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SECOND CIRCUIT REVIEW

Expert Analysis

Certified Questions To State Court

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The U.S. Court of Appeals for the Second Circuit certifies unsettled questions of state law to state courts more frequently than any other circuit court. See Judith S. Kaye & Kenneth I. Weissman, "Interactive Judicial Federalism: Certified Questions in New York," 69 Fordham L. Rev. 373, 397 (2000). This trend has continued in the past year, where the Second Circuit has requested certification of unsettled state law issues in at least four cases.

Purpose and Criteria

Certification is a mechanism by which the Second Circuit may request that a state's highest court answer an unsettled question of state law. Parties may request certification, but the Second Circuit has the power to seek certification sua sponte. Second Circuit Local Rule 27.2 provides that "[i]f state law permits, the court may certify a question of state law to that state's highest court." Section 500.27 of the Rules of Practice of the Court of Appeals expressly allow for certification of state law questions by the Second Circuit to the New York Court of Appeals.

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The Second Circuit's certification criteria are the absence of an authoritative state court decision, the importance of the issue to the state, and whether certification will resolve the litigation. See *Makinen* v. *City of New York*, 857 F.3d 491, 493 (2d Cir. 2017). Certification does not terminate or transfer the case—rather, it allows a state court to resolve a question of state law while the federal lawsuit is pending.

We discuss below recent cases from the Second Circuit where certification was requested.

Cases Requiring Certification

In the past year, the Second Circuit addressed requests to certify questions to state court in five cases: in the majority of these cases, the court requested certification sua sponte. Four of the cases were certified to the New York Court of Appeals, and one was certified to the Connecticut Supreme Court. Interestingly, Judge Debra Livingston and Judge Raymond Lohier issued the opinions in four of the five cases involving certification.

In *Corsair Special Situations Fund v. Pesiri*, 863 F.3d 176, 183 (2d Cir. 2017), the court certified questions concerning a Connecticut statute governing the fees and expenses of state officials who carried out the "servicing process" of particular writs. There, a Connecticut state marshal had served on the defendant a writ of execution to enforce a previous judgment. The defendant ignored the writ, and the state marshal filed a motion to intervene to recover statutory fees owed under a Connecticut statute, which arguably required that 15 percent of the judgment be paid to him.

The panel, consisting of Judge Robert Sack, Judge Reena Raggi, and Judge Pierre Leval, requested sua sponte

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that the Connecticut Supreme Court address whether a "levy of an execution," without more, satisfied the 15 percent commission required under the statute, and whether it mattered that the monies that were the subject of the writ were procured only after the judgment creditor, not the marshal, pursued further enforcement proceedings in the courts.

In a thoughtful concurrence, Judge Leval discussed the costs and benefits of certification. Specifically, Leval pointed out that certification has advantages, such as providing parties an opportunity to solicit an answer from the state's highest court and benefiting the public by clarifying the law of the state. But Leval also pointed out that certification has significant potential disadvantages, such as increasing the time and costs that parties incur in litigation by requiring at least two additional rounds of appellate review, delaying the resolution of the case, and defeating a litigant's constitutional right to have its case adjudicated by the federal court rather than a state court in diversity cases. Leval deemed the detriments less worrisome in this case because neither party objected to certification.

In *Makinen v. City of New York*, 857 F.3d at 493, plaintiffs brought suit under the New York City Human Rights Law (NYCHRL) and alleged discrimination based on a mistaken perception that they were alcoholics. The district court held that individuals regarded as untreated alcoholics may state a claim under the NYCHRL because analogous claims are available under both the New York State Human Rights Law and the Americans with Disabilities Act. Defendants requested certification on appeal. The Second Circuit, in an opinion written by Judge Lohier, and joined by Judge Sack and Judge Livingston, agreed to certify to New York Court of Appeals whether sections of the New York City Administrative Code precluded a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism.

In *E.J. Brooks Company v. Cambridge Security Seals*, 858 F.3d 744 (2d Cir. 2017), an employer alleged misappropriation of trade secrets, unfair competition, and unjust enrichment claims against three former employees and a competitor. The Second Circuit, in an opinion by Judge Lohier, joined by Judge Amalya Kearse and Judge Christopher Droney, certified two damages-related questions: whether a plaintiff asserting the above claims could recover damages that were measured by the costs the defendant avoided due to its unlawful activity, and, if the answer was yes, whether prejudgment interest was mandatory. The parties did not request certification, though at oral argument acknowledged that New York courts had never addressed these issues.

In *Expressions Hair Design v. Schneiderman*, 877 F.3d 99 (2d Cir. 2017), the Second Circuit requested certification after the Supreme Court vacated and remanded a prior Second Circuit opinion. The prior Second Circuit opinion held that a New York statute prohibiting surcharge on the use of credit cards in lieu of cash did not violate the First Amendment because it was regulated conduct, and not protected speech. The Supreme Court found that because the statute operated by regulating the way sellers communicated their prices, rather than the prices themselves, the New York law must be analyzed as a speech regulation under the First Amendment. The court, in an opinion by Judge Livingston, joined by Judge Richard Wesley and Judge Susan Carney, certified the question to the New York Court of Appeals to determine whether a merchant complies with the statute so long as the merchant posts the total dollars-and-cents price charged to credit-card users. Although neither the Supreme Court nor the parties requested certification, Justice Breyer's and Justice Sotomayor's concurrences in the judgment suggested certification may be helpful.

The only reported case during the next year in which the Second Circuit declined to issue certification was *MacNeil v. Berryhill*, 869 F.3d 109 (2d Cir. 2017). There, the plaintiff had conceived children using in vitro fertilization from the stored sperm of her deceased husband and then sought social security benefits for her children based on the wage earnings of their deceased father. The lower court held that she was not entitled to social security benefits because her children were conceived after her husband's death and thus were not entitled to any inheritance under New York's Estates, Powers and Trusts Law. Plaintiff urged that the Second Circuit certify to New York Court of Appeals the question whether posthumously conceived children may inherit in intestacy, and the defendant did not oppose certification. The Second Circuit, in an opinion written by Judge Livingston and joined by Judge John Walker, with Judge Gerald Lynch concurring, denied the request on the ground that New York law on the issue was clear, and that the question was not one of sufficient importance to state public policy.

As these cases demonstrate, the Second Circuit has not hesitated to certify questions to state courts, typically requesting certification sua sponte.