

Certification Of State Law Questions: Pennsylvania's Experience In The First Five Years

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INTRODUCTION

Since 1945, most states, Puerto Rico, and the District of Columbia, have provided an outlet for the federal courts (and some other tribunals) to seek an authoritative determination from the courts of last resort of those jurisdictions on an issue of local law. This procedure, called "certification," allows the federal courts effectively to abstain from deciding state law issues. The Supreme Court of Pennsylvania was one of the last tribunals to allow certification requests, adopting a policy in 1999. This article discusses certification and its first five years in the Commonwealth. Section II examines the genesis of certification and how other states have adopted and utilized it. Section III focuses on the Pennsylvania experience, detailing the precursors to the Supreme Court's adoption of Internal Operating Procedure X and explores some of the cases in which certification has been requested. Finally, Section IV

opines that, despite some minor drawbacks, the experience has been a resounding success.

CERTIFICATION IN GENERAL

The Notion of Certification

One of the most fundamental tenets of our dual entity system of governance is that both federal law and state law have primacy in their own realms. When a federal court is asked to interpret an issue of state law, the federal court should abstain from deciding the issue if it is "unsettled" in the state's jurisprudence. The United States Supreme Court expressly recognized the basic notion of abstention in *Railroad Commission of Texas v. Pullman*,¹ in which it observed that:

Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of [the Texas statutes] and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an

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¹ 312 U.S. 496 (1941).

issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.²

In *Pullman*, rather than allowing the federal courts to resolve the dispositive issues of state law involved, the Supreme Court remanded the matter to the district court with instructions to retain jurisdiction but await a ruling from the state court on the state law issues before proceeding.³ *Pullman*, however, brought its own problems relative to the length of time expended in resolving cases and its inefficient use of judicial resources, involving multiple trips up and down both state and federal appellate ladders.⁴ Even the Supreme Court recognized these drawbacks in subsequent decisions and limited the circumstances that would justify abstention.⁵

The abstention doctrine sprouted a new branch⁶ in 1960, with the decision of the U.S.

Supreme Court in *Clay v. Sun Insurance Office, Limited*.⁷ *Clay*, a diversity action instituted in Florida, concerned an insurance policy executed in Illinois. If Illinois law were to apply, the action would be time-barred because the policy contained a clause that any claim for loss had to be brought within one year.⁸ If Florida law applied, a state statute could potentially invalidate the contractual time limitation.⁹ The district court determined that Florida law applied, allowed the case to go to a jury, and denied a motion for judgment non obstante veredicto, determining that the Florida statute in question "rendered the clause ineffective."¹⁰

The U.S. Court of Appeals for the Fifth Circuit reversed, concluding that the Florida statute violated due process considerations.¹¹ However, the Fifth Circuit failed to address the threshold question of whether the statute applied at all. The Supreme Court granted certiorari,¹² ostensibly to address the abstention problem inherent when a federal appeals court resorts to answering a federal constitutional question instead of a precedent state law question that could render the constitutional issue moot.

In vacating the Opinion of the Fifth Circuit, the Supreme Court recognized the difficulty in attempting to guess how the Florida courts would handle the issue.¹³ However, the Court noted the existence of an obscure provision of Florida law, enacted in 1945, that allowed a federal circuit court to "certify" a difficult

² *Id.* at 499-500 (internal citations omitted).

³ *Id.* at 501-502. Implicit in the remand order was an indication that the parties would file in state court to ascertain Texas law on the matter, which the Supreme Court indicated would be a necessary prerequisite to any disposition by the federal district court on remand.

⁴ Charles Alan Wright, *Law of Federal Courts* at 325-326 (West 1994). See also *Lister v. Lucey*, 575 F.2d 1325, 1333 (7th Cir. 1978), cert. denied, 439 U.S. 865 (1978) ("[a]s a general matter . . . the Supreme Court recently has recognized that in appropriate circumstances harms such as delay can outweigh the need for clarification and dictate that abstention be avoided") (citing *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974)).

⁵ See generally *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the special circumstances prerequisite to its application must be made on a case-by-case basis"). See also *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964) (abstention not necessary where neither party requests it and the litigation has already been subjected to significant delays).

⁶ In previous situations, the Court had ordered federal courts to abstain from deciding potentially moot federal constitutional questions in favor of allowing pending state court or administrative pro-

ceedings to decide the issues of state law. See *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959), and cases cited therein.

⁷ 363 U.S. 207 (1960).

⁸ *Id.* at 208.

⁹ F.S.A. §95.03 (1957) (quoted at *Clay*, 363 U.S. at 209 n.2) provided in relevant part as follows:

All provisions and stipulations contained in any contract . . . fixing the period of time in which suits may be instituted under any such contract . . . at a period of time less than that provided by the statute of limitations of this state, are hereby declared . . . to be illegal and void. No court in this state shall give effect to any provisions or stipulation of the character mentioned in this section.

The applicable Florida statute of limitations provided a five-year period for filing an action on a written contract. See F.S.A. §95.11(3) (1960).

¹⁰ *Clay*, 363 U.S. at 208-209.

¹¹ *Sun Insurance Office Limited v. Clay*, 265 F.2d 522 (5th Cir. 1959).

¹² 361 U.S. 874 (1959).

¹³ *Clay*, 363 U.S. at 212.

question of Florida law to the Supreme Court of Florida for a decision.¹⁴

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.¹⁵

Even though the Florida courts had not promulgated any rules governing certification or procedures outlining how it would work, the U.S. Supreme Court certified the question of the applicability of F.S.A. §95.03 anyway, explaining that “[i]t is not to be assumed, however, that [certification] rules are a jurisdictional requirement for the entertainment by the Florida Supreme Court of a certificate under §25.031.”¹⁶

In advance of issuing its decision, on March 1, 1961, the Florida Supreme Court promulgated Florida Appellate Rule 4.61 (1961),¹⁷ which provided as follows:

a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this State.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in subparagraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of said certificate in the appellate court of this State having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

Seven months later, the Florida court ultimately held that F.S.A. §95.03 applied,¹⁸ but the Fifth Circuit nevertheless reversed, relying on its earlier determination that the provision

¹⁴ F.S.A. §25.031 (1957) provides as follows:

The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.

¹⁵ *Clay*, 363 U.S. at 212.

¹⁶ *Id.* at 212 n.3. Interestingly, a year before Justice Frankfurter published his *Clay* opinion, one of his former law clerks had spoken on this then-obscurer provision of Florida law. See Jona Goldschmidt, *Studies of the Justice System: Certification of Questions of Law: Federalism in Practice* 4-5 (American Judicature Society 1995).

¹⁷ See *In Re: Florida Appellate Rules*, 127 So.2d 444 (Fla. 1961).

¹⁸ *Sun Insurance Office Limited v. Clay*, 133 So.2d 735 (Fla. 1961).

