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 branch[6] 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 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

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[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 proceedings 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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

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[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-obscure 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).

violated the due process clause.[19] The Supreme Court again granted *certiorari*[20] and reversed the Fifth Circuit, concluding that Florida had sufficient contact with the contracting parties to justify application of its statute and render the due process claim without merit.[21]

The Evolution of the Certification Process

As *Clay* illustrates, certification "permits a federal court to obtain an authoritative ruling on unsettled questions of state law without recourse to prediction and without abdicating its obligation to provide a federal forum to parties who have properly invoked federal jurisdiction."[22] "[Certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[23]

Certification, while used by the Supreme Court on numerous subsequent occasions, does have its limitations, as recognized by the Court in *City of Houston, Texas* v. *Hill*.[24] In that case, the Court rejected an attempt by the City of Houston to estop the federal courts from interpreting a city ordinance that the Texas courts had never construed. Specifically, the Court found that the ordinance was unambiguous and to wait for the Texas courts to consider the provision would constitute an unnecessary waste of judicial resources[25]:

> The possibility of certification does not change our analysis. The certification procedure is useful in reducing the substantial burdens of cost and delay that abstention places on litigants. Where there is an uncertain question of state law that would affect the resolution of the federal claim, and where delay and expense are the chief drawbacks to abstention, the availability of certification becomes an important factor in deciding whether to abstain. Nevertheless, even where we have recognized the importance of certification in deciding whether to abstain, we have been careful to note that the availability of certification is not in itself sufficient to render abstention appropriate. It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim. As we have demonstrated, this ordinance is neither ambiguous nor obviously susceptible of a limiting construction. A federal court may not properly ask a state court if it would care in effect to rewrite a statute. We therefore see no need in this case to abstain pending certification.[26]

Additionally, by necessary implication, the Court also recognized that certification is possible only where the state court has adopted a rule allowing it.

In 1967, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Certification of Questions of Law Act (UCQLA) in an attempt both to recommend to states adoption of certification provisions and to ensure that such enactments would be uniform throughout the land, easing the transition for federal courts. The UCQLA Commissioners traced the genesis of certification not to the 1945 Florida statute, but rather to the British Law Ascertainment Act of 1859 and the Foreign Law Ascertainment Act of 1861, which provided for certification of questions of law within the empire and to foreign nations, respectively.[27]

In 1995, the drafting committee revised the UCQLA, which had been fashioned after F.S.A. §25.031, to reflect that while certification was widely used, it was not applied uniformly and was "not utilized as frequently as it could and should be."[28] The new UCQLA amended the original in four significant ways: (1) it expanded the list of courts that could seek certification to include tribal courts and Canadian and Mexican courts[29]; (2) it codified

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[19] 319 F.2d 505 (5th Cir. 1963).

[20] *Clay* v. *Sun Insurance Office Limited*, 375 U.S. 929 (1963).

[21] 377 U.S. 179 (1964).

[22] 32 Am. Jur. 2d Federal Courts §1341 (*citing Fiat Motors of North America, Inc.* v. *Wilmington*, 619 F.Supp. 29 (D.C. Del. 1985)).

[23] *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974) (internal footnote omitted).

[24] 482 U.S. 451 (1987).

[25] *Id.* at 468. *See also* Goldschmidt, *supra* note 16 at 8-9.

[26] *City of Houston*, 482 U.S. at 471 (internal quotations and citations omitted).

[27] Goldschmidt, *supra* note 16 at 101 (*citing* 9 Halsbury's Statutes of England 58206 (2d ed. date unknown)).

[28] National Conference of Commissioners on *Uniform State Laws, Uniform Certification of Questions of Law Act/Rule* 3 (1995) (approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws August 4, 1995) (approved by the American Bar Association February 5, 1996) (hereinafter 1995 UCQLA).

[29] Id. at §2. *See* Goldschmidt, *supra* note 16 at 102 (providing a general discussion of the differences between the 1967 UCQLA and the 1995 UCQLA).

the limitations on the doctrine expressed in City of Houston[30]; (3) it permitted the "receiving court" to "reformulate" the certified question[31]; and (4) it required the "receiving court" to accept or reject certification with all deliberate speed, notify the requesting court of its decision, and rule on certified questions "as soon as practicable."[32]

A Survey of Certification Provisions Elsewhere

As of 1995, forty-three states, Puerto Rico, and the District of Columbia had adopted certification rules that were mostly based, at least in part, on the Florida rule and the 1967 UCQLA.[33] Prior to 1990, Missouri allowed certification by statute,[34] but by order dated July 13th of that year, the Supreme Court of

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[30] 1995 UCQLA at §3.

[31] *Id.* at §4. The drafters explained:

Requiring a question to be answered precisely as it is certified imposes a counterproductive rigidity that could decrease the utility of the answer received. Permitting the receiving court to amend the certified question freely may also adversely affect the utility of the answer and result in the issuance of an advisory opinion. The term "reformulate" is intended to connote a retention of the specific terms and concepts of the question while allowing some flexibility in restating the question in light of the justiciable controversy pending before the certifying court.

Id. at 8, Comment to §4.

[32] *Id.* at §7. The Comment to Section 7 provides as follows:

This section is new and is intended to promote communication between the receiving and certifying court and to urge the receiving court to afford priority to answering certified questions of law consistent with notions of comity and fairness. The receiving court, may, but is not obligated to, advise the certifying court of the reasons for a rejection.

[33] **Alabama** (Ala. R. App. P. 18) (expressly based on Florida Appellate Rule 4.61).

Alaska (Alaska R. App. P. 407).

Arizona (Ariz. Rev. Stat. §12-1861) (expressly based on §1 of the 1967 UCQLA).

Colorado (Colo. Appellate Rule 21.1) (expressly based on the 1967 UCQLA).

Connecticut (Conn. Gen. Stat. §51-199b). Conn. Gen. Stat. §51-199a, which had been based on the 1967 UCQLA, was replaced in 1999 by §51-199b, which tracked the revised 1995 UCQLA.

Delaware (Del. Supreme Court Rule 41).

District of Columbia (D.C. Code §11-723) (expressly based on the 1967 UCQLA).

Florida (discussed *supra*, notes 14-21).

Georgia (Ga. Code Ann. §15-2-9) (expressly based on the 1967 UCQLA).

Hawaii (Hawaii R. App. P. 13).

Idaho (Idaho Appellate Rule 12.2).

Illinois (Ill. Supreme Court Rule 20).

Indiana (Ind. Code §33-2-4-1) (expressly based on the 1967 UCQLA).

Iowa (Iowa Code §§684A.1 - 684A.11) (expressly made similar to the 1967 UCQLA).

Kansas (Kan. Stat. §§60-3201 - 60-3212).

Kentucky (Ky. R. Civ. P. 76.37).

Louisiana (La. Rev. Stat. §13:72.1, La. Supreme Court Rule XII) (expressly based on the 1967 UCQLA).

Maine (Maine R. App. P. 25). Maine R. Civ. P. 76B was recodified and amended in 2001 as Maine R. App. P. 25.

Maryland (Md. Code, Courts & Judicial Proceedings §§12-601 - 12-609). The Maryland rule appears to have been recodified in 1999, but it is unclear from where the statutory authority for certification emanated prior to that date. We do know, however, that Maryland accepted certified questions as early as 1978. *See Elkins* v. *Moreno*, 435 U.S. 647 (1978), *certified question answered*, 397 A.2d 1009 (Md. 1979).

Massachusetts (Mass. Supreme Judicial Court Rule 1:03) (*cited* to as the "Uniform Certification of Questions of Law Rule).

Michigan (Michigan Rules of Court 7.305) (originally adopted in 1963, prior to the promulgation of the 1967 UCQLA).

Minnesota (Minn. Stat. §480.065). Minn. Stat. §480.061, which had been based on the 1967 UCQLA, was replaced in 1999 by Minn. Stat. §480.065, which tracked the revised 1995 UCQLA).

Mississippi (Miss. R. App. P. 20). Miss. Supreme Court Rule 46, adopted in 1980, was replaced effective 1995 with Miss. R. App. P. 20. *See Government Employees Insurance Co.* v. *Brown*, 446 So.2d 1002 (Miss. 1984).

Montana (Mont. R. App. P. 44).

Nebraska (Neb. Rev. Stat. §§24-219 - 24-225).

Nevada (Nev. R. App. P. 5) (available at http://www.leg.state.nv.us/CourtRules/NRAP.html, last visited January 5, 2004).

New Hampshire (N.H. Supreme Court Rule 34).

New Mexico (N.M. Stat. Ann. §§39-7-1 - 39-7-13, N.M. R. App. P. 12-607). New Mexico's certification rules were amended in 1997, and are now based on the 1995 UCQLA. Prior to 1997, N.M. Stat. Ann §34-2-8, adopted in 1978, in conjunction with a prior version of N.M. R. App. P. 12-607, governed certification. According to the National Conference of Commissioners on Uniform State Laws, the prior enactment adopted the 1967 UCQLA.

New York (N.Y. Rules of Court 500.17).

North Dakota (N.D. R. App. P. 47) (expressly based on the 1967 UCQLA).

Ohio (Ohio Supreme Court Practice Rule XVIII).

Oklahoma (Okla. Stat. Ann. Title 20 §§1601, 1602, 1604, 1606, 1608, 1609 - 1611). Oklahoma's certification rules were amended in 1997, and are now based on the 1995 UCQLA. Prior to 1997, Okla. Stat. Ann. Title 20 §§1601 - 1611, adopted in 1973 and based on the 1967 UCQLA, governed certification.

Oregon (Or. Rev. Stat. §§28.200 - 28.255, Or. R. App. P. 12.20) (expressly based on the 1967 UCQLA).

Puerto Rico (P.R. Supreme Court Rule 27).

Rhode Island (Rhode Island Rules of Court,

Missouri determined that the Missouri Constitution did not permit Missouri courts to accept certified questions from federal courts.[35] However, in 2000, the state General Assembly reinstituted certification.[36]

Chief Judge Dolores K. Sloviter of the U.S. Court of Appeals for the Third Circuit, in a law review article published in 1990, cogently recounted one of the primary reasons for certification: that the federal courts have often guessed incorrectly on issues of state law that could have been resolved in short stead by state judges, more specifically versed in the law of their specific jurisdiction.[37] Additionally, numerous commentators have noted that certification of a state law question to the state courts in the first instance ensures that the determination rendered by the federal court does not become the authority on the state law issue.[38]

With one exception, all state supreme courts that accept these questions also allow certification from the Supreme Court of the United States and all federal circuit courts. Illinois will not accept certified questions from federal appeals courts other than the Seventh Circuit.[39] Thirty-six jurisdictions, including Puerto Rico, allow certification from any federal district court.[40] Tennessee accepts certified questions from the district courts situate within Tennessee, but not from other district courts.[41]

Twenty-eight of these jurisdictions also accept certified questions from various other courts. For instance, California, Connecticut, Delaware, the District of Columbia, Kentucky, Massachusetts, New York, Virginia, and Wisconsin will entertain certification requests

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Supreme Court Rules of Appellate Procedure, Art. I, Rule 6).

South Carolina (S.C. Appellate Court Rule 228).

South Dakota (S.D. Laws §§15-24A-1 - 15-24A-11) (expressly based on the 1967 UCQLA).

Tennessee (Tenn. Supreme Court Rule 23).

Texas (Tex. R. App. P. 58.1 - 58.10). In 2003, former Tex. R. App. P. 114 and 214, dealing with certification to the Texas Supreme Court and the Texas Court of Criminal Appeals, respectively, were joined and reclassified as Tex. R. App. P. 58.1 - 58.10.

Utah (Utah R. App. P. 41).

Virginia (Va. Supreme Court Rule 5:42).

Washington (Wash. Rev. Code §§2.60.010 - 2.60.900, Wash. Appellate Procedure Rule 16.16) (originally adopted in 1965, prior to the promulgation of the 1967 UCQLA).

West Virginia (W.Va. Code §§51-1A-1 - 51-1A-13). In 1996, the West Virginia statute, originally adopted in 1976, was amended to adopt the 1995 UCQLA. The statute does not clarify whether the original version was based on the 1967 UCQLA.

Wisconsin (Wis. Stat. Ann. §§821.01 - 821.12) (expressly based on the 1967 UCQLA).

Wyoming (Wyo. Stat. Ann. §1-13-106).

[34] V.A.M.S. §477.004 (West 1989).

[35] *Grantham* v. *Missouri Department of Corrections*, ___ S.W.2d ___, 1990 WL 602159 (Mo. 1990) (per curiam order).

[36] The General Assembly noted the following regarding the contrary decision of the Supreme Court of Missouri:

> The Missouri Supreme Court order of July 13, 1990, provides that since the Supreme Court's general jurisdiction is both established and limited by the Missouri Constitution, Art. V, §§3 and 4, which provisions do not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts, the Court must decline to answer certified questions from the United States District Court for the Western District of Missouri in the case of *Grantham* v. *Missouri Department of Corrections*, notwithstanding this section.

V.A.M.S. §477.004 (West 2002) (Update) (internal citation modified). Accordingly, the General Assembly expressly limited the holding of *Grantham* to that particular case, although the Court engaged in no such limitation. However, the statute has remained in force since 2000.

[37] Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1679 - 1680 (1990). *See also* Stella L. Smetanka, To Predict or to Certify Unresolved Questions of State Law: A Proposal for Federal Court Certification to the Pennsylvania Supreme Court, 68 Temp. L. Rev. 725, 727 (1995).

[38] *See, generally*, Sloviter, *supra* note 37 at 1681 - 1682:

> Indeed, some evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-Erie levels. Perhaps the most important effect of diversity is its impact on state law. The federal judge's prediction of state law in the absence of a dispositive holding of the state supreme court often verges on the lawmaking function of that state court. As Justice Benjamin Cardozo observed, even though the common law judge legislates only when that judge fills the open spaces in the law within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom that stamps its action as creative. The law that is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.

(internal footnotes and quotations omitted).

[39] Ill. Supreme Court Rule 20(a). Illinois is located within the confines of the Seventh Circuit.

[40] Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

[41] Tenn. Supreme Court Rule 23(1).