MEMORANDUM

TO: Panel Members
FROM: Myron T. Steele, Chief Justice, Supreme Court of Delaware
RE: 2009 Third Circuit Judicial Conference – Certified Questions

This memorandum will address the process by which we accept certified questions and will discuss several examples from the United States Court of Appeals for the Third Circuit, the District Courts within the Third Circuit, and the SEC.

Our State Constitution permits various state and federal courts and the SEC to certify questions of law to our Court.[1] The constitutional provision provides:

> (8) To hear and determine questions of law certified to it by other Delaware courts, the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, the United States Securities and Exchange Commission, or the highest appellate court of any other state, where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it. The Supreme Court may, by rules, define generally the conditions under which questions may be certified to it and prescribe methods of certification.[2]

Therefore it is within our discretion to accept or deny a certified question. The constitution requires us to find that there are *important and urgent reasons* for an immediate determination of such questions by this Court. We have previously declined to answer questions certified by the trial courts of Delaware because "it is

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1 DEL. CONST. art. IV, § 11, cl. 8.

2 *Id.*

preferable as a matter of the orderly administration of justice for the trial courts of this State to decide in the first instance all questions of law, including new and challenging legal questions, so that this Court will have the benefit of the reasoning and analysis of the trial court."[3] We may be more inclined to accept and answer a certified question, however, where the highest appellate court of any other state or a federal district or circuit court requests us to answer a novel question of Delaware law because we would otherwise not be able to exercise judicial review after the particular court's decision. But we are not bound by another court's decision on a novel issue of Delaware law if we decline to accept, or decline to answer, another court's certified question.

Delaware Supreme Court Rule 41 also addresses which bodies may certify questions, the requirements for accepting a certified question, and the procedures for certification.[4] First, the rule sets out the entities that may certify a question of law to this Court. The rule permits the same entities to certify questions of law that are allowed under our constitution. In fact, we have refused to answer questions from individual parties that attempt to certify questions.[5] In *Brooks-McCollum v. Shareef*, we reiterated that under Rule 41 we only accept questions from state and

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3 *State Farm Mut. Auto. Ins. Co. v. Dann*, 953 A.2d 127, 127 (Del. 2001).

4 DEL. SUPR. CT. R. 41.

5 *Brooks-McCollum v. Shareef*, 871 A.2d 1127 (Del. 2004) (Table).

federal courts and that individual parties have no right to request certification under Rule 41.[6]

Second, Rule 41 provides the requirements for accepting certification. As mentioned, important and urgent reasons for an immediate determination by our Court must exist. We will not accept certification if the facts material to the issue certified are in dispute.[7] Without limiting the Court's discretion, the rule also provides three reasons why we may accept a question: (1) original question of law, which is one of first instance in this State; (2) conflicting decisions, which occurs when decisions of the trial courts are conflicting upon the question of law; and (3) unsettled question, which is a question of law that relates to the constitutionality, construction, or application of a statute which has not been, but should be, settled by this Court.[8]

Finally, Rule 41 sets out a detailed procedure for certification. First, a judge of the certifying court or agency must sign and file a certification on the form set forth in Form K of our official forms. Second, the clerk of the certifying court must file with our clerk, a petition, any response, and a stipulation of facts. Third, the clerk of our Court will docket the proceeding and distribute to the Justices a

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6 *Id.*

7 DEL. SUPR. CT. R. 41(b).

8 *Id.*

copy of the certification and any accompanying papers. Fourth, the Justices will determine whether to accept or refuse the certification. If accepted, the certification as filed constitutes the record. And finally, briefs will be filed in the order recommended by the certifying court, unless we designate a different order, and, if necessary, oral arguments will be scheduled. Once accepted "[t]he scope of the issues that may be considered . . . is limited by the procedural posture of the case."[9]

In the past, we have accepted and answered certified questions from many jurisdictions including the United States Court of Appeals for the Third Circuit, the United States District Courts within the Third Circuit, and the Securities and Exchange Commission. The overwhelming majority of certified questions, however, come from our own State trial courts.[10]

United States Court of Appeals for the Third Circuit

In 1998, we accepted certification from the Third Circuit in *Kerns v. Dukes*.[11] The Third Circuit requested that we make a determination on whether the trial courts of Delaware had jurisdiction over the plaintiffs' claims or whether the

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[9] *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993).

[10] Our opinions on questions certified by our own State trial courts will not be discussed in this memorandum.

[11] *Kerns v. Dukes*, 707 A.2d 363 (Del. 1998).

plaintiffs could pursue their claims in federal court. The plaintiffs filed suit against the members and officials of the Sussex County Council and the officials of DNREC in federal district court in Delaware claiming that they were being compelled to abandon their reliance on septic systems to "join and . . . pay the costs of, and fees for, the expanded sewer system" in violation of their procedural and substantive due process rights and several federal statutes.[12] The District Court dismissed the claims based on lack of jurisdiction and the plaintiffs appealed. The Third Circuit, before rendering a decision, asked us to consider, in light of what it saw as "a potential tension" between Superior Court and Court of Chancery decisions, whether the courts of Delaware could provide plaintiffs with "a plain, speedy and efficient" remedy.[13]

We determined that the courts of Delaware, specifically the Court of Chancery, could provide an ample remedy to the plaintiffs. "The jurisdiction of the courts of Delaware encompasses the Property Owners' § 1983 claims as brought, and such courts may provide relief equivalent to that available in federal court, should the claims be sustained" and the plaintiffs may recover under their

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12 *Id.* at 366.

13 *Id.* at 367.

Clean Water Act claim the relief equivalent to that available in federal court if they prevail.[14]

In 1997, the Third Circuit certified four questions in *Penn Mutual Life Insurance Co. v. Oglesby*[15] because the legal issues presented were of first impression under Delaware law. The four issues that the Third Circuit certified concerned the effect of an undisclosed pre-existing condition on an insured's disability income insurance policy.[16] Here, we seemingly approached the case just as we would have had it come before us on appeal. We began with the general principles of interpreting insurance contracts and discussed the policy of construing the insurance contract against its drafter.[17] We then examined the contract language itself to answer the certified questions. We also considered a split in authority over whether an insurance company could use the "first manifest doctrine" as a defense to liability based on when an injury first manifests. We agreed with the District Court's opinion, which concluded "that 'the Supreme Court of Delaware would not relieve Penn Mutual of its bad bargain by allowing it to use a defense of 'first manifest' at trial.'"[18]

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14 *Id.* at 370.

15 *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146 (Del. 1997).

16 *Id.* at 1148-49.

17 *Id.* at 1149-50.

18 *Id.*

The Third Circuit certified two more questions in *Konstantopoulos v. Westvaco Corp.*[19] in 1996. We answered the question presented—whether the Delaware Workers' Compensation Act prevents an employee from filing a tort claim against her employer for alleged sexual harassment that occurred during the course of employment—in the negative.[20] The Court determined that under the Act "an employee's recovery against an employer for personal injuries sustained during the course of employment and arising out of employment is limited to those remedies provided under the Delaware Workers' Compensation Act."[21] Our answer rendered the second half of the first question and the second question moot; therefore, we declined to answer those questions.

The three cases examined demonstrate two areas where we have accepted certification: jurisdiction issues and construction of Delaware statutes. In all three cases, we approached the issue just as we would have had the case been before us on appeal. Our answers to the certified questions, however, were constrained to the specific factual and procedural nature of the case at bar.

District Courts Within the Third Circuit

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19 *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936 (Del. 1996).

20 *Id.* at 937.

21 *Id.* at 940.

In *Rales v. Blasband*,[22] we accepted certification from the United States District Court for the District of Delaware in 1993. In *Rales*, we considered whether the stockholder-plaintiff, in accordance with the substantive law of Delaware, alleged facts to show that demand is excused on a board of directors in a double derivative action.[23] The stockholder-plaintiff owned stock in a parent corporation and challenged a decision of the subsidiary's board. To answer the certified question, the Court first considered what were the applicable and appropriate legal principles, including the applicability of the *Aronson* test.[24] The Court concluded that "the *Aronson* test does not apply in the context of this double derivative suit because the Board was not involved in the challenged transaction."[25] The appropriate test here was whether the stockholder-plaintiff "raise[ed] a reasonable doubt regarding the ability of a majority of the Board to exercise properly its business judgment in a decision on a demand had one been made at the time this action was filed."[26] The Court rejected the defendants' argument that would require a stockholder-plaintiff to always make demand or demonstrate a

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22 *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).

23 *Id.* at 932.

24 *Id.*

25 *Id.* at 937. *See also id.* at 934 ("A plaintiff in a double derivative suit is still required to satisfy the *Aronson* test in order to establish that demand on the subsidiary's board is futile.").

26 *Rales*, 634 A.2d at 937.

reasonable probability of success on the merits.[27] This case provides an example of how a certified question opinion may clarify a particular area of law and provide guidance for future disputes—just as any other opinion issued following appeal.[28]

In 1985, the United States District Court for the District of Delaware certified three questions regarding a Delaware statute—the Municipal Tort Claims Act—in *Fiat Motors of North America, Inc. v. Mayor and Council of the City of Wilmington*.[29] In *Fiat Motors*, Fiat attempted to bring a negligence claim against the City of Wilmington. The District Court certified the questions because of the "unsettled state of Delaware decisional law as to municipal immunity and in view of the broad impact which a ruling defining the scope of municipal immunity would have in Delaware."[30] We concluded: (1) the Tort Act renders a municipality immune from liability for its negligent acts or omissions; (2) the Tort Act prohibits a municipality from waiving its statutory immunity; and (3) a municipality's purchase of insurance does not waive its statutory immunity.[31]

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[27] *Id.* at 934.

[28] On Westlaw, *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), has over 2,200 citing references.

[29] *Fiat Motors of N. Am., Inc. v. Mayor and Council of the City of Wilmington*, 498 A.2d 1062 (Del. 1985).

[30] *Id.* at 1063.

[31] *Id.* at 1063-64.

Here, again, our Court surveyed the Delaware case law and examined the relevant statutory provisions in formulating its answers to the certified questions.

We have refused to answer questions that a District Court certified. For example, we refused to answer certified questions where the certifying court had previously, in another case, ruled upon "basically the same questions of law which were decided" in the previous case.[32] Thus, the question does not comply with Rule 41. Also, in another case, we refused certification where a statutory amendment after the case was initiated rendered the legal issue moot.

Securities and Exchange Commission

The Delaware Constitution and Rule 41 were amended recently to allow certified questions from the Securities and Exchange Commission. In 2008, this process was first used in *CA, Inc. v. AFSCME Employees Pension Plan*.[33]

The SEC certified two questions: (1) whether the AFSCME proposed stockholder bylaw, which would require the corporation to reimburse a stockholder for reasonable expenses incurred in nominating a candidate for the board so long as certain requirements were met, is a proper subject for stockholder action as a matter of Delaware law; and (2) would AFSCME's proposal, if adopted as

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[32] *Nemours Found. V. Manganaro Corp.*, 565 A.2d 280 (Del. 1989) (Table).

[33] *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008).

presented, would cause the corporation, CA, Inc., to violate any Delaware law to which it is subject.[34] We answered both questions in the affirmative.

This case provides a good example of an important distinction between a certified question opinion and an opinion rendered on appeal. Our answer to the first question followed the same path that it likely would have had it been raised on appeal. We examined the relevant statutory provisions and case law to determine that the stockholder bylaw proposal was a proper action for stockholders, even without concurrence of the board.[35] Our answer to the second question, however, illustrates the distinction. We recognized that the certified question requested a determination in the abstract, and not a determination under a specific factual setting.[36] Therefore, we were required to "consider any possible circumstance under which a board of directors might be required to act."[37] In doing so, we determined that, at least in one hypothetical case, "the board of directors would breach their fiduciary duties if they complied with the Bylaw"; therefore we concluded that the bylaw, as drafted, would violate Delaware law.[38] The bylaw, as drafted, violated a Delaware prohibition on "contractual arrangements that commit

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34 *Id.* at 231.

35 *Id.* at 233-37.

36 *Id.* at 238.

37 *CA, Inc.*, 953 A.2d at 238.

38 *Id.*

the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and the shareholders."[39] This scenario demonstrates the breadth of a certified question, as opposed to a limited specific factual record that is presented on appeal.

Certified questions permit our Court to provide definitive answers, primarily, on issues of first impression under Delaware law. While we prefer to review a case with the full benefit of another court's reasoning before us, certified questions allow the Court to accept questions from foreign forums where we would otherwise not be able to review the issue on appeal. This process provides an avenue for our Court to decide issues of Delaware law. We approach these cases just as we approach cases on appeal. However, we are cognizant of the abstract nature of answering certified questions. Our answers are also limited by the factual and procedural record presented as well as the guidelines set forth in Rule 41 for accepting and answering certified questions.

[39] *Id.*

Table 1: Delaware Supreme Court Certified Questions
From Federal Courts Within the Third Circuit, and the SEC*

Certifying Court:	**Cases Accepted:**	**Answered/Refused:**
United States Court of Appeals for the Third Circuit	3	3: 707 A.2d 363 (1998) 695 A.2d 1146 (1997) 690 A.2d 936 (1996)
United States District Court for the District of Delaware	12	10: 787 A.2d 71 (2001) 706 A.2d 499 (1998) 688 A.2d 894 (1997) 669 A.2d 73 (1995) 647 A.2d 1098 (1994) 634 A.2d 927 (1993) 619 A.2d 911 (1992) 602 A.2d 65 (1991) 535 A.2d 1346 (1988) 498 A.2d 1062 (1985) 2 *Refused*: 577 A.2d 754 (1990) 565 A.2d 280 (1989)
United States District Court for the District of New Jersey	0	0:
United States District Court for the [Eastern, Middle, and Western] District of Pennsylvania	1 (E.D. Pa)	1: 677 A.2d 29 (1996)
Securities and Exchange Commission	1	1: 953 A.2d 227 (2008)

* We have also accepted and answered certified questions from other federal courts. *See Duncan v. Theratx, Inc.*, 775 A.2d 1019 (Del. 2001) (Eleventh Circuit); *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37 (Del. 1996) (Seventh Circuit); *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464 (Del. 1995) (Second Circuit); *Farahpour v. DCX, Inc.*, 635 A.2d 894 (Del. 1994) (D.C. Circuit); *E.I. DuPont de Nemours & Co. v. Fl. Evergreen Foliage*, 744 A.2d 457 (Del. 1999) (District Court for the Southern District of Florida). Recently, we accepted certification from the United States District Court for the Southern District of New York. *See A.W. Fin. Serv., S.A. v. Empire Res., Inc.*, No. 55, 2009 (Del.).