New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.law.com/ny
VOLUME 231—NO. 23 WEDNESDAY, FEBRUARY 4, 2004

APPELLATE PRACTICE

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Court of Appeals Review of Certified Questions From Other Courts

EVER SINCE *Erie v. Tompkins*,[1] when the jurisdictional predicate for a case in federal court is diversity of citizenship, all questions of substantive law must be decided according to the governing state law. Occasions will arise, however, where the state law is either unclear or the issue is one of first impression and state law is nonexistent. That circumstance does not relieve the federal court of its obligation to decide the case before it or to determine what result the state's highest court would reach if the case were in state court.[2] As the U.S. Court of Appeals for the Second Circuit noted, "In the absence of direct New York authority, we must make our best estimate as to how New York's highest court would rule in this case."[3]

A federal court is not bound by lower state court decisions. However, when there is no controlling decision of the state's highest court, absent strong evidence that the New York Court of Appeals would decide the issue differently, rulings of the Appellate Division are "particularly persuasive evidence of state law" that will guide the federal court "in predicting how the New York Court of Appeals would rule."[4]

The problem of predicting how the New York Court of Appeals would rule is not unique to federal courts. New York law often controls issues being litigated in other state courts because the parties by contract have chosen it as the governing law, or the application of recognized choice-of-law principles points to New York law.

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Foreign Courts and NY Issues of Law

The problem of a foreign court having to decide important issues of New York law without any guidance from the Court of Appeals was addressed in 1985 by an amendment to the New York State Constitution (art. VI, §3[b][9]), which granted the Court of Appeals discretionary jurisdiction to review questions of New York law certified to it by the U.S. Supreme Court, any U.S. Circuit Court of Appeal or the highest court of any state. This is an exception to the general rule that the "courts of New York do not issue advisory opinions."[5]

Section 500.17 of the Rules of the Court of Appeals, which sets forth the procedure to be followed when certification is requested by another court, restricts the type of questions that may be certified to only those that are "determinative" of the issues in the case pending before the certifying court and "for which there is no controlling precedent of the Court of Appeals."

The Court of Appeals will decide for itself whether the issue is truly outcome-determinative of the underlying litigation. If it finds the matter unclear or that the issue is not determinative, certification will be declined.[6] Moreover, the questions must be "fact and case- specific" for the Court will not accept "[a]bstract or overly generalized questions" that might "curb this Court's ability to promulgate a precedentially prudent and definitive answer to a law question."[7]

Limited to Facts Before It

The Court of Appeals is limited to the facts given to it in the certified question and it has no power to make its own de novo review of the facts of the underlying case.[8] Thus, in *Engel v. CBS*,[9] the question certified asked "whether an attorney, sued by his client's adversary for the purpose of interfering with the attorney's zealous representation of his client, and whose representation is actually undermined by the suit, may satisfy the required element of special injury in an action for malicious prosecution of a civil lawsuit under New York law where no provisional remedy is had against him." After discussing the standard for malicious prosecution, the Court stated:

> The allegations of injury presented to this Court *by the facts of the certified question*, nonetheless fall short of this standard. The question itself begs us to assume that an attorney-client relationship was "actually undermined," but on the facts given to us, we cannot so conclude. …
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> … *Under the facts of this certified question*, the deleterious consequences strongly desired by CBS in bringing an action never materialized to the degree necessary to constitute special injury. As a result, we do not assume that the attorney-client relationship was "actually undermined"

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as the certified question suggests, and with this understanding, we answer the certified question in the negative.[10]

In *Engel,* the Court also noted that "only the certified question and not the question of summary judgment is before this Court, and we offer no ultimate conclusion as to whether *Engel* has raised a question of fact to defeat summary judgment. *We rely solely on the facts presented by the certified question.* Other averred allegations or facts, not before this Court, may have a bearing on this determination. On certified questions, our province is bounded by "questions of New York law * * * which may be determinative."[11]

Similarly, in *Home Ins. Co. v. American Home Products*,[12] the question certified was whether New York would "require the insurer to reimburse the insured for punitive damages awarded against the insured on the out-of-state [Illinois] judgment in this case." AHP argued that the Court of Appeals should satisfy itself that the legal standard under which the punitive damages were awarded against it is substantially the same as New York's standard. The Court of Appeals declined to do so, stating: "We should look beyond the law, it is argued, and make our own de novo analysis of the trial record to determine whether AHP's conduct was 'morally culpable.' In effect, AHP asks us to discredit the application of Illinois law by the Illinois courts in upholding the jury's award of punitive damages. We decline to do so."

To date, the certification procedure has been used almost exclusively (if not entirely) by federal Courts of Appeal and not by the highest court of any sister state. While the Second Circuit hailed the certification procedure as "a valuable device for securing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties to a particular lawsuit," it recognized that it is to be used sparingly; the procedure "must not be a device for shifting the burden of this Court to those whose burdens are at least as great."[13] In 2002, the Court of Appeals accepted three cases certified to it and decided two others that had been accepted in 2001.[14] On average, the Court accepts and decides from three to five cases on certified questions each year.

When certification is declined, the federal court, although left without guidance from the state's highest court, must "for better or worse" decide the issue before it.[15] Certification will be declined where the same or a similar question is working its way up through the state appellate courts. In such a case, the Court of Appeals has said that it is "unquestionably preferable in the resolution of significant State law issues to secure the benefit of our normal process — the considered deliberation and writing of our intermediate appellate court in a pending litigation."[16]

Certification Procedure

The certification procedure, as spelled out in §500.17 of the Court's Rules, is as follows:

> The certifying court shall prepare a certificate which shall contain the caption of the case, a statement of the facts setting forth the nature of the cause and the circumstances out of which the questions of New York law arise and the questions of New York law, not controlled by precedent which may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals at this time.
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> The certificate, issued by the clerk of the certifying court under official seal, together with the original or copies of all relevant portions of the record and other papers before the certifying court shall be filed with the Clerk of the New York Court of Appeals. The Court of Appeals may request any additional papers which it deems necessary for its review.

Examining the Merits

The Court of Appeals, on its own motion, will examine the merits presented by the certified question, first to determine whether to accept the certification and, second, if accepted, the review procedure to be followed in determining the merits. When the certified question is accepted, the matter is treated as any other appeal — either in the normal course with full briefing and oral argument or pursuant to the Court's SSM procedure (commonly referred to as the sua sponte merits examination or SSM) under Rule §500A. The "preferred method is full briefing and oral argument on an expedited schedule" with the average period from acceptance of a certification to disposition being six months.[17] The decision is sent to the certifying court.

If the constitutionality of a New York statute affecting the public interest is involved in a certification to which the state of New York or an agency is not a party, the clerk of the Court of Appeals shall notify the attorney general in accordance with Executive Law §71.

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(1) 304 US 64, 78 (1938).

(2) *Meredith v. City of Winter Haven,* 320 US 228, 234-235, 88 LEd2d 9, 11 (1943) (federal courts may not avoid decision in diversity cases "merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state.").

(3) *Francis v. INA Life Ins. Co. of N.Y.,* 809 F2d 103 (2d Cir. 1987).

(4) *West v. American Tel. & Tel. Co.,* 311 US 223, 237 (1940) ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."); *In re Eastern & Southern Districts Asbestos Litigation,* 772 Supp 1380, 1390 (E&SDNY 1991), aff'd in part, rev'd in part on other grounds, 971 F2d 831, 850-851 (2d Cir. 1992); *FDIC v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 205 F3d 66, 71 (2d Cir. 2000).

(5) *Cuomo v. Long Island Lighting Co.,* 71 NY2d 349, 354, 525 NYS2d 828, 830 (1988).

(6) *Yesil v. Reno,* 92 NY2d 455, 682 NYS2d 663 (1998).

(7) Ibid.

(8) The certified questions are often accompanied by a comprehensive opinion of the federal circuit court of appeals setting forth the factual context out of which the question arises. See, e.g., *Carvel v. Noonan,* 350 F3d 6 (2d Cir. 2003), a 40-page opinion authored by Circuit Judge Wesley, who until recently was an associate judge of the New York Court of Appeals.

(9) 93 NY2d 195, 198, 689 NYS2d 411, 413 (1999).

(10) Id. at 207, 689 NYS2d at 418 (emphasis added).

(11) Ibid. (emphasis added).

(12) 75 NY2d 196,205,551 NYS2d 481, 486 (1990).

(13) *Kidney v. Kolmar Laboratories, Inc.,* 808 F2d 955, 956 (2d Cir. 1987).

(14) 2002 Annual Report of the Clerk of the Court of Appeals, p. 12.

(15) *Connecticut Performing Arts Foundation, Inc. v. Brown,* 801 F2d 566, 568 (2d Cir. 1986).

(16) *Ruffino v. United States,* 69 NY2d 310, 312, 514 NYS2d 200, 201 (1987).

(17) 2002 Annual Report of the Clerk of the Court of Appeals, p. 12.