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971). Thus the plaintiffs in *Haynes* were deprived of a forum by an incorrect prediction of Virginia law. *See also* Note, *The Case for Certification*, 12 WM. & MARY L. REV. 627, 642 nn. 93-98 (1971).

4. Federal courts can avoid the problem in narrowly limited circumstances by abstention. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-821 (1976); *see also* 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §§ 4241-4247 (1978) (hereinafter 17 WRIGHT & MILLER).

Abstention, however, raises a number of problems, especially the necessity for litigation through the state court system with the concomitant delay and expense. See Note, *Inter-jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 346-48 (1963) (hereinafter Note, *Inter-jurisdictional Certification*); Note, *Certification Statutes: Engineering a Solution to* Pullman *Abstention Delay*, 59 NOTRE DAME L. REV. 1339, 1339-48 (1984).

of state law to the highest court of the state whose law is controlling. It was used first in 1960 after the United States Supreme Court expressed its approval[5] of a Florida statute providing for certification.[6] In 1967 the American Bar Association approved a proposal for a Uniform Certification of Questions of Law Act drafted by the National Conference of Commissioners on Uniform State Laws.[7] Since then, the procedure has received increasing acceptance and praise from courts and commentators:

> [Certification] prevent[s] federal invasion of the state law-making function and ... avoid[s] needless federal-state friction—but also represents a more perfect attempt at cooperative judicial federalism, since concern for state sovereignty is implemented through a more efficient and simpler proceeding [than abstention].[8]

Furthermore, the procedure increases the quality of judicial decision-making because certification results in a clear answer to a state law question that is binding on the parties, receives full faith and credit in the federal court, and creates a correct precedent for future litigants.[9]

Thirteen years after the Supreme Court approved the procedure, it endorsed certification even more strongly. Justice Douglas, who initially had spoken out against certification,[10] wrote for a unanimous court in *Lehman Bros. v. Schein*:[11] "[T]he certification procedure ... does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism...."[12]

There are now thirty-one jurisdictions that have a statute or rule allowing certification.[13] The Uniform Act, which has been adopted by a

5. *See* Clay v. Sun Ins. Office, 363 U.S. 207 (1960). Justice Frankfurter wrote for the Court: "The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by 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." *Id.* at 212. *See also* Sun Ins. Office Ltd. v. Clay, 133 So. 2d 735, 739-43 (Fla. 1961) (decision of certified question).

6. FLA. STAT. ANN. § 25.031 (West 1957).

7. UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 52 (1967) (hereinafter UNIFORM ACT).

8. Note, *Inter-jurisdictional Certification, supra* note 4, at 350. *See also* Note, *Civil Procedure—Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155, 1156 nn. 11, 13 (1976).

9. Lillich and Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. REV. 888, 906-08 (1971); *see also* Note, *The Case for Certification, supra* note 3, at 641-45; Note, *Uniform Act, supra* note 2, at 470-74.

10. *See* Clay v. Sun Ins. Office, 363 U.S. 207, 227-28 (1960) (Douglas, J., dissenting).

11. 416 U.S. 386 (1974).

12. *Id.* at 390-91; *see also* Bellotti v. Baird, 428 U.S. 132 (1976), in which the Court directed the district court on remand to certify a question of state statutory interpretation to the Supreme Judicial Court of Massachusetts, noting that "the importance of speed in resolution of the instant litigation is manifest.... [T]he availability of certification greatly simplifies the analysis." *Id.* at 151.

13. 17 WRIGHT & MILLER, *supra* note 4, § 4248 n. 29 (1978 & Supp. 1984); *see also* Note, *Giving Deference to State Law: New South Dakota Certification Statutes Enable Federal Courts to Defer to Supreme Court*, 30 S.D.L. REV. 180, 181 n.9 (1984). These lists do not include South Carolina, which adopted certification by Supreme Court rule in 1982. S.C. SUP. CT. R. 46.

majority of the states that have a certification procedure,[14] gives the highest court of the state the discretionary authority to answer questions certified to it.[15]

The Uniform Act allows certification only if there is no controlling precedent that would govern the case.[16] When a federal court decides to certify a question,[17] it sets forth a certification order containing the question of law and a statement of the nature of the controversy and the facts necessary to the disposition of the case.[18] In some courts, including the Court of Appeals for the Fourth Circuit, the parties participate in preparing the submission to the state court.[19] The cases are then briefed and argued before the state court, as provided by local rule.[20]

The state court may request the complete record,[21] or it may restate the question in order to provide a complete state law answer.[22] The state court simply may refuse to answer the question if the certifying court has not provided sufficient facts for a decision.[23] Also, refusal is appropriate when the state court concludes that its construction of state law would not be dispositive of a controverted issue.[24] These procedural safeguards preclude requests for advisory opinions and assure the state court that it is asked to decide only controverted legal issues arising from facts that the certifying court has determined conclusively.

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14. *Compare* Table of Jurisdictions, UNIFORM ACT, *supra* note 7, at 17 *with* WRIGHT & MILLER, *supra* note 4, § 4248 n. 29.

15. The uniform statute and most state statutes allow certification from both federal courts and appellate courts of other states. UNIFORM ACT, *supra* note 7, § 1.

16. *Id.* § 8. This restriction is designed in part to prevent federal courts from certifying state court questions merely because they are difficult. *See* 17 WRIGHT & MILLER, *supra* note 4, § 4248.

17. Certification may be invoked by the court, or it may be sought by any party. UNIFORM ACT, *supra* note 7, § 2.

18. *Id.* §§ 3-4.

19. *See, e.g.*, Goldstein v. Potomac Elec. Power Co., 578 F.2d 975 (4th Cir. 1978); H.S. Equities v. Hartford Accident & Indem. Co., 512 F.2d 1277 (5th Cir. 1975).

20. *See, e.g.*, MD. SUP. CT. R. 896, 830; S. C. SUP. CT. R. 46, § 6.

21. UNIFORM ACT, *supra* note 7, § 5. *See* Note, *Florida's Inter-jurisdictional Certification: A Reexamination to Promote Expanded National Use*, 22 U. FLA. L. REV. 21, 30-32 (1969).

22. 17 WRIGHT & MILLER, *supra* note 4, § 4248 nn. 57, 58.

23. *See In re* Richards, 223 A.2d 827 (Me. 1966), in which the court held that it would only answer certified questions if "all material facts have been either agreed upon or found by the [certifying] court," and sent the case back to the federal court for fact-finding. *Id.* at 833.

24. For example, the West Virginia Supreme Court of Appeals refused to decide a certified question because it believed federal law was controlling regardless of its decision of the state law question. Abrams v. West Virginia Racing Comm'n, 263 S.E.2d 103 (W. Va. 1980). Some courts will answer a certified question only if the state law answer will settle the entire case, but commentators have pointed out that this narrow interpretation renders the procedure virtually useless. Most courts will answer the question if at least one resolution of the question could dispose of the case. *See* Note, *Case for Certification*, *supra* note 3, at 627-28; American Law Institute, Study of The Division of Jurisdiction between State and Federal Courts 283, 295-96 (1965).

The Supreme Judicial Court of Maine has rejected the contention that certification calls for advisory opinions.[25] The court pointed out that the parties are before the court and the court's decision has "the force of decided case law within the courts of this state, and constitutes res adjudicata as between the same parties...."[26] *Erie* makes the answers to certified questions "conclusive and determinative in the federal courts with respect to the state of the law in [that state]."[27]

Concern that certification will engender undue delay has proved to be unfounded.[28] Experience suggests that any delay caused by certification is outweighed by its benefits. In 1983 the Federal Judicial Center conducted a study of the experience of federal courts that had used certification.[29] The Center surveyed federal judges who had participated in a sample group of forty-nine cases in which certified questions had been answered, asking them whether they believed certification had been effective and what its advantages and disadvantages were.[30]. The study found that the procedure received overall positive ratings from the judges.[31] They indicated that while the procedure may delay a final decision, that disadvantage is outweighed by the advantage of having an authoritative answer from an appropriate tribunal, which reduces future litigation and improves relations between state and federal courts.[32]

State court judges have also expressed satisfaction with the procedure. Justice Sidney W. Wernick of the Supreme Judicial Court of Maine told the Fourth Circuit Judicial Conference in 1976 that "I come as a salesman.... I am an unabashed enthusiast of the certification procedure."[33] Commentators and jurists have praised certification because it improves interjurisdictional relations and reinforces the sovereignty of state courts.[34] In addition, statistics show that state courts have not been inundated with the flood of cases that

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25. *See* In re Richards, 223 A.2d at 829-32.

26. *Id.* at 832.

27. *Id.* at 832; *see* Lillich and Mundy, *supra* note 9, at 904 n. 106, pointing out that the state court at least implicitly has jurisdiction over the parties to the case before it; *see also In re* Elliot, 74 Wash. 2d 600, 446 P.2d 347 (1968), in which the court stated that its opinion would not be advisory because it was binding on the parties as res judicata and constituted binding state precedent. *Id.* at ____, 446 P.2d at 354.

28. For example, in Justice Douglas's dissent in *Clay*, he argued against certification because of the delay and expense involved. *See* Clay v. Sun Ins. Office, 363 U.S. 207, 227-28, (1960) (Douglas, J., dissenting). Justice Douglas subsequently changed his mind and spoke in favor of certification in 1973. *See supra* note 12 and accompanying text.

29. Federal Judicial Center Staff Paper, Certifying Questions of State Law: Experience of Federal Judges (January 1983) (hereinafter FJC Study).

30. *Id.* at 1.

31. *Id.* at v.

32. *Id.* at 10-11.

33. Speech by Justice Sidney W. Wernick, Fourth Circuit Judicial Conference (June 29, 1976).

34. *See* FJC Study, *supra* note 29, at 11; Note, *Case for Certification*, *supra* note 3, at 641-43.

some critics suggested would follow certification.[35] While certification carries with it the potential for abuse, the existence of discretion at both ends of the procedure helps to reduce that risk. As one commentator wrote: "There is good reason to suppose that federal and state court judges are sensitive to the burdens that can be placed upon either by an injudicious use of the procedure."[36]

The Court of Appeals for the Fourth Circuit has adopted policies and procedures to avoid the pitfalls of certification. The court will not certify a question to a state court "unless and until it appears that the answer is dispositive of the litigation or is a necessary and inescapable ruling in the course of the litigation."[37] The court has pointed out that "federal courts should take care not to burden their state counterparts with unnecessary certification requests."[38] It has refused to certify cases where the state law issue is not dispositive or where there is existing controlling precedent.[39]

Maryland was the first among the five states in the Fourth Circuit to pass a certification statute and has the most experience using it.[40] The Maryland Court of Appeals has answered questions from several courts covering a wide range of Maryland law, generally involving subjects that traditionally are the province of the states. Thus, issues involving statutes of limitations,[41] products liability,[42] punitive damages,[43] public policy questions,[44] and construction of wills[45] have been certified to the Maryland court.

West Virginia passed its certification statute in 1976.[46] All four of the

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35. Note, *Case for Certification*, *supra* note 3, at 640; Note, *Reexamination to Promote National Use*, *supra* note 21, at 30.

36. Lillich and Mundy, *supra* note 9, at 910; *see also* FJC Study, *supra* note 29, at 9-10.

37. Boyter v. Commissioner, 668 F.2d 1382, 1385 (4th Cir. 1981).

38. *Id.* at 1385 n. 5.

39. *See, e.g.*, Pyne v. Hartman Paving, Inc., No. 83-1443; (4th Cir. Oct. 2, 1984); Smith v. FCX, Inc., 83-1993 (4th Cir. Oct. 2, 1984). Despite the care that it has exercised, the court improvidently certified one case to the West Virginia Supreme Court of Appeals. *See* Flannery v. United States, 718 F.2d 108 (4th Cir. 1983).

40. MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to 12-609 (1972). Since 1972, at least 16 cases with published opinions have been certified to the Maryland Supreme Court: 11 from federal district courts, 4 from the federal courts of appeal, and 1 from the United States Supreme Court. *See infra* notes 41-45.

41. Goldstein v. Potomac Elec. Power Co., 578 F.2d 975 (4th Cir. 1978); Walko Corp. v. Burger Chef Systems, Inc, 554 F.2d 1165 (D.C. Cir. 1977); Chertkof v. Mayor of Baltimore, 497 F. Supp. 1252 (D. Md. 1980); Yarmouth v. Government Employees Ins. Co., 286 Md. 256, 407 A.2d 315 (1979); Toll v. Moreno, 284 Md. 425, 397 A.2d 1009 (1979); Guy v. Director, Patuxent Instit., 279 Md. 69, 367 A.2d 946 (1977).

42. Volkswagen of America v. Young, 272 Md. 201, 321 A.2d 737 (1974).

43. Smith v. Gray Concrete Piping Co., 267 Md. 149, 297 A.2d 721 (1972).

44. Food Fair Stores v. Joy, 283 Md. 205, 389 A.2d 874 (1978).

45. Bryan v. United States, 286 Md. 176, 406 A.2d 423 (1979); Mercantile Safe Deposit Co. v. Purifoy, 273 Md. 58, 327 A.2d 483 (1974) and 280 Md. 46, 371 A.2d 650 (1977).

46. W. VA. CODE §§ 51-1A-1 to 51-1A-12 (1976).

published cases in which the West Virginia Supreme Court of Appeals answered certified questions dealt with questions of tort law and damages under West Virginia law.[47]

In South Carolina, the Supreme Court adopted a rule in 1982 authorizing certification.[48] Since then, the South Carolina Supreme Court has answered seven certified questions, nearly all of which dealt with South Carolina insurance statutes, products liability, and other tort law questions.[49]

Virginia, understandably, has not been quick to join the growing number of states with certification procedures. Until the creation of the Court of Appeals of Virginia,[50] Virginia was the only state in the nation with a population greater than three million in which the Supreme Court carried the entire burden of appellate review.[51] The Court of Appeals for the Fourth Circuit has expressed its view that certification would be beneficial because unresolved questions of Virginia law arising in federal cases could be decided definitively.[52] Perhaps the new intermediate appellate court will relieve the Supreme Court of enough of its heavy caseload to make certification feasible.

The Virginia Constitution gives the Supreme Court original jurisdiction "in cases of habeas corpus, mandamus and prohibition.... All other jurisdiction of the Supreme Court shall be appellate."[53] Subject to those limitations, the General Assembly has the power "to determine the original and appellate jurisdiction of the courts of the Commonwealth."[54] It would seem, therefore, that the General Assembly constitutionally could allow the Virginia Supreme Court to accept certified cases that are appellate in nature. This restriction would require certification to be limited to questions from appellate courts.

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47. Flannery v. United States, 297 S.E.2d 433 (W. Va. 1982); Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679 (W. Va. 1982); Sydenstricker v. Unipunch, 288 S.E.2d 511 (W. Va. 1982); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).

48. S.C. SUP. CT. R. 46.

49. Dixon v. Nationwide Mut. Ins. Co., ___ S.C. ___, 316 S.E.2d 376 (1984); Hupman v. Erskine College, ___ S.C. ___, 314 S.E.2d 314 (1984); Hill v. BASF-Wyandotte Co., 280 S.C. 734, 311 S.E.2d 734 (1984); Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984); Gambrell v. Travellers Ins., 280 S.C. 69, 310 S.E.2d 814 (1983); Southeastern Freight Lines v. Michelin Tire Corp., 279 S.C. 174, 303 S.E.2d 860 (1983); Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735 (1983).

50. VA. CODE §§ 17-116.01 to .14 (1983).

51. The thirteen states that do not have intermediate appellate courts have populations that are considerably smaller than that of Virginia (5,491,000). The states are: Delaware (602,000), Mississippi (2,551,000), Montana (801,000), Nebraska (1,586,000), Nevada (881,000), New Hampshire (951,000), North Dakota (670,000), Rhode Island (958,000), South Dakota (691,000), Utah (1,554,000), Vermont (516,000), West Virginia (1,948,000), and Wyoming (502,000). Population figures were taken from Bureau of the Census, Statistical Abstract of the United States 11 (104th ed. 1984).

52. Virginia State Bar v. Surety Title Ins. Agcy., Inc., 571 F.2d 205 (4th Cir. 1978).

53. VA. CONST. art. VI, § 1.

54. *Id.*

The New York State Law Review Commission has sent a proposal to the New York legislature recommending certification only from appellate courts because the appellate court can "use the lower court's opinion to determine more accurately whether there is no controlling state law; to make certain that the question is necessary to the disposition of the case; and to assist the formulation of the question to be certified."[55] Several other states allow certification only from appellate courts in order to limit the number of certified cases and to avoid any problems with the fact finding aspects of the cases.[56]

It is likely that limiting certification to appellate courts would add only a small number of cases to the Virginia Supreme Court's docket. For example, the Court of Appeals for the Fourth Circuit has certified less than a half-dozen cases since 1972 out of approximately 23,000 cases filed during that time.[57]

Certification has many advantages, but undoubtedly its greatest virtue is the enhancement of the quality of justice.[58] Virginia citizens whose rights depend on authoritative interpretation of the law of the Commonwealth will be beneficiaries of certification.

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55. Memorandum of the New York State Law Review Commission to the 1984 Legislature, Leg. Doc. (1984) No. 65[B], at 11-12 (1984) (hereinafter cited as New York Memorandum). *See* Note, *Inter-jurisdictional Certification, supra* note 4, at 360-61.

56. *See, e.g.,* New York Memorandum, *supra* note 55, at 12. Wisconsin, Florida, Hawaii, Georgia, Indiana, Louisiana, and Mississippi do not allow certification from federal district courts. *See* WISC. STAT. ANN. § 821.01 (West 1976 & Cum. Supp. 1984); FLA. STAT. ANN. § 25.031 (West 1974); HAWAII REV. STAT. § 602-5(2) (1976) in conjunction with HAWAII S. CT. R. 20; GA. CODE ANN. § 15-2-0(a) (1982) in conjunction with GA. S. CT. R. 36; IND. CODE ANN. § 33-2-1-3 (Burns 1985) in conjunction with IND. S. CT. R. 15(o); LA. REV. STAT. ANN. § 13:72-1 (West 1983) in conjunction with LA. S. CT. R. 12; MISS. CODE ANN. § 9-3-39 (1972) in conjunction with MISS. S. CT. R. 46; *see also* Comment, *Abstention and Certification in Diversity Suits: Perfection of Means and Confusion of Goals*, 73 YALE L. J. 850 (1964).

57. Administrative Office of the United States Courts, Court Management Statistics, Table—Fourth Circuit (1984, 1979, and 1974). The estimate of the number of cases certified by the Court of Appeals was derived from published cases disclosed in an electronic search. The clerk recently has begun to keep a list of cases involving certified questions.

58. In *Green v. American Tobacco Co.*, Judge Rives wrote:

> First, to the Justices of the Supreme Court of Florida we wish to express publicly and with deep sincerity our appreciation for their answer to the question which we certified to that Court.... That answer has saved this Court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice. The Supreme Court of Florida has been a very real help in the administration of justice.

Green v. American Tobacco Co., 325 F.2d 673, 674 (5th Cir. 1963); *see also* Note, *Case for Certification, supra* note 3, at 643 n. 101.