New York's Certification Procedure: Was It Worth the Wait?

St. John's Law Review
NEW YORK'S CERTIFICATION PROCEDURE: WAS IT WORTH THE WAIT?

By amendment to the state constitution on November 6, 1985, New York became the thirty-sixth state to allow its highest court to entertain questions of state law certified to it by other courts.¹ The amendment commanded the New York Court of Appeals to adopt rules and procedures whereby federal appellate courts and other states' highest courts could certify uncertain questions of New York law directly to the Court of Appeals.² The rules, as enacted, allow certification when it appears to the certifying court "that determinative questions of New York Law are involved . . . for which there is no controlling precedent of the Court of Appeals."³ Within days of the enactment of the certification rules, the

¹ See N.Y. Const. art. VI, § 3(b)(9). The amendment provides:
The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the supreme court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

² See N.Y. Const. art. VI, § 3(b)(9). The rules authorized by the constitutional amendment were filed December 17, 1985, to be effective January 1, 1986. [1989] 22 N.Y.C.R.R. § 500.17.

³ [1989] 22 N.Y.C.R.R. § 500.17(a). Section 500.17 provides in pertinent part:
(a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state, that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court
Court of Appeals for the Second Circuit was both praising the advent of certification and considering whether certification would be proper under circumstances then confronting the court.\footnote{4}

The certification procedure has been in effect for nearly four years, yet only two certified questions have been answered.\footnote{5} The initial flourish of excitement and adulation has been replaced by

\footnote{4} The certification procedure has been in effect for nearly four years, yet only two certified questions have been answered. The certification procedure was initially received enthusiastic responses. See, e.g., Kidney v. Kolmar Laboratories, Inc., 808 F.2d 955, 957 (2d Cir. 1987) (“valuable device for securing prompt and authoritative resolution of unsettled questions of state law”); Siegel, \textit{A Good Start for the New Certification Procedure Whereby the Court of Appeals Directly Answers New York Law Questions for Other Courts}, 329 N.Y. St. L. Dig. 1, 1 (May 1986) (same).

criticism as to the value and efficiency of the process adopted by the New York Court of Appeals.\textsuperscript{8}

This Note will assess the benefits of certification and attempt to dispel the recent dissonance concerning its propriety. Part One will discuss the history and background of certification generally. Part Two will concentrate on New York's experience with certification to date. Finally, Part Three will assess the future of New York's certification procedure, offering suggestions to enable the process to function more efficiently and effectively.

**History of Certification**

The United States Supreme Court, in *Erie Railroad Co. v. Tompkins*,\textsuperscript{7} changed the way federal courts decide state law claims. Prior to *Erie*, under the rule established in *Swift v. Tyson*,\textsuperscript{8} federal courts sitting in diversity had the option of applying federal common law in situations where there was no applicable state statute.\textsuperscript{9} *Erie* was an attempt to discourage forum shopping and

\begin{quote}

\textsuperscript{7} 304 U.S. 64 (1938).

\textsuperscript{8} 41 U.S. (16 Pet.) 1 (1842).

\textsuperscript{9} See id. at 18-19. *Swift* involved a commercial law question of whether a preexisting debt could be consideration for a contractual endorsement. *Id.* at 16. Federal and state decisions on the issue conflicted. *Id.* Referring to section thirty-four of the Judiciary Act of 1789, the Rules of Decision Act, Justice Story concluded that the section did not apply to questions of a general nature, not dependent upon local statutes. *Id.* at 18-19. "*Swift* . . . held that federal courts . . . need not . . . apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be . . . ." *Erie*, 304 U.S. at 71. For the text of the Rules of Decision Act, see infra note 12.

Having opened a Pandora's box of problems concerning the delineation between "local" and "general" law, the *Swift* decision was subject to criticism well before its rejection in *Erie*. See, e.g., Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting) (regrettable that federal courts do not follow state courts); Lane v. Vick, 44 U.S. (3 How.) 464, 477 (1845) (McKinley, J., dissenting) (construction of Mississippi Supreme Court should be binding on federal courts).

Perhaps the most blatant example of the injustice that *Swift* fostered is Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928). Brown & Yellow Taxicab had a contract with a railroad for exclusive taxi service at its stations. *Id.* at 522. When another cab company interfered, Brown & Yellow found no recourse under Kentucky law, which considered such exclusive contracts to be against public policy. *Id.* at 523. To circumvent state law, Brown & Yellow reincorporated in Tennessee and brought a successful diversity suit in federal court. *Id.* In dissent, Justice Holmes, joined by Justices Brandeis and Stone, argued that the effect of *Swift* was an unconstitutional usurpation of states rights by the United States. *Id.* at 533 (Holmes, J., dissenting).
avoid the disparate results that *Swift* had fostered.\textsuperscript{10} While somewhat successful in accomplishing that objective, *Erie* further mandated that federal courts apply state law even in situations where state law was unsettled or unclear.\textsuperscript{11} Furthermore, although *Erie* and its progeny require federal courts to adjudicate based upon state law, the Rules of Decision Act designates the state as the final arbiter of those laws.\textsuperscript{12} When combined, these principles put federal courts in the unenviable position of having to decide state law—absent a controlling decision of the highest state court—while lacking the authority to make the decision binding upon anyone but the instant litigants.\textsuperscript{13} Often, this inherent prob-

\begin{quote}
*Black & White* is illustrative of *Swift*’s two greatest evils, forum shopping and inconsistent results. It was undisputed that the law of Kentucky was settled, *Id.* at 526, and was unfavorable to the interests of Brown & Yellow. *Id.* By reincorporating outside Kentucky, Brown & Yellow was able to achieve a result in contravention of Kentucky law. *Id.* at 531.

\textsuperscript{10} See *Erie*, 304 U.S. at 64. *Erie* was a personal injury action in which the common law of Pennsylvania was in conflict with the “general common law.” *Id.* at 69-70. Justice Brandeis, writing for the Court, noted that “the [*Swift*] doctrine rendered impossible equal protection of the law,” *id.* at 75, and that “Congress ha[d] no power to declare substantive rules of common law applicable in a State.” *Id.* at 78; see Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). Referring to *Erie*, the Guaranty Trust Court observed that “the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship ... the outcome of the litigation in the federal court should be substantially the same ... as it would be if tried in a State court.” *Id.*; see also United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 486 (5th Cir.) (“This approach recognizes that it is basically unfair for decision to turn on irrelevant accidents such as state citizenship, residence, geography, or the case being filed in one courthouse, rather than in the one a block down the street”), cert. denied, 377 U.S. 935 (1964).

\textsuperscript{11} See *Erie*, 304 U.S. at 78. “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. ... There is no federal general common law.” *Id.; see also* Meredith v. Winter Haven, 320 U.S. 228, 237 (1943) (“*Erie* ... placed on [the federal courts] a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern”). *See generally* Brown, Fifth Circuit Certification — Federalism in Action, 7 CUMB. L. REV. 455, 455 (1977) (*Erie* rule often requires federal judges to play role of prophet in interpreting and applying state substantive law).

\textsuperscript{12} See Rules of Decision Act, 28 U.S.C. § 1652 (1982). The law states: “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” *Id.*

\textsuperscript{13} See United States v. Burns, 475 F.2d 1370, 1373 n.5 (5th Cir. 1972). “[The] stare decisis effect is entirely within the control of the Supreme Court of Louisiana under its power to alter, modify or reverse ... [or] reject the reading which the Fifth Circuit has given to the pertinent state law.” *Id.; United Servs. Life Ins. Co.*, 328 F.2d at 487 (Brown, C.J., concurring).

Chief Judge Brown of the Fifth Circuit discussed his experience with the *Erie* mandate as follows:

It has been awkward—and, to some, not a little embarrassing—when our first
Problem is then exacerbated when other federal courts or foreign state courts, ruling on similar issues, use the possibly incorrect holding of the first federal court as authority in their rulings on the same law. This domino effect continues until broken by a final decision in the highest court of the state whose law is in question.

To cope with this problematic directive, the judiciary created the discriminating doctrine of abstention, which allows a federal court to send litigants into state court for a declaratory judgment or, in extreme applications, to dismiss the entire action, thus requiring the parties to seek state court relief. Criticized for denying turns out to be wrong and the state court makes the second and last guess by reversing our holding. But more important than possible embarrassment is the frustration for litigants when the rule of law we prescribe turns out to be a ticket for one ride only. There is no certainty in the judicial system where a federal court decision has both res judicata and collateral estoppel effect on the particular parties to the litigation but due to subsequent state decision to the contrary has no stare decisis effect.

Brown, supra note 11, at 455-56 (footnote omitted).

See, e.g., Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 283 (2d Cir. 1981) (other federal courts should defer to holding of pertinent court of appeals absent clear signals from state's highest court suggesting incorrectness), cert. denied, 456 U.S. 927 (1982); Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979) ("sister circuit's reasoned decision deserves great weight"), cert. denied, 446 U.S. 919 (1980); see also Note, Intercircuit Deference in Diversity Cases: Respect for Expertise or Judicial Ventriloquism?, 57 St. John's L. Rev. 62, 62 (1982) ("The Supreme Court and the circuit courts of appeals . . . have deferred to a district court's interpretation").


ing plaintiffs their right to a federal forum,\textsuperscript{18} the practice of abstention often proved wasteful and time-consuming.\textsuperscript{19} Out of this befuddled legal quagmire evolved the "redeeming light" of certification.\textsuperscript{20} Endowed with all the benefits of abstention without the attendant drawbacks, certification was hailed as the solution to the guess-or-abstain dilemma.\textsuperscript{21}

\textsuperscript{18} See Meredith v. Winter Haven, 320 U.S. 228, 234-36 (1943). The Winter Haven Court noted the difficulty in reconciling abstention with the congressional policy favoring the availability of a federal forum through diversity jurisdiction. \textit{Id.} at 236. Writing for the Court, Chief Justice Stone found "no [congressional] policy which would exclude cases from the jurisdiction merely because . . . the law is uncertain or difficult to determine." \textit{Id.} Subsequent to Winter Haven the Supreme Court spoke again of its dissatisfaction with abstention: "[The mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." \textit{Lehman Bros. v. Schlein, 416 U.S. 386, 390 (1974); see also 17A C. WRIGHT, A. MILLER & E. COOPER, supra note 16, \S 4248, at 158 (abstention held improper "merely because" state law unclear). See generally Mattis, Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts, 23 U. MIAMI L. REV. 717, 719 (1969) (abstention not "particularly bright chapter in the history of American jurisprudence").

\textsuperscript{19} See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 418 (1964) (discussing "delay and expense to which . . . abstention doctrine inevitably gives rise"); \textit{Corr & Robbins, Interjurisdictional Certification and Choice of Law, 41 VAND. L. REV. 411, 415 (1988); Roth, supra note 16, at 6; see also Note, Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use, 22 U. FLA. L. REV. 21, 26 (1969) ("some litigants spend[] up to nine years in federal and state courts"); \textit{Note, supra note 17, at 346-47 ("delay may be magnified if the propriety of abstention was litigated in the federal system prior to the separate state action, and is increased when the case returns to the federal district court for final adjudication subject to further federal appellate review") (footnote omitted).

\textsuperscript{20} See Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 375-76 (Fla. 1978). In \textit{Mobil}, the court observed that "[t]he certification process was initiated to eliminate both the expense and delay of abstention, by permitting the federal litigation to be abated while the doubtful question of state law was referred directly to the highest state court for resolution." \textit{Id.} (footnote omitted); \textit{see also Corr & Robbins, supra note 19, at 413 (certification permits courts to decide cases they would otherwise refuse to decide, due to another jurisdiction's unsettled law). But see Mattis, supra note 18, at 725 (federal case took 11 years to decide due to certification process). Certification may be viewed as an outgrowth of both the \textit{Erie} decision and general dissatisfaction with abstention. See Corr & Robbins, supra note 19, at 414-16.

\textsuperscript{21} See, e.g., \textit{Lehman Bros., 416 U.S. at 391 (certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism"); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) (certification praised for allowing authoritative state court determination of unsettled local law); \textit{Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274 (5th Cir.) (noting approval of certification by both Fifth Circuit and Supreme Court), cert. denied, 429 U.S. 829 (1976); In re Richards, 223 A.2d 827, 832 (Me. 1966) (noting Supreme Court approval of certification was a process); see also \textit{Uniform ACT, supra note 16, at 50 (certification "much more orderly way of handling the problem" than abstention). See generally 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, pas-sim (1962) (comparison of certification's efficacy to that of abstention).
A reaction to the malfunctioning abstention doctrine, certification permitted a federal court to retain jurisdiction over a case and obtain a definitive determination of state law. The first certification statute was enacted in Florida in 1945, where it lay dormant for over fifteen years until thrust into the limelight by the Supreme Court in Clay v. Sun Insurance Office Ltd. Calling the Florida statute an example of "rare foresight," the Supreme Court remanded the case to the Fifth Circuit with the implication that the court ought to certify the unresolved state law questions to the Florida courts. Certification procedures are now available in at least thirty-eight states, as well as the District of Columbia and Puerto Rico.

NEW YORK'S EXPERIENCE

The New York amendment was, with limited exceptions, an adoption of the wording contained in the Uniform Certification of Questions of Law Act. While most states have adopted the Uni-

---

22 See supra note 20 and accompanying text.
23 1945 Fla. Laws, ch. 23098, § 1 (codified as Fla. Stat. § 25.031 (1977)). See generally Kaplan, supra note 21, at 1 (discussing history of Florida statute); Roth, supra note 16, at 1-10 (same).
24 363 U.S. 207 (1960). In Clay, the Supreme Court suggested that the Fifth Circuit utilize Florida's certification statute to determine the validity of a contractual clause in an Illinois insurance contract. Id. at 212. The clause in question required that a suit to recover on the insurance contract be brought within 12 months of the claim's discovery. Id. at 208. The Court indicated that the circuit court had incorrectly turned to the constitutional ramifications of the clause before looking to Florida law which might avoid the necessity of constitutional interpretation. Id. at 209-10.
25 Id. at 212.
27 See Uniform Act, supra note 16, § 1 at 52. Section one of the Act provides:
The [highest court of any state] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may
form Act's general wording, some differ as to the inclusion or exclusion of certification by district courts or other states' highest courts. New York allows certification by the highest courts of sister states, but excludes district court certification. To date, only the Second Circuit has certified questions to the New York Court of Appeals. Two questions have been answered, one was declined, and one was accepted but, following briefs and oral arguments, returned unanswered. On at least two other occasions, certification has been considered and rejected at the federal level. All the New York decisions regarding whether to answer certified questions have been unanimous.

The first case certified to the New York Court of Appeals was *Kidney v. Kolmar Laboratories, Inc.* The certified question was accepted, answered, and returned without comment on the certification process itself. In *Rufino v. United States*, the New York Court of Appeals certified a question to the New York Court of Appeals. The court answered the question and returned it without comment on the certification process. The differences from New York's constitutional amendment and procedure are slight.

Id. The differences from New York's constitutional amendment and procedure are slight. See supra notes 1 and 3.

---

Court of Appeals was faced with a second request for certification; however, the request was rejected by the New York court. Although the questions concerned an unclear area of state law and would have otherwise been acceptable to the court, there was a case pending before the New York Appellate Division based on identical issues, the outcome of which would be determinative of the certified questions and thus, the federal case. The court feared that answering the certified question would interfere with the ongoing state process. Additionally, although abstention is at times criticized, the case presented a textbook example of when abstention is justified. In the third case, *Loengard v. Santa Fe Industries, Inc.*, the New York Court of Appeals accepted and decided a certified question without comment on the certification procedure, just as it had done in *Kidney*.

On appeal from the United States District Court for the Southern District of New York, the Second Circuit, finding no state cases on point and considering the question "likely to recur with some frequency," seized the opportunity to certify. *Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987). Unlike the New York court, the Second Circuit did comment on the procedure at length, incorporating its certification request into its opinion "[b]oth to enhance understanding... and to provide an illustration." *Id.* at 956.

39 *See id.* at 311-12, 506 N.E.2d at 911, 514 N.Y.S.2d at 201.
40 *See id.* The New York Court of Appeals noted that "[t]he very questions now tendered for our review were only recently answered by Supreme Court, New York County, in *McDougald v. Garber* (132 Misc 2d 457), and are the subject of an appeal currently going forward in the Appellate Division, First Department." *Id.* at 311, 506 N.E.2d at 911, 514 N.Y.S.2d at 201.
41 *See id.* at 311-12, 506 N.E.2d at 911, 514 N.Y.S.2d at 201. "Were we to undertake to answer the certified questions now, by... responding to specific questions from the Federal court rather than deciding a case fully before us for review, we would necessarily affect the ordinary State procedure now in actual progress for the resolution of these issues." *Id.; see also Rufino v. United States*, 829 F.2d 354, 359 n.7 (2d Cir. 1987) ("we fully appreciate [the New York Court of Appeals'] preference... to allow significant issues arising under state law to be resolved according to the State's usual process").
42 *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (abstention considered since there existed state case addressing question on state grounds); *cf. Meredith v. Winter Haven* 320 U.S. 228, 237 (1943) (abstention unwarranted where "[n]o litigation is pending in the state courts in which the questions here presented could be decided").

The fourth and most recent case to be certified to the New York Court of Appeals, as well as the most procedurally complex, was *Retail Software Services, Inc. v Lashlee.*\(^4^4\) In *Retail Software*, the plaintiff commenced an action in the United States District Court against three of the principals of a California franchisor, alleging, *inter alia*, a violation of New York's Franchise Sales Act ("FSA").\(^4^5\) The defendants moved for dismissal on the ground that the court lacked personal jurisdiction.\(^4^6\) The plaintiff argued that jurisdiction was proper under both FSA section 686 and New York's Long Arm Statute, section 302 of the Civil Practice Law and Rules ("CPLR").\(^4^7\) The district court held that the FSA did not provide a basis for personal jurisdiction and that the application of CPLR section 302 in this instance would violate notions of "fair play and substantial justice" as set forth by the Supreme Court in *International Shoe Co. v. Washington.*\(^4^8\) Accordingly, the district court dismissed the case.\(^4^9\)

On appeal,\(^5^0\) the plaintiff argued that section 691(3) of the FSA removed the protection offered by the corporate veil for any corporate officer who "materially aids in the act of transaction constituting the violation."\(^5^1\) When combined with the service of process designation of FSA section 686, it was argued that section 691(3) created a basis of jurisdiction over nonresident corporate of-

---


\(^4^5\) See *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 19 (2d Cir. 1988). *Retail Software Services* ("Retail") a New York corporation, brought suit against Software Centre International ("SCI") alleging that SCI had fraudulently misrepresented its financial condition, inducing Retail to purchase SCI's obsolete goods. *Id.* at 19-20. Retail claimed violations of civil RICO and New York's Franchise Sales Act as well as common law fraud and breach of fiduciary duty. *Id.* at 19; see N.Y. GEN. BUS. LAW §§ 680-695 (McKinney 1984) (Franchise Sales Act).

\(^4^6\) See *Retail Software*, 854 F.2d at 20.

\(^4^7\) Id.; see also N.Y. CIV. PRAC. L. & R. § 302(a)(1), (2) & (3) (McKinney 1972 & Supp. 1989) (New York's "long arm" statute). Although the FSA sets forth specific methods for service of process, it does not indicate whether these methods alone constitute an independent basis of jurisdiction over nonresident defendants. See N.Y. GEN. BUS. LAW § 686 (McKinney 1984).

\(^4^8\) 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

\(^4^9\) See *Retail Software*, 854 F.2d at 20. The district court also ruled that it would have been unfair to subject the defendant to the jurisdiction of the New York courts due to a lack of minimum contacts with New York. *Id.* The court, although disapproving of the concept, felt that the corporation acted as a shield to prevent the jurisdictional attachment of the corporate officers, who merely acted through the corporation. *Id.*

\(^5^0\) *Id.* at 21.

\(^5^1\) See N.Y. GEN. BUS. LAW § 691(3) (McKinney 1984).
Finding the statutory interpretation question one of first impression in New York, the Second Circuit certified it to the New York Court of Appeals. After considering the certification request, the New York court felt that to answer the question would violate the rules of the court as well as the constitutional grant of authority, which required that the question be one which "may be determinative" of the cause then pending in the certifying court. The court reasoned as follows:

If we were to answer the question, as framed, in the affirmative, we would establish only the abstract proposition that, in some circumstances, section 686 provides a basis for jurisdiction . . . . [E]ven if this court were to conclude that this statute did not provide a basis for personal jurisdiction, that answer would not be determinative here, since the question would remain whether our long-arm statute (CPLR 302) makes these defendants amenable to suit in this State in any event.

To overcome the abstract nature of an affirmative answer, the court felt that it would have had to consider the constitutionality of section 686 as applied to the facts of the case. This it was neither asked nor at liberty to do. Exercising its discretion, the court sent the unanswered question back to the Second Circuit.

The snafu here was that the district court had already ruled that it would be unconstitutional to haul these defendants into a New York court, regardless of the proffered jurisdictional justifica-

---


53 See Retail Software Servs., Inc. v. Lashlee, 838 F.2d 661, 662 (2d Cir. 1988). The Second Circuit found insufficient state law upon which to reach a conclusion without engaging in conjecture. Id.

54 See Retail Software Servs., Inc. v. Lashlee, 71 N.Y. 2d 788, 790, 525 N.E.2d 737, 738, 530 N.Y.S.2d 91, 92 (1988); supra notes 1 and 3 and accompanying text.

55 Id. at 780-91, 525 N.E.2d at 738, 530 N.Y.S.2d at 92-93 (1988). The court added, "[i]n addition, the certified question asks only whether the statute provides a basis for personal jurisdiction as well as a method for service of process, but we cannot answer that question in a vacuum, divorced from the consideration of the constitutionality of the statute in its actual application." Id. at 791, 525 N.E.2d at 738, 530 N.Y.S.2d at 93.

56 See id. To rule on the issue of constitutionality would have had the effect of positioning the New York court as an appellate court to the federal district court on a federal constitutional question rather than a question of state law. See infra note 60.

57 See Retail Software, 71 N.Y.2d at 791, 525 N.E.2d at 738, 530 N.Y.S.2d at 93.

58 Id.
tion under state law. In the hierarchy of adjudication, courts are to consider state law first, constitutional issues last. Here, however, the district court had already considered and ruled on the constitutional issue. Regardless of which New York law applied, the constitutional roadblock remained; the choice of section 686 or 302 would not change the constitutional objection that application of either statute violated International Shoe, thus rendering any interpretation of 686 irrelevant to the outcome. In other words, if the New York Court of Appeals had determined that section 686 granted jurisdiction, its determination would have been meaningless because the district court already had held that even if the statute permitted jurisdiction, the Constitution did not.

While closing the door on the Second Circuit’s certification request, the "unanswered reply" that the New York Court of Appeals returned actually contained the key for unlocking it. Subsequent to the district court’s holding, but prior to declining the certified question, the New York court decided two cases regarding section 302, finding in both that it was not unconstitutional to subject defendants to the jurisdiction of the New York courts under circumstances similar to those in Retail Software. Thus, were the Second Circuit to reverse the district court’s ruling on constitutionality, an essential prerequisite to statutory consideration but

---

59 See Retail Software Servs., Inc. v. Lashlee, 854 F.2d 18, 20 (2d Cir. 1988).
60 See Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 209-10 (1960) (constitutional issue should have been reached only if decision was compelled); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (“Court will not pass upon a constitutional question ... if there is also present some other ground upon which the case may be disposed of”); Burton v. United States, 196 U.S. 283, 295 (1905) (same); Liverpool v. Emigration Comm’rs, 113 U.S. 33, 39 (1885) (same).
61 See Retail Software, 71 N.Y.2d at 790-91, 525 N.E.2d at 738, 530 N.Y.S.2d at 92-93. In holding that “officers ... can[not] be deemed to have acted through their corporation in transacting business or causing a tort within the state,” the district court ruled that minimum contacts were not met by the individual defendant. See Retail Software, 854 F.2d at 20. Therefore, neither statute would affect the ultimate outcome of the jurisdictional question, once lack of minimum contacts was determined. See Retail Software, 71 N.Y.2d at 791, 525 N.E.2d at 738, 530 N.Y.S.2d at 93.
62 See Retail Software, 71 N.Y. 2d at 791, 525 N.E.2d at 738, 530 N.Y.S.2d at 92. Thus, because of the lack of minimum contacts, the court decided that regardless of how it "might respond to the question [its] answer would not be meaningful." Id.
63 See id. at 789, 525 N.E.2d at 737, 530 N.Y.S.2d at 92.
64 See id. at 790 n.*, 525 N.E.2d at 738 n.*, 530 N.Y.S.2d at 92 n.*. “We note that the District Court’s decision preceded our discussions of the fiduciary shield doctrine in Kreutzer v. McFadden Oil Corp. (71 N.Y.2d 460) and CPC Intl. v. McKesson Corp. (70 N.Y.2d 268).” Id.
65 See id. at 789, 525 N.E.2d at 737, 530 N.Y.S.2d at 92.
something the New York court was not in a legal position to sug-
gest, it would have had at its disposal the state court decisions
holding that section 302 did confer jurisdiction upon these defend-
ants. It seems that the New York court actually sent back the
answer, concealed within a footnote of the declination, which
would permit the Second Circuit to authoritatively resolve the
state law question without reference to section 686. This is borne
out by the subsequent opinion of the Second Circuit, which held
that it was not necessary to reach the issue of whether the FSA
creates a basis for personal jurisdiction because a recent New York
Court of Appeals decision had indicated that New York's long-arm
statute provided "a more than adequate basis . . . for the exercise
of personal jurisdiction." By reversing the district court's holding
on constitutionality, the Second Circuit "opened the door" to the
proper interpretation of state law, the result it had sought through
its original certification. To paraphrase Judge Frank, never have
ventriloquist and dummy performed in such perfect unison. Without
the New York court's lips moving, the Second Circuit
spoke its words.

NEW YORK CERTIFICATION'S FUTURE

The future success of New York's certification procedure re-
quires a combination and coordination of the efforts of federal
courts—especially the Second Circuit—with those of the state.
Teamwork between the two is essential, since it is a waste of both
time and judicial resources for the federal court to certify unac-
ceptable questions, and for the state court to consider and reject
them. Necessary for efficient operation is a template whereby the

---

66 See id.; supra note 56.
67 Retail Software Servs., Inc. v. Lashlee, 854 F.2d 18, 21 (2d Cir. 1988).
68 See Retail Software, 854 F.2d at 23-24. "The defendants in this case have greater
contacts with New York than the Burger King defendant did with Florida . . . . [The de-
fendants] reached into New York . . . stood to benefit . . . [and] received explicit notice,
through the FSA, that they would be individually liable . . . ." Id. at 23. "We conclude that
the limits of the due process clause will not be exceeded in this case by effectuating the
statutorily expressed intent of the New York legislature." Id. at 24.
69 See Richardson v. Comm'r, 126 F.2d 562, 567 (2d Cir. 1942). Speaking for the Second
Circuit Court of Appeals, Judge Frank characterized the federal court's role after the Erie
decision as that of a "ventriloquist's dummy to the courts of some particular state." Id.
70 See Retail Software, 71 N.Y.2d at 790, 525 N.E.2d at 738, 530 N.Y.S.2d at 92. The
initial refusal to answer the question pointed the Second Circuit toward a source of author-
ity. See supra note 64. It is suggested that utilizing this clue, the Second Circuit reached the
proper result.
federal court is made aware of the requirements and guidelines for acceptability by the state court. This template happens to be a natural by-product of case law development; questions answered demonstrate acceptability and those rejected establish areas to be avoided in the future. It is submitted that although cases such as Rufino, in which the federal court is merely unaware of the pending state court litigation, are difficult to avoid, recurrences of the Retail Software situation are preventable. The court considering certification need only examine the ruling below and ask itself whether it is possible that the certified question may dispose of the case. If the answer is no, Retail Software demonstrates that it is simply not proper to certify.

From New York's standpoint, it is imperative to the creation of this framework that the New York court articulate any problems presented by a certified question and offer possible suggestions for their elimination. For example, if rephrasing the question would make it acceptable, the court should emphasize this, and possibly add a recommendation that, had the certifying court authorized the rephrasing in its request, as some courts do, the New York court would not have had to send the question back unanswered. If New York encounters problems of incomplete or piecemeal records, putting the federal court on notice would allow the correction of this flaw by the inclusion of complete certified records when confusion is anticipated.

Furthermore, New York's certification procedures contain untested applications. An example would involve injuries caused by such substances as asbestos or diethylstilbestrol ("DES"), and the

---

71 See, e.g., Waters v. Armstrong World Indus. Inc., 773 F.2d 248, 260 (9th Cir. 1985) (federal court's non-exclusive formulation enables state court to fashion the basic issues in any appropriate manner); Allen v. Estate of Carman, 446 F.2d 1276, 1277 (5th Cir. 1971) ("we wish that the Court exercise the widest discretion . . . including . . . a complete reformation of the certified questions"). See generally Brown, supra note 11, at 461 (allowing state court to reformulate certified question avoids delay and waste of judicial resources).

72 See, e.g., Allen, 446 F.2d at 1280 (entire record transmitted); Note, supra note 17, at 352 ("rather than certifying a question that would necessarily be hypothetical because not presented in a context of related and necessary facts and issues of law, the federal court should send to the state court . . . the entire record in order to guarantee a concrete setting of interrelated issues").

73 See [1989] 22 N.Y.C.R.R. § 500.17(a). An example not discussed within this Note is state-to-state certification. New York's procedure allows sister states to certify questions to New York's Court of Appeals, although this device is yet to be used. See Corr & Robbins, supra note 19.
various tort theories created to deal with such injuries. Although today's technology makes it possible to identify the medical cause of injurious effects manifesting themselves over a decade after the occurrence, it does nothing to improve records or memories over this same time period. Often, the result is the ability to identify the cause of the tort without the ability to identify the tortfeasor.

---

74 See Hymowitz v. Eli Lilly, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989). In this recent DES liability case, the Court of Appeals formulated a new rule regarding defendant drug manufacturers' liability with respect to plaintiffs who claim DES related injuries. Due to the difficulties which plaintiffs faced in proving which DES manufacturer's drugs caused their injuries, the new ruling subjects all named defendants to liability for plaintiffs' DES related injuries, regardless of whether the defendants can prove that their drugs were not taken by plaintiffs' mothers. See id. at 506-07, 539 N.E.2d at 1074-75, 541 N.Y.S.2d at 946-47. The new rule imposes only several liability upon the defendants, and each defendant's share of liability is directly proportional to its relative market share ownership of the national DES market. See id. at 511-12, 539 N.E.2d at 1077-78, 541 N.Y.S.2d at 949-50. Under prior New York law, a plaintiff could recover jointly and severally from any or all defendant manufacturers based on an alternative liability or concerted action liability theory. See Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 580-82, 580 n.5, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). Under an alternative liability or concerted liability theory, however, a defendant manufacturer could be exculpated by proving that a plaintiff's mother ingested other DES drugs than that which the manufacturer had produced. See RESTATEMENT (SECOND) OF TORTS § 433B comment d (1977).

Hypothetically, if the Second Circuit had to decide a similar DES case based on New York law, before the Hymowitz ruling was handed down, it is submitted that the Second Circuit's foresight would have been askew as to the true direction of New York law. In Tidler v. Eli Lilly & Co., 851 F.2d 418 (D.C. Cir. 1988), the D.C. Circuit denied a plaintiff's request for certification of a question which was similar to the issue presented to the New York Court of Appeals in Hymowitz. See Tidler, 851 F.2d at 420. However, the federal court denied the plaintiff's motion and ultimately denied the plaintiff recovery by refusing to adopt the market share theory of liability. See id. at 421. It is submitted, therefore, that in the hypothetical scenario presented above, a federal court's refusal to certify such a question to the state court would be inappropriate and an encroachment upon a state's right to speak the law.

75 See, e.g., Tidler, 851 F.2d at 421 (plaintiffs "are unable to identify the firm that manufactured the DES"); Sindell v. Abbot Laboratories, 26 Cal. 3d 588, 595, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134 (Manufacturers do not maintain records of users; "pharmacists filled prescriptions from whatever brand of the drug happened to be in stock"); mother failed to keep records or remember brand), cert. denied, 449 U.S. 912 (1979); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 66-67, 289 N.W.2d 20, 22 (1979) (medical and pharmacological records destroyed), cert. denied, 469 U.S. 833 (1984); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 558, 420 A.2d 1305, 1308 (1980) ("generation has passed . . . no records have been maintained"); Bichler, 55 N.Y.2d at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779 ("DES was manufactured and prescribed generically"); patient, physician, pharmacist and drug company records disappeared; individuals' recollections obliterated by time).

76 See, e.g., Tidler, 851 F.2d at 421 (victims, their parents, physicians and pharmacists, unable to identify firm that manufactured DES to which they were exposed); Ferrigno, 175 N.J. Super. at 558, 420 A.2d at 1308 (plaintiffs and mothers unable to link the pills used to the manufacturing drug company); Bichler, 55 N.Y.2d at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779 (identity of drug company whose DES tablets were ingested can never accu-
While the injustice apparent here is causing states to change their tort theories, it has been suggested that it would be improper to invoke certification where the law is clear, regardless of whether the state would be moved to adopt an alternative theory of liability to avoid the injustice. This may prove to be an extreme approach, arising from the negative reception which abstention has received, coupled with a misguided loyalty to Erie. While Erie should command loyalty, one of its underlying principles was to avoid inconsistent outcomes. If a federal court believes that a state court would change its clear, unambiguous, existing law if presented with the facts, it is a dereliction of Erie’s intent, if not its precise language, not to submit the question to the state. For, if the federal court believes that the state might change its law if faced with the

---

77 See, e.g., Sindell, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. The Sindell Court reasoned as follows:

[Advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.]

78 See Tidler, 851 F.2d at 425. The Tidler court inferred that, like it or not, it must apply the law of the state as it finds it. Id. “It is decidedly not the business of the federal courts to alter or augment state law to meet the felt necessities of the case.…” Id. (emphasis added). “[F]ederal courts . . . are obligated to apply . . . existing state law.” Id. at 426 (emphasis added).

The reasoning advanced by the court is based upon the premise that a federal court sitting in diversity is not in a position to change or restructure state law, nor to apply that law in other than traditional directions. See id. at 424-26. “A federal court . . . is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court . . . .” Id. at 424 (quoting Day and Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975)). “Thus, we take the law of the appropriate jurisdiction as we find it; and we leave it undisturbed.” Id.; cf. Eli Lilly & Co. v. Home Ins. Co., 764 F.2d 876, 879 (D.C. Cir. 1985) (certification was proper to allow state opportunity to decide DES litigation because “massive DES litigation continues to loom as people who believe they are DES victims seek a measure of compensation and redress in courts of law”).

79 See Note, supra note 19, at 29. One reason for this confusion over proper use of certification is that the Winter Haven restrictions applicable to abstention have been “erroneous[ly]” applied to certification by a limited number of both federal courts and commentators. Id.; see Kaplan, supra note 21, at 433 (“this procedure can be used only in those cases which require the operation of abstention and not in all cases involving issues of uncertain state law”).

80 See supra note 10 and accompanying text (discussing policy of Erie).

81 See Brown, supra note 11, at 458. Chief Judge Brown stated: “It is entirely proper and appropriate that a federal court freely certify questions to any state court when the need arises and a state procedure is available.” Id.
facts before the federal court, but refuses to allow certification, the federal court is once again dictating state law as in *Swift v. Tyson*, and a return to forum shopping and inconsistent outcomes would be the logical result.

**Conclusion**

The New York Court of Appeals and the federal courts (or sister states' high courts) should be as free, open and candid with each other as possible to maximize the advantages to be gained through certification. Certification enables federal courts to obtain guidance when faced with the difficult questions necessitated by *Erie*. Certification further grants state courts respect and deference, returning to them the power to decide state law questions as guaranteed by Congress, thus enhancing federal-state comity. Considering the options, certification is an undisputed boon to justice as well as to litigants. Acting as a proverbial lifeboat in a turbulent legal sea, certification ensures that both federal and state courts, as well as the concerned parties, reach terra firma. Although new to the helm, New York's Court of Appeals is thus far handling the waves admirably.