Focus

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The Practitioner Appellate Law

Cooperative Federalism

Attorneys Should Consider Certifying Unsettled State-Law Questions

By James C. Martin and Benjamin G. Shatz

Every lawyer knows that *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), held that there is no general federal common law and that federal courts exercising diversity jurisdiction must apply applicable substantive state law. But how does a federal court apply state law when faced with a state-law issue of first impression?

One approach, of course, is simply to abstain and wait for a state court determination of the issue. But abstention can be an unsatisfying and awkward solution that causes delay, expense and inconvenience to courts and litigants.

Another option is for a federal court to hazard a guess — based on dicta and "obvious implications and inferences" in state precedent and any other available sources of law (e.g., treatises, law reviews, restatements) that might help ascertain how a state court might rule. *Food Indus. Research & Eng'g Inc. v. State of Alaska*, 507 F.2d 865 (9th Cir. 1974) (court makes an "Erie-educated guess" on questions of state law); *Yoder v. Nu-Enamel Corp.*, 117 F.2d 488 (8th Cir. 1941).

This, too, however, is a somewhat awkward solution. Requiring federal judges to divine the rule a highest state court might adopt is by no means an exact science.

In 1945, the state of Florida devised another approach: Allowing federal appellate courts to certify questions of state law to the Florida Supreme Court. Florida Appellate Rule 9-150. This idea did not catch on immediately: It took 15 years before a court — the U.S. Supreme Court, in fact — actually used the statute. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (complimenting Florida's "rare foresight" in creating certification rule).

Despite this slow start, federal judges eventually endorsed certification because it enabled them — without abdicating their responsibility — to obtain an authoritative answer "to problems where the Erie lights are dim, confusing, or conflicting." *Strange v. Krebs*, 658 F.2d 268 (5th Cir. Unit A Sept. 1981) (extolling the virtues of the "remarkable device" of certification); *American E. Dev. Corp. v. Everglades Marina*, 608 F.2d 123 (5th Cir. 1979) ("both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism").

Momentum for certification built slowly: In 1971, only seven states had a certification procedure; by 1976, that number was only 15. But in 1977, the American Bar Association urged adoption of certification, and by 1997, the number of states with certification procedures had risen to 44. See William G. Bassler and Michael Potenza, "Certification Granted," 29 Seton Hall L. Rev. 491 (1998). These states included every state within the 9th Circuit — except California.

Two years ago, however, California joined its sister 9th Circuit states by becoming the 45th state nationwide to adopt a rule allowing certification of questions of state law. Effective Jan. 1, 1998, California Rule of Court 29.5 created a process whereby sister state courts of last resort and federal appellate courts could certify unresolved questions of California law to the California Supreme Court.

Under Rule 29.5, the California Supreme Court exercises its discretion in accepting certified questions. When it agrees to answer certified questions, the resulting opinion carries the precedential weight of any other high-court decision. Rule 29.5(k).

Although new, Rule 29.5 already has had one substantive amendment: Effective Jan. 1, parties may support or oppose certification requests by filing briefs in the California Supreme Court.

During Rule 29.5's short life span, neither the U.S. Supreme Court nor any sister state high court has certified a question. Twelve of the 13 federal appellate courts also have made no use of the rule. The 9th U.S. Circuit Court of Appeals is the exception.

The 9th Circuit has certified questions to the California Supreme Court six times and the Supreme Court has declined only one of its requests.

Although there is no time limit within which the court must respond to a certification request, the California Supreme Court generally has done so within the 90-day time frame for appellate decisions. So far, the court has taken an average of 83 days from the date of certification to issue an order either granting or denying the request (with 137 and 44 days as the longest and shortest periods for a ruling).

The fact that the California Supreme Court has accepted certification five of the six times the 9th Circuit has asked bodes well for certification. Litigants should appreciate, however, that the 9th Circuit itself will not jump on the certification bandwagon any time a party suggests it. In at least two cases, the court has expressly noted its denial of a party's certification request. *Cucamongans United v. City of Rancho Cucamonga*, 2000 WL 61312 (9th Cir. 2000) (unpublished affirmance of discretionary dismissal on abstention grounds); *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000) (denying the state's motion to certify two questions deemed irrelevant).

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So far, the 9th Circuit has sought substantive guidance on California law by certifying questions in three areas: constitutional law (twice), insurance law (three times) and employment law (once).

The very first question certified to the high court implicated state constitutional concerns. The 9th Circuit asked whether a city's ban on aggressive panhandling violated the California Constitution's liberty of speech clause. *L.A. Alliance for Survival v. City of Los Angeles*, 157 F.3d 1162 (9th Cir. 1998). The court certified this question after noting conflicting views among California cases and also among federal district courts attempting to apply California law.

The California Supreme Court accepted the request but rephrased its precise wording to avoid unnecessarily restricting its analysis — a procedure allowed by Rule 29.5(g). The court then waited to receive written notice from the 9th Circuit that it had no objection to the rephrasing of the question — a courtesy not expressly required by the rule.

Then, this March, the California Supreme Court answered the question, issuing an opinion upholding the law's constitutionality. *L.A. Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352 (2000).

Because this was the first time the court had ever accepted a certified question, a portion of the majority opinion, authored by Chief Justice Ronald George, briefly discussed certification, approving the way the procedure "strengthens the primacy of the state supreme court in interpreting state law" and "protects the sovereignty of state courts."

The 9th Circuit also sought guidance interpreting California's constitution in *Ventura Group Ventures Inc. v. Ventura Port District*, 179 F.3d 840 (9th Cir. 1999), where it certified two questions concerning "the interplay of Article XIIIA of the California Constitution and California's statutory writ of mandate providing for the payment of judgments by local public entities."

The 9th Circuit found it "difficult to harmonize" this portion of California's constitution with portions of the Navigation and Government codes. The parties now have fully briefed this matter in the California Supreme Court and are awaiting an oral argument date.

In the insurance context, the first certified case was *Vu v. Prudential Property & Casualty Insurance Co.*, 172 F.3d 725 (9th Cir. 1998). There, the 9th Circuit certified a question concerning whether the statute of limitations bars an insured's claim more than one year after earthquake damage was sustained but within one year of discovery of additional damage.

Interestingly, the court certified this question on its own motion without the urging of either party and noted "[i]f the court declines to accept the certified question, we will resolve the issue according to our own understanding of California law, misguided though it be."

In another insurance case, *Blue Ridge Insurance Co. v. Jacobsen*, 197 F.3d 1008 (9th Cir. 1999), the certified question asks whether an insurer defending a personal-injury case under a reservation of rights may recover settlement payments made over the insured's objection when it later determines there was no coverage. Both *Vu* and *Blue Ridge* have yet to be argued at the California Supreme Court.

The insurance arena also represents the one area where the California Supreme Court declined to accept a certified question. In *In re KF Dairies Inc.*, 179 F.3d 1226 (9th Cir. 1999), the 9th Circuit certified the question of whether insurance coverage existed for groundwater contamination occurring within the policy period but after the policyholder purchased the property.

The 9th Circuit recognized that two California Court of Appeal decisions answered this question (in the negative), but nonetheless noted a "potential conflict" between these decisions and the general rule that policy language governs the scope of coverage. The California Supreme Court denied certification without stating reasons, but it seems reasonable to believe that the court viewed the "potential conflict" either as nonexistent or insignificant.

The 9th Circuit also has certified a question involving an employment contract: Can an employer unilaterally rescind a policy requiring employees to be retained so long as a specific condition does not occur even though the specified condition has not occurred? *Asmus v. Pacific Bell*, 159 F.3d 422 (9th Cir. 1998). No controlling precedent answered this question, which the 9th Circuit noted was determinative of part of the appeal. After slightly rephrasing the question, the California Supreme Court answered the question affirmatively. *Asmus v. Pacific Bell*, 2000 Daily Journal D.A.R. 5689 (June 1, 2000).

Federal district courts — on the front lines of applying state law — are a noteworthy omission from the enumeration of courts eligible to certify questions under Rule 29.5. At least five different district courts within and outside California have lamented their inability to use Rule 29.5, noting that they would have certified questions if allowed to do so. E.g., *Stonewall Ins. Co. v. Argonaut Ins. Co.*, 75 F. Supp.2d 893 (N.D. Ill. 1999); *California Teachers Ass'n v. Davis*, 64 F. Supp.2d 945, 951 (C.D. Cal. 1999). This could be one direction in which certification could expand.

However, at least one California Supreme Court justice believes that the constitutionality of the practice is still open for debate. In *L.A. Alliance*, Justice Kathryn Werdegar's concurrence emphasized that the court has not yet addressed the constitutionality of certification because the parties never questioned Rule 29.5's validity.

Although prevailing notions of constitutional jurisprudence allow certification in the vast majority of states (see Jerome I. Braun, "A Certification Rule for California," 36 Santa Clara L. Rev. 935 (1996)), this concurring opinion may invite a future challenge to the process.

While there might have been reason to speculate on whether certification actually would be available given the California Supreme Court's workload, the court obviously is willing to make use of the procedure. It has not hesitated to grant requests when asked to do so. The message for practitioners is plain: Counsel in 9th Circuit appeals should evaluate whether certifying a question of California law would be determinative in the resolution of cases they are handling.

As its short history suggests, Rule 29.5 is particularly useful when addressing novel questions where there is a demonstrable conflict in the published case authority or a potentially recurring issue where there is need for guidance given the relevant (or lack of relevant) authority.

If certification seems appropriate, counsel should raise the issue in a motion for certification. Such a motion should contain all material the 9th Circuit would need to draft a certification request, including a statement of the question to be answered, the relevant background facts, a discussion of why existing precedent does not suffice, and an analysis of why an answer to the certified question would have a determinative effect on the appeal.

Counsel should evaluate whether certification would be determinative in the resolution of cases they are handling.