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THESIS

Certification of Legal Questions to the Utah Supreme Court

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Contents

| | |
|---|-----|
| Abstract..... | iii |
| Acknowledgments..... | iv |
| Overview of the Certification Process | v |
| Introduction..... | 1 |
| Legal Context..... | 3 |
| The Development of Certification in the United States..... | 3 |
| Legal Precedent and Alternatives | 3 |
| Florida First In Certification—and U.S. Supreme Court Commentary | 5 |
| Uniform Certification of Questions of Law Act | 6 |
| Debate on Value of Certification..... | 10 |
| Development of Utah’s Certification Process..... | 14 |
| 1975 Certification Rule..... | 15 |
| Comparison with Colorado Rule of Appellate Procedure 21.1..... | 16 |
| Comparison with Uniform Certification of Questions of Law Act (1967)..... | 16 |
| <i>Holden v. NL Industries</i> Invalidates the 1975 Certification Rule | 17 |
| 1984 Judicial Article of Utah Constitution | 19 |
| Effectuating the Constitutional Revision..... | 20 |
| Utah Code Provision | 20 |
| Utah Rule of Appellate Procedure 41 | 20 |
| Cases Bridging the Certification Processes | 28 |
| Early Certification Cases Under the New Rule | 29 |
| Statistical Overview | 30 |
| Certification by the Tenth Circuit - Summary Statistics..... | 30 |
| Certification in the District and Bankruptcy Courts - Summary Statistics..... | 32 |
| Certification of Questions of Utah Law from Federal Courts | 34 |
| Federal Court Certification Processes..... | 34 |
| Federal Court Considerations for Certifying Questions of Utah Law | 35 |
| Arguments and Authorities Against Certification..... | 36 |
| Criteria for Certification | 40 |
| Motion to Certify Denied..... | 41 |
| Remarkable Cases..... | 45 |
| Significant Legal Issues | 51 |
| Certifications by Article I Judges..... | 53 |
| The Role of Justice and Judge Parrish | 54 |
| Impact of Certification on Cases | 58 |
| Certification Motion Causes Cases to Settle..... | 58 |
| Cases Settle While Questions Pend in Utah Supreme Court | 59 |
| Answer to Certified Questions Causes Cases to Settle..... | 60 |
| Certification Answer Dispositive for Motion in Federal Case..... | 62 |
| Certified Answer Irrelevant..... | 62 |
| Deference for Answers to Certified Questions | 63 |
| Utah Supreme Court Responses to Certification Orders | 63 |
| Utah Supreme Court Standards When Responding to Certified Questions..... | 63 |
| Is Certification Worth It? | 67 |

| | |
|---|-----|
| Costs and Benefits for the Parties | 67 |
| Costs and Benefits for the Federal and State Systems | 68 |
| Summary and Reconciliation of Costs and Benefits | 69 |
| Recommendations for Improvement of the Utah Certification Process | 69 |
| Changes in Federal Practice..... | 70 |
| Recommendation of a Local Federal Rule | 70 |
| Changes in State Rule and Practice | 77 |
| Conclusions..... | 80 |
| Appendices..... | 82 |
| Appendix - Recommendations for Further Study..... | 82 |
| More detailed study within the scope of the thesis | 82 |
| Tenth Circuit involvement in certification | 83 |
| Study of inter-institutional dynamics of certification | 83 |
| Other Topics | 83 |
| Appendix—Bibliography..... | 84 |
| Appendix—Uniform Acts..... | 85 |
| Appendix—List of All Cases Considering Certification | 89 |
| Appendix—Questions Certified to the Utah Supreme Court | 94 |
| Appendix—Methods of Gathering Utah Cases Related to Certification..... | 129 |

Abstract

For 30 years, federal courts have certified questions of state law to the Utah Supreme Court. This thesis examines the history and utility of the process and recommends changes to the process in the federal district court and in the Utah Supreme Court.

The current focus of federal judges in certifying questions is on utility for the case before the court. But certification of questions from a federal court to a state court is an expression of federalism—a humble acknowledgment by a federal authority which is often regarded as supreme that the state is the proper and best authority to declare its own law. Certification of questions is a rare instance of direct communication between state and federal courts, and a chance for both systems to cooperate in resolution of a single case, in their respective roles.

Certification of legal questions from federal courts to state courts has emerged in the last 75 years. Similar purposes were accomplished previously in American law by very cumbersome procedures, and antecedents existed in English law. From Florida's adoption of the first statutory certification procedure in 1945 through a 1960 U.S. Supreme Court endorsement of certification and promulgation of the Uniform Certification of Questions of Law Act, all states except North Carolina have adopted a certification procedure.

The Utah procedure and practice began in 1975 with a rule later found to violate the Utah Constitution. But in 1984, a constitutional authorization paved the way for a valid process which has been used regularly, and most frequently in the last three years since a justice of the Utah Supreme Court became a district judge in the District of Utah.

Thirty years of experience with certification in Utah federal and state courts is thoroughly examined in this thesis. Case histories and court practices demonstrate the usefulness of certification in Utah. But the thesis also suggests changes to Utah certification, by adoption of a new rule in the U.S. District Court for the District of Utah; by changes to the applicable Utah Rule of Appellate Procedure; and by changed practices of judges and lawyers. This thesis can serve as the basis for reflection, discussion and improvement between participants in the process of certification.

This thesis also suggests other areas of study for the future, some related to Utah's experience and other more general topics.

Utah's foundation for certification of questions from the federal court to the Utah Supreme Court has been laid. And now the process can be refined and improved for the future.

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My wife's patience with my month-long absences to Duke Law School each May for two years, her tolerance of my transformation into a monastic academic author for the last year, and her sustaining encouragement, are the only reasons this project was completed.

The assimilation and interpretation in the thesis, with all errors, are mine.

Overview of the Certification Process

This section of the thesis serves as an introduction for those unfamiliar with the process of certification—*delivering questions to a state appellate court by a court of another jurisdiction*. Those familiar with the process may skip this section. This section introduces some terminology peculiar to certification.

The law of the state having the greatest relationship to the parties' dispute usually must be applied to resolve the dispute. Even if a case is filed in the court of another state or in a federal court, the law of the state having the greatest relationship generally must be applied. So, courts of one state (or a federal court) may attempt themselves to determine the applicable law by research, if precedent exists, or by prediction if there is no precedent, or the courts may *certify* a legal question to a court in the state of the governing law.

This thesis only discusses certification of legal questions to the Utah Supreme Court by the Tenth Circuit Court of Appeals, the District Court for the District of Utah, and the Bankruptcy Court for the District of Utah. The certification process has many stages as outlined in these charts:

Federal Court with Lawsuit or Appeal

Legal question arises, dependent on Utah state law

Suggestion to certify is made by the court (“sua sponte”) or by a motion from a party

Court determines to certify, by an order granting the motion or by advising the parties in an order or hearing

Attorneys and the judge draft facts and question to send to Utah Supreme Court

Judge signs and sends “certification order” to Utah Supreme Court with documents from court record

Utah Supreme Court

Court receives certification order

Court issues an order accepting or rejecting the question certified and requests documents from federal court record

Court sets briefing schedule, receives briefs and holds argument (all these steps may be modified)

After argument, court confers and assigns opinion to a justice (another justice may write a separate opinion)

Justices issue opinion(s) answering questions (majority opinion controls)

Opinion(s) sent to federal court

Federal Court with Lawsuit or Appeal

Federal court applies answer of Utah Supreme Court

Introduction

Certification is a unique opportunity for state and federal courts to directly interact, though in a heavily formalized manner. When a federal court certifies a question to a state court, the parties' dispute is partially shared between two independent judicial systems. Other circumstances in which a dispute is shared between the courts of two different sovereign jurisdictions are very rare.

In certification, contrary to usual supremacy of federal over state systems, state courts set the procedures federal courts must follow. And a state court always has discretion to refuse, receive, and even reformulate the question from the federal court. In certifying a question to a state court, a federal court acknowledges the sovereignty of the state and the presumed expertise and right of a state court to interpret state law. Certification is a unique feature of American federalism.

Certification from federal courts to state appellate courts is also an unusual process for the state appellate court. Certification interactions are different than the exchanges between courts of a single system, which are usually between a superior court and an inferior court. In those instances, the superior court instructs, rejects, or approves the actions of the inferior court. In certification, the responding court has a role delimited by the questioning court.

Certification interaction, where a responding court receives a narrow, certified question, is similar to the role of an appellate court focused on a subset of issues raised in a trial court. But certification, on a partially developed record, is very different than an appeal from a fully tried case. In certification, the certifying court assesses the determinative nature of a question of state law, formulates facts on which the state court will make a decision, and prepares a certification order—before trial on the merits. Certification nearly places a state court in the position of answering a hypothetical question, which is generally disfavored by courts.

Utah was an early adopter of certification. The Utah Supreme Court adopted a rule permitting certification in 1975. But in 1981, after the roster of justices on the court had entirely changed, the rule was found unconstitutional. Fortunately, other issues with the Judicial Article in Utah's Constitution resulted in a revision of that Article in 1984. The revision included authorization for the Utah Supreme Court to respond to certified questions. A new statute and court rule followed in 1986.

Since that time, Utah's 30 years of experience with certification has created a rich database of over 130 cases. We can examine the benefits and detriments of certification in specific cases.¹

¹ The reader is cautioned by a note appearing in a scholarly article over twenty years ago, relating the responses of two judges to a survey on the issue of certification: "As to the value of this survey, two of the more interesting comments provided by the respondents were: 'This is a truly tedious subject about which I have not given three minutes of thought in the last 22 years!'; and 'This is a very interesting issue – AJS is to be complimented on addressing it.'" Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice*, 2 n.1, American Judicature Society (1995).

But certification is more than case-specific. Certification has institutional significance that has not been emphasized as federal courts have considered certification to the Utah Supreme Court. Certification recognizes the primary role of the Utah Supreme Court as the interpreter of Utah law. While a federal court is empowered to interpret the law of any state or foreign jurisdiction, certification expresses federalism, and recognizes the superior role of the Utah Supreme Court in setting Utah precedent.

The unique nature of certification calls for careful consideration of its benefits, processes and detriments, which this thesis undertakes. The practices of the Utah Supreme Court, the various judges of the Utah federal district court and bankruptcy court,² and the panels of the Tenth Circuit Court of Appeals are reviewed. This thesis examines:

- the types of cases and issues that have used certification;
- the best stages of proceedings to seek certification;
- the federal judges who most often suggest certification and grant motions to certify;
- the principles which have guided lawyers and judges as questions are formulated for certification and included in certification orders;
- the sua sponte use of certification of questions by the Tenth Circuit Court of Appeals in 13 cases, where nine of the answers have resulted in reversal of a trial court decision;
- the processes followed in the federal courts which certify questions to the Utah Supreme Court;
- the factors considered by the federal courts in granting certification, including outdated factors still cited in certification decisions;
- the role of Jill Parrish, former Utah Supreme Court justice and now federal district judge in changing the use of certification by the district court;
- the criteria which appear to have been used for the decision of the Utah Supreme Court to accept, reject, or reformulate certified questions; and
- the impact of certification on the case at issue, including delay from the certification process and the role of certification in resolving the case.

If judges so choose, the data and analysis in this thesis may serve as a basis for direct non-case related communication about certification between the state and federal courts.

This thesis recommends changes in the Utah certification process. A new local rule is proposed for the federal district court. Changes are recommended to the 30-year-old Utah Rule of Appellate Procedure on certification. These changes will better balance case specific and inter-governmental considerations. The rule proposals may be considered by the rules committees of the respective courts.

² The term “trial court” is sometimes used to include the federal district court and bankruptcy court in the District of Utah.

Legal Context

The United States of America is unique in having dual sovereignties, with fifty state legal and court systems and a single federal system which overlaps the fifty states geographically and, in many instances, jurisdictionally. Federal courts may consider disputes arising under state law, and some federal disputes, such as tax matters, depend on application of state law. A state or federal court in one state may decide a case under the law of another state.

The web of interrelated systems requires courts whose regular work is with the law of the sponsoring government to occasionally apply the law of a different sovereign. Conflict of law rules determine how these courts select the law to apply. “Federal courts [after *Erie R.R. Co. v Tompkins*³] must, when a state law question is posed within the context of a federal case, apply state substantive law as the rule of decision.”⁴

After a court determines that the law of the state in which it sits should not apply, the court proceeds into less familiar legal territory. A state or federal court in which a case is pending is not engaged full-time in application of the law of another state; is not an integral and constitutional part of that state’s legal system; is not as familiar with the culture and policies of the other state; and, possibly most importantly, does not have the constitutional role as final arbiter of that state’s law. The court in which the case is pending is, however, required to locate authority and interpret it, or in some instances it may certify legal questions to a court of the jurisdiction where the law originates.

The Development of Certification in the United States

Legal Precedent and Alternatives

The idea of certifying questions from one judicial system to another is not an American invention:

The British Law Ascertainment Act of 1859 permitted a court in one part of the British Commonwealth to remit a case for an opinion on a question of law to a court in another part of the Commonwealth. The Foreign Law Ascertainment Act of 1861 allowed questions of law to be certified between British courts and courts of foreign countries, provided that each country had signed a convention governing such procedure.⁵

³ 304 U.S. 64 (1938).

⁴ William G. Bassler and Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 Seton Hall L. Rev. 491, 491 (1998-1999).

⁵ Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. Legis. 127, 132 (1992).

These enactments were made long after the dissolution of ties between England and the American colonies, so they were not part of the common law adopted in the colonies. But they may have influenced the adoption of certification processes in the United States.

There was a federal statute of long standing which allows federal courts of appeal to certify questions of law to the U.S. Supreme Court.⁶ This procedure is no longer in use because the Supreme Court has limited its caseload.⁷ That could be an analog to certification from courts of states or federal courts to the courts of states.

Before certification procedures were in place, American federal courts would take alternative approaches when decisive questions of state law were presented on which the federal court was unwilling to opine. The federal court could stay its proceedings and direct parties to file a declaratory judgment action in a state court, if the state accepted such actions.⁸ Or a federal court could simply abstain from proceeding with the case, leaving the parties to re-file in another court—or lack a remedy. Abstention was disfavored: “Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.”⁹ Those interests were generally confined to comity and where a “federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law.”¹⁰

And declaratory actions were sometimes rejected. In *United Services Life Insurance Company v. Delaney*¹¹ the Fifth Circuit instructed the parties to “initiate a proceeding in a Texas court seeking a declaratory judgment about of the meaning of the pertinent clauses of the respective insurance contracts, with a review of such judgment by a court of last resort of the State of Texas.”¹² The parties did file the declaratory action, but were told by the Texas trial court (which was affirmed by the Texas Supreme Court) that the declaratory case could not be heard due to “a constitutional lack of power.”¹³ “[T]he rendition of advisory opinions by courts is unauthorized by our constitution”¹⁴

⁶ 28 U.S.C. § 1254(2) (2006); see also Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 Geo. Wash. L. Rev. 1310 (2010).

⁷ Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1712 (2000).

⁸ *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959).

⁹ *Allegheny Cty. v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959).

¹⁰ *Id.* at 189.

¹¹ 328 F.2d 483 (5th Cir. 1964).

¹² *Id.* at 485.

¹³ *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 863 (Tex. 1965).

¹⁴ *Id.* at 864.

Florida First In Certification—and U.S. Supreme Court Commentary

Florida was the first state to adopt a procedure to accept questions certified from federal courts. The 1945 Florida statute was followed by an implementing rule in 1961.¹⁵ Before the rule was adopted, the U.S. Supreme Court instructed the Fifth Circuit to use the statutory process,¹⁶ and spoke in glowing terms about the procedure:

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. Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.¹⁷

The Supreme Court directed that the Fifth Circuit, on remand, use the procedure,¹⁸ and the Supreme Court used the procedure itself in later Florida cases decided in 1963.¹⁹ These endorsements were cited as motivation the formulation of the Uniform Certification of Questions of Law Act (1967) (“Uniform Act (1967)”).²⁰

¹⁵ Bassler, *supra* n.4, at 494 n.13.

¹⁶ The Supreme Court noted that the promulgation of rules was not “a jurisdictional requirement for the entertainment by the Florida Supreme Court of a certificate” from a federal court. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960).

¹⁷ *Id.* (citations omitted). When the Fifth Circuit invoked the process on remand, the procedure was upheld against a challenge in the Florida Supreme Court. Goldschmidt, *supra* n.1, at 94 n.233 (citing *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735 (Fla. 1961), *rev'd*, 319 F.2d 505 (5th Cir. 1963), *rev'd*, 377 U.S. 180 (1964)). The Fifth Circuit refused to follow the Florida Supreme Court’s answer to the substantive question, but was in turn reversed by the U.S. Supreme Court.

¹⁸ See *Clay*, 363 U.S. at 213 (Black, J., dissent).

¹⁹ *Dresner v. Tallahassee*, 375 U.S. 136 (1963); *Aldrich v. Aldrich*, 375 U.S. 249 (1963).

²⁰ “The Florida provision has also been used by the Supreme Court of the United States, *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963) question answered 164 So.2d 208 (1964), and *Aldrich v. Aldrich*, 375 U.S. 75, 249 (1963), questions answered 163 So.2d 276 (1964).” Uniform Act (1967) at Prefatory Note.

Uniform Certification of Questions of Law Act

Dissatisfaction with abstention and the positive attention to the Florida example led to the Uniform Act (1967).²¹ Even before the Uniform Act was promulgated, three other states followed Florida's lead with legislation of their own.²²

“Prior to formulation of the Uniform Act [(1967)] . . . scholarly work had been done in the area, primarily by Allan Vestal, then Professor of Law at the University of Iowa and one of the Commissioners on Uniform State Laws [which] formed the basis for many of the policies ultimately realized in the U.L.A [Uniform Laws Annotated].”²³ A uniform law was needed because “[u]niformity would make probable the greater use of certification. If attorneys and judges are faced not with an unfamiliar act, but rather with a carbon of the act of their own states, they will be more willing to use the device.”²⁴ The Uniform Act (1967) was “patterned in large measure on Florida Appellate Rule 4.61.”²⁵

The Uniform Act (1967) was quite simple. It was drafted as a model legislative enactment, unlike the 1995 revision which also contemplated enactment as a court rule. The Uniform Act (1967) specified:

That a designated court could answer questions from specified courts that were “questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the [specified appellate courts] of this state”;²⁶

That the process could initiate on motion or sua sponte (on the court's own suggestion);²⁷

The contents of a certification order—a statement of relevant facts and “the questions of law to be answered”;²⁸

²¹ Uniform Act (1967); 12 U.L.A. 86 (1996). The Tarlton Law Library at the University of Texas has two boxes of “materials related to drafting the Uniform Certification of Question of Law Act.” <https://legacy.lib.utexas.edu/taro/utlaw/00040/law-00040p30.html> (last visited January 27, 2018).

²² Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. Legis. 127, 133 n.44 (1992). The states were Hawaii, Maine, and Washington.

²³ *Id.* at 131.

²⁴ Uniform Act (1967) at Prefatory Note n.1.

²⁵ *Id.* at Prefatory Note n.2.

²⁶ *Id.* § 1.

²⁷ *Id.* § 2.

²⁸ *Id.* § 3.

The form of an order and the method of transmitting it and a sufficient record to the receiving court;²⁹

For an equal allocation of costs between the parties;³⁰

That the receiving court rules regarding briefs and argument would apply to certification proceedings;³¹

For transmittal of the state court opinion to the certifying court and the parties;³²

That specified courts of the enacting state could certify to other courts, on similar grounds,³³ using the process of the receiving state;³⁴ and

Severability,³⁵ construction,³⁶ title,³⁷ and effective date.³⁸

After 25 years of experience with the Uniform Act (1967), Professor Ira Robbins proposed a new act to remedy issues which had arisen in the states which had enacted the earlier uniform act.³⁹ They had often enacted variants of the Uniform Act (1967) which in his view were ill advised. His proposals included:

Restricting the power to answer questions to the highest state court, to avoid inefficiency of a state appeal;⁴⁰

Ensuring that all federal courts and the highest court in a state may certify;⁴¹

²⁹ *Id.* § 4.

³⁰ *Id.* § 5.

³¹ *Id.* § 6.

³² *Id.* § 7.

³³ *Id.* § 8.

³⁴ *Id.* § 9.

³⁵ *Id.* § 10.

³⁶ *Id.* § 11.

³⁷ *Id.* § 12.

³⁸ *Id.* § 13.

³⁹ Robbins, *supra* n.5; see also Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 *Judicature* 125 (1992).

⁴⁰ Robbins, *supra* n.5, at 177-78.

⁴¹ *Id.* at 178.

Providing reciprocity, so that a court which may receive questions may also certify questions;⁴²

Allowing certification of questions which “may be determinative” rather than requiring that the question “must be determinative”;⁴³

Allowing certification of questions when “no controlling” precedent exists, rather than the “no clear controlling” standard;⁴⁴

Allowing initiation of certification sua sponte or on motion;⁴⁵

Encouraging preferential treatment of certification cases, by requiring the responding court to act “as soon as practicable . . .”;⁴⁶ and

Clarifying who generates the statement of facts in the certification order, by specifying that the parties may propose facts, but that the court has final responsibility.⁴⁷

Comparing Robbins’ recommendations to the Uniform Act (1967) shows that only the last two features in the above list were new. His intention was therefore principally to unify existing versions of the Uniform Act (1967) by calling attention to the problems with the variants which had been adopted. His recommendations were influential.⁴⁸

The Uniform Act (1967) was revised in 1995. Beyond Robbins article, a deep study by the American Judicature Society was also influential in the Uniform Certification of Questions of Law Act (1995) (“Uniform Act (1995)”). A survey of “all federal judges on the U.S. district courts and circuit courts of appeals and all state supreme court justices”⁴⁹ along with a compilation of all rules and statutes governing certification was “presented to a group of U.S. district and circuit judges and state supreme court justices who, in December 1994, attended a National Workshop on Certification of Questions of Law”⁵⁰ The workshop resulted in several recommendations:

⁴² *Id.* at 179.

⁴³ *Id.* at 179-80.

⁴⁴ *Id.* at 180.

⁴⁵ *Id.* at 181.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Uniform Certification of Questions of Law Act (1995) (“Uniform Act (1995)”); 12 U.L.A. 71 (1995).

⁴⁹ Goldschmidt, *supra* n.1, at 1.

⁵⁰ *Id.* at 2.

Whether a litigant was a plaintiff who initiated a federal case or a defendant who removed a state case should have no bearing on the certification process;⁵¹

State courts should establish standards and criteria for accepting questions, including the Oregon standard “that the answer ‘would have the potential of resolving at least one claim’ in the litigation”;⁵²

The priority of treatment and time limits of a certified case should be determined on a case-by-case basis;⁵³

A certifying court should be free to communicate with an accepting court;⁵⁴

Reformulation of questions should be permitted;⁵⁵

Certifying courts should not have discretion to reject answers to certifying questions;⁵⁶ and

Answers to certified questions should be binding precedent.⁵⁷

The National Conference of Commissioners On Uniform State Laws released the 1995 revision in the fall of that year. According to Jonas Goldschmidt, the principal changes in the Uniform Act (1995) are:

- (1) the Act now allows for certification to and from tribal courts, and Canadian and Mexican courts, including the highest or intermediate appellate courts;
- (2) it provides that certification is only appropriate where no controlling answer to the question is provided by a constitutional provision, statute, or appellate decision;
- (3) it provides that a certified question may be reformulated by the answering court;
- (4) it requires that the certification be accompanied by an agreed statement of facts, or, if one cannot be agreed upon, by a statement of facts determined by the court; and, most notably,
- (5) the Act now contains a provision stating that the receiving court “shall notify the certifying court of acceptance or rejection of the question; and, in accordance with

⁵¹ *Id.* at 75.

⁵² *Id.* at 76.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 77.

⁵⁷ *Id.*

notions of comity and fairness, it shall respond to an accepted certified question as soon as practicable.”⁵⁸

As a result of the discussion leading up to and the publication of the Uniform Act (1995) and continued advocacy for certification, almost all states and the District of Columbia, Puerto Rico,⁵⁹ the Northern Mariana Islands and Guam provide for certification.⁶⁰ North Carolina is the only state without a certification procedure.⁶¹

Debate on Value of Certification

Despite the rapid spread and current prevalence of certification procedures, debate about the practice persisted. Proponents argued the superiority of certification over the former practice of abstention, under which the court uncertain about the law of a state would stay or dismiss its proceedings, and leave the parties to find the answer to state law from a court of that state. Abstention left parties without resolution of their dispute in the court where the case was originally filed and pushed them to a state trial court declaratory judgment proceeding that could lead to an appeal. The delay and expense were not minimal.

Principles of comity are cited in favor of certification,⁶² along with the wisdom of deferring interpretation of state law to the highest court in a state. If state supreme courts are regarded in practice as the final arbiter of state law issues, inconsistencies between state and federal decisions are reduced.⁶³ One federal judge has referred to the relief from “guesswork” that certification affords.⁶⁴ Certification can also be said to dampen forum shopping. A prospective litigant has no incentive to seek an alternative federal interpretation of state law if the federal court policy is that that a state law issue will be certified to a state court. And certification has the benefit of bringing a discrete legal issue to the state supreme court before the

⁵⁸ *Id.* at 102.

⁵⁹ Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 Duke L.J. 69, 71 (2008); Sharika Robinson, *Right, but for the Wrong Reasons: How A Certified Question to the Supreme Court of North Carolina Could Have Alleviated Conflicting Views and Brought Clarity to North Carolina State Law*, 34 N.C. Cent. L. Rev. 230 (2012).

⁶⁰ Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 Penn St. L. Rev. 377, 384-85, and 385 n.59 (2010-2011).

⁶¹ “North Carolina is the only state in the Fourth Circuit without such a mechanism.” *Stahle v. CTS Corp.*, 817 F.3d 96, 113 (4th Cir. 2016) (Thacker, Circuit Judge, concurring); “North Carolina is the sole state in the union that does not permit a federal court to certify questions of state law to the high state court for resolution.” *United States v. Kelly*, 917 F. Supp. 2d 553, 560 (W.D.N.C. 2013).

⁶² M. Bryan Schneider, “*But Answer Came There None*”: *The Michigan Supreme Court and the Certified Question of State Law*, 41 Wayne L. Rev. 273, 301 (1994-1995); Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. Miami L. Rev. 717, 724-25 (1968-1969).

⁶³ Schneider, *supra* n.62, at 299-301; Mattis, *supra* n.62, at 724.

⁶⁴ *George v. Haslam*, 112 F. Supp. 3d 700, 715 (M.D. Tenn. 2015) (quoting *Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cty.*, 2011 WL 4048523, at *12 (M.D. Tenn. September 12, 2011)).

expense of trial is incurred. In this respect, filing a case in federal court has an advantage over filing in state court.

But these benefits are not universally acknowledged to outweigh the time and expense that certification proceedings cause. There is no question that certification takes time, while the question is formulated, the order drafted and entered, and the state court process ensues.⁶⁵ A 1983 study by the Federal Judicial Center found that the median delay is approximately six months.⁶⁶ But if the legal question were not certified to the state court, it would have been briefed, argued and decided in the federal court, possibly in that same time frame and with similar expense.

Some have argued that federal judges are just as able to determine state law issues as their state court colleagues, sometimes with more staff resources, and that there are benefits from “cross-pollination” when two judicial systems look at legal questions.⁶⁷ Whether that outweighs comity is a matter of opinion. But this comparison of relative competency, usually by a competitive federal court, fails to recognize the value of decisions of state law made by the court constitutionally entrusted with the duty to decide those issues. It fails, usually from an outside perspective, to recognize the benefit of decisions by a court integrated into a system of state law, by judges who have experience in that state’s legal system and better understand the policy and values of the state.

In some instances, answers from a state supreme court have been ignored or rejected by the certifying federal court, causing some to object that the state court is giving advisory opinions.⁶⁸ In other instances, the federal case resolves while the certification issue is still pending or without regard to the answer, because other decisive issues arise after certification.

Because certification can occur early in a federal case, the question can be regarded as abstract.⁶⁹ Formulation of an issue too early can consume a great deal of time and may, as discovery and motions develop, prove to be an inaccurate forecast. Piecemeal litigation is generally disfavored.⁷⁰ The American common law system discourages interlocutory appeals, but certification is just that—the federal court presents an issue to an appellate state court, before trial has taken place.

⁶⁵ Mattis, *supra* n.62, at 725-27 (1969).

⁶⁶ Bassler, *supra* n.4, at 511; Schneider, *supra* n.62, at 296.

⁶⁷ Bassler, *supra* n.4, at 516-20.

⁶⁸ *Id.* at 520-25; John B. Corr and Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, Vand. L. Rev. 411, 419-20 (1988); Mattis, *supra* n.62, at 734.

⁶⁹ Bassler, *supra* n.4, at 525; Schneider, *supra* n.62, at 294-95; Corr & Robbins, *supra* n.68, at 422.

⁷⁰ Mattis, *supra* n.62, at 727-28.

Early in the American certification experience, some expressed fear of overloading state dockets.⁷¹ But no jurisdiction reports this as a problem,⁷² though some state courts reject a much higher percentage of certified questions than other courts.⁷³

Some practitioners express that certification may misshape issues in a case. Some feel that judges attempt to avoid federal constitutional issues by finding a state law issue that might vitiate the constitutional claim. This could allow the federal judge to defer action, dodge a hard issue, and defer truly deserved relief from constitutional violations.

But certification has strong advocates. The U.S. Supreme Court, as noted above, praised the process in *Clay v. Sun Insurance Office Limited*. And it has further said certification “does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.”⁷⁴

Judge Guido Calabresi of the Second Circuit penned a stirring opinion (in dissent) that “federal courts in general, and this circuit in particular, have tended to be far too reluctant to certify questions to the state courts.”⁷⁵ His fundamental premise was that “[r]eluctance to certify is wrong because it leads to precisely the kind of forum shopping that *Erie R.R. Co. v. Tompkins* was intended to prevent.”⁷⁶ The majority opinion in the case relied on authority from *intermediate* New York courts which would “prevent the state’s highest court from reaching the issue”⁷⁷ [I]n the absence of certification, the party that is favored by the lower court decisions will almost invariably seek federal jurisdiction⁷⁸ to avoid contrary binding state precedent. And similar result would occur when an old state decision is contrary to emerging authority in other states.⁷⁹ The party favored by the outdated case law will avoid state court. Thus, he concluded “When federal courts, in effect, prevent state courts from deciding unsettled

⁷¹ Bassler, *supra* n.4, at 511, 514.

⁷² Schneider, *supra* n.62, at 297-98.

⁷³ *Id.* at 315-17. The 27 certification orders over a 20-year period reported in the article would not seem to be a burden. But the Michigan Supreme Court answered only eight.

⁷⁴ *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

⁷⁵ *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (Calabresi, J., dissenting). Judge Calabresi cited Martin Flumenbaum and Brad S. Karp, *Certification of Unsettled Law Issues*, N.Y.L.J., January 29, 1992, at 3 (“noting that the procedure for certification to the New York Court of Appeals ‘has been used only sparingly by the Second Circuit,’ which in 1992 had certified only five issues over the preceding six-year period.”).

⁷⁶ *McCarthy*, 119 F.3d at 157 (citations omitted).

⁷⁷ *Id.* at 158.

⁷⁸ *Id.* at 157-58.

⁷⁹ *Id.* at 158 n.1.

issues of state law, they violate fundamental principles of federalism and comity.”⁸⁰ Those courts “end up ‘mak[ing] important state policy, in contravention of basic federalism principles.’ ”⁸¹

He rejected the argument that federal courts use certification to shift unwanted burdens to state courts:

[I]t is well known that state court judges have expressed both publicly and privately their desire for certification and their irritation with the fact that federal courts often decide interesting and important questions rather than certifying them to the courts that should be deciding them. More importantly, a state court that feels overburdened, or that for any other reason does not wish to decide the certified question, is always free to refuse to answer it.⁸²

Judge Calabresi gave the example of cases deciding ownership of stolen property in which the statute of limitations was used as a defense to a claim for recovery. The issue of reasonable diligence in attempting to recover the property was presented. The Second Circuit “elected not to certify this question of New York law to the New York Court of Appeals”⁸³ and found that reasonable diligence was necessary to recovery of property. Judge Calabresi recounts what happened when that same issue later arose in another case in state court:

Three years later, the New York Court of Appeals was presented with precisely the same issue [as the Second Circuit], and held that the statute of limitations does not require a showing of reasonable diligence. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 626-27, 569 N.E.2d 426, 429-30 (1991). The [New York] Court of Appeals remarked, somewhat acidly:

Although the [Second Circuit] acknowledged that the question posed by the case was an open one, it declined to certify it to this Court, stating that it did not think that it “[would] recur with sufficient frequency to warrant use of the certification procedure.” Actually, the issue has recurred several times in the three years since *DeWeerth* was decided, including the case now before us. We have reexamined the relevant New York case law and we conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.⁸⁴

After the state court opinion *Guggenheim* made New York law clear, the claimant in the wrongly decided Second Circuit case attempted to re-open her claim.⁸⁵ But it was too late. So the stolen

⁸⁰ *Id.* at 158.

⁸¹ *Id.* (quoting *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting)).

⁸² *Id.* at 160.

⁸³ *Id.* at 159.

⁸⁴ *Id.*

⁸⁵ *Id.*

painting that should have been her painting was not hers because the Second Circuit failed to certify a question of state law.

Judge Calabresi persuasively argues that state courts should make significant state law decisions. The court considering certification still must consider whether the existing state cases are sufficiently clear. But if there is a serious question of state law, the issue should be certified.

Development of Utah’s Certification Process

Just as the Uniform Act (1967) was being promulgated, a Utah case illustrated the conundrum presented by Utah’s lack of a certification procedure. In *Black v. United States*, District Judge Sherman Christensen considered “whether in Utah a husband can maintain an action for loss of consortium by reason of negligent injury of his wife by a third person.”⁸⁶ Judge Christensen traced Utah law from territorial times and concluded that where “the state Supreme Court has not had occasion to pass upon the particular question, it still is my duty to ascertain the best I can from all available sources what the local law is and apply it.”⁸⁷ Not finding a clear statement that a right to loss of consortium existed in Utah, Judge Christensen declined to recognize the claims stated and struck them:

Unless and until the Utah State Legislature or the Supreme Court of the State of Utah expressly charts the course, it would be presumptuous under the circumstances for the federal court to initiate and foster such a new and, in my judgment, retrogressive and confusing system for the state.⁸⁸

Judge Christensen was thus compelled to deny the plaintiff’s claim. If a certification process had existed, the Utah Supreme Court could have authoritatively rejected—or possibly recognized—the plaintiff’s claim.

On appeal after trial, different issues were raised which also depended upon state law—and were also without precedent.

To determine the answer to each of these issues it is necessary to apply the substantive law of Utah as found in the statutory and case law of that state. Counsel for Philco and plaintiff each state that no precedent of any kind exists under the Utah law that serves as a persuasive guideline. . . .

[W]e consider it unnecessary and certainly undesirable to advance a foreguess as to how the Utah Supreme Court would decide the issues were they presented to that high court.⁸⁹

⁸⁶ 263 F.Supp. 470, 471 (D. Utah 1967).

⁸⁷ *Id.* at 472-73.

⁸⁸ *Id.* at 480.

⁸⁹ *Black v. United States*, 421 F.2d 255, 258 (10th Cir. 1970).

If certification had existed in Utah, the Utah Supreme Court could have spoken on these issues.

1975 Certification Rule

Utah adopted a Certification Rule on April 17, 1975 (“1975 Certification Rule”).⁹⁰ While based in part on the Uniform Act (1967), it appears to be most closely modeled on Colorado Rule of Appellate Procedure 21.1 (“Colorado Rule”).

The 1975 Certification Rule reads:

- (a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.
- (b) Method of Invoking. This rule may be invoked by an order of any of the courts referred to in section (a) upon said court's own motion.
- (c) Contents of Certification Order. A certification order shall set forth:
 - (1) The question of law to be answered; and
 - (2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.
- (d) Preparation of Certification Order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.
- (e) Costs of Certification. Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.
- (f) Briefs and Arguments. Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The plaintiff in the trial court, or the appealing party in the appellate court shall file his opening brief within thirty days from the date of receipt of the notice, and the opposing parties shall file an answer brief within thirty days from service upon him of copies of the opening brief. A reply brief may be filed within twenty days of the service of the answer brief. Briefs shall be in the manner and form of briefs as provided in this Court.
- (g) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the Certifying court and to the parties.

⁹⁰ *Holden v. NL Indus., Inc.*, 629 P.2d 428, 429 (Utah 1981). Unfortunately, no records of the adoption of the 1975 Certification Rule could be located at the Utah Supreme Court or in the Utah State Law Library.

Comparison with Colorado Rule of Appellate Procedure 21.1

The only variations between the Colorado Rule and the 1975 Certification Rule are:

- a. elimination by Utah of the United States Court of Claims as a potentially certifying court;
- b. elimination by Utah of the possible initiation of certification by motion of the parties, even though that feature was included in the Uniform Act (1967). (The 1975 Certification Rule only permitted *sua sponte* certification.); and
- c. minor technical changes, such as changes in briefing times, and reference to Utah rules regarding argument rather than referring to the Colorado argument rule.⁹¹

Comparison with Uniform Certification of Questions of Law Act (1967)

The 1975 Certification Rule⁹² varies in more significant ways from the Uniform Act (1967). The 1975 Certification Rule:

- a. omits references⁹³ to many potential certifying courts: “the United States Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Claims Court, the United States Court of Military Appeals, the United States Tax Court, [or the highest appellate court or the intermediate appellate court of any other state]”;
- b. requires the certification order to set forth the “question of law to be answered” rather than referring to “questions of law”;⁹⁴
- c. has a more complete description of the briefing process;⁹⁵
- d. omits the procedures and the power to certify to the courts of other states;⁹⁶ and
- e. omits provisions on severability,⁹⁷ construction,⁹⁸ short title⁹⁹ and effective date.¹⁰⁰

⁹¹ The 1975 Certification Rule has other minor puzzling variations from the Colorado Rule, such as subtitle (f)’s reference to “Arguments” rather than “argument,” though that subsection in both rules and in the Uniform Act (1967) has no text about oral argument, and capitalization of “Certifying” when referring to the originating court in (g)—but not in other parts of the rule.

⁹² The 1975 Certification Rule and the Colorado Rule have the same variations from the Uniform Act (1967).

⁹³ Compare 1975 Certification Rule at (a) with Uniform Act (1967) § 1.

⁹⁴ Compare 1975 Certification Rule at (c)(1) with Uniform Act (1967) § 3(1).

⁹⁵ 1975 Certification Rule at (f).

⁹⁶ Uniform Act (1967) §§ 8-9.

⁹⁷ *Id.* § 10.

⁹⁸ *Id.* § 11.

⁹⁹ *Id.* § 12.

¹⁰⁰ *Id.* § 13.

***Holden v. NL Industries* Invalidates the 1975 Certification Rule**

In 1981, the Utah Supreme Court struck down the 1975 Certification Rule as unconstitutional in *Holden v. NL Industries*.¹⁰¹ After an adverse ruling from the trial court, plaintiff's counsel asked for and was granted certification of two questions. The Supreme Court's acceptance was expressly tentative, because the "defendant . . . filed a motion in opposition to acceptance of certification."¹⁰² After briefly recounting the status of certification procedures nationally and reciting the 1975 Certification Rule, Justice Dallin Oaks searched for a jurisdictional basis on which the Utah Supreme Court might accept questions certified from federal courts. First, he looked to the Utah Constitution Judicial Article:¹⁰³

The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus, to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any district court or judge thereof in the State. In other cases the Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction.

He concluded "This section grants no 'original jurisdiction' to answer certified questions since certification does not involve one of the writs to which this Court's original jurisdiction is limited."¹⁰⁴ A comparison with Colorado's Constitution was important to his decision. The Colorado Constitution granted jurisdiction to the Colorado Supreme Court "to issue writs . . . and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same."¹⁰⁵ Citation of the Colorado Constitution made sense because Utah's 1975 Certification Rule appears to have been derived from the Colorado rule.

Justice Oaks then looked to the constitutional reference to appellate jurisdiction as providing authority to answer certified questions. This possibility was rejected because of one word:

Article VIII, Section 4 . . . provides: "In other cases the Supreme Court shall have appellate jurisdiction only . . ." The comparable provision in most state constitutions omits the word only. In the absence of that negative, the constitutional conferral of appellate jurisdiction would be susceptible to the

¹⁰¹ 629 P.2d 428; *see also* Bassler, *supra* n.4, at 934; Goldschmidt, *supra* n.1, at 95.

¹⁰² *Holden*, 629 P.2d at 429.

¹⁰³ Utah Const. art. VII, § 4.

¹⁰⁴ *Holden*, 629 P.2d at 430.

¹⁰⁵ *Id.* (citing Colo. Const. art. VI, § 3).

construction that the court's jurisdiction could be enlarged by an exercise of legislative or judicial power, by law or by court rule.¹⁰⁶

He compared the Utah result with a decision of the Washington Supreme Court,¹⁰⁷ under a constitution omitting the word “only” and generously providing ““appellate jurisdiction in all actions and proceedings”¹⁰⁸ “Since this provision contained no limitation similar to that in the Utah Constitution, the Washington Legislature was free to define its court’s jurisdiction to include the functions specified in the [Washington] certification legislation.”¹⁰⁹ And he also contrasted the favorable findings of constitutionality in Florida and Alabama.¹¹⁰

Finally, Justice Oaks examined whether “appellate jurisdiction only” might include responding to questions from a federal trial court. He found that it did not, because appellate jurisdiction applies to inferior courts, not to courts of other jurisdictions.

“Appellate jurisdiction” obviously connotes review of the action of an inferior court. “Inferior court” has been appropriately defined as “any court subordinate to the chief appellate tribunal in the particular judicial system.” Federal courts are not “inferior courts” to this Court. Consequently, this Court's answer to a certified question in a case that originated in or is to be adjudicated in a federal court is not an exercise of “appellate jurisdiction” within the meaning of the Utah Constitution.¹¹¹

So the Utah Supreme Court withdrew its own 1975 Certification Rule as unconstitutional and dismissed Holden’s request for certification, but with a salute to the idea of certification:

The procedure devised to permit federal courts to certify questions of state law for state courts to answer is a commendable effort to further the interest of justice through cooperative efforts by state and federal courts. If our constitutional powers permitted us to be involved in that kind of cooperative effort, and if other legal questions unnecessary to the disposition of this case could be resolved, we would have no hesitancy. But under the current language of our constitution, we must conclude that this Court has no jurisdiction to provide federal courts the requested ruling on state law.¹¹²

¹⁰⁶ *Id.*

¹⁰⁷ *In re Elliott*, 446 P.2d 347 (Wash. 1968).

¹⁰⁸ *Holden*, 629 P.2d at 430.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 431 (citing *Sun Ins. Office, Ltd.*, 133 So.2d at 742) (construing Fla. Const. art. V, §§ 3-4; Ala. Const. art. VI, § 140 (Amend. No. 328)).

¹¹¹ *Holden*, 629 P.2d at 431.

¹¹² *Id.* at 431-32.

How could a court unanimously strike down a rule it adopted only six years earlier? The composition of the Utah Supreme Court changed completely between 1975 and 1981.¹¹³ None of the justices present in 1975 were still present in 1981. The members of the *Holden* court were not personally committed to the 1975 Certification Rule.

Utah's constitutional quandary is notable because *Holden* is the only case to find a certification procedure unconstitutional.¹¹⁴ While Arkansas's Constitution had similar restrictions,¹¹⁵ the Arkansas Constitution was amended¹¹⁶ in 2000 to grant "[o]riginal jurisdiction to answer questions of state law certified by a court of the United States, which may be exercised pursuant to Supreme Court rule."¹¹⁷ Thus, Utah stands alone as adopting a certification procedure, invalidating it, and—after a constitutional amendment—readopting certification.

1984 Judicial Article of Utah Constitution

The Utah Constitution judicial article was amended in 1984 and one part of the amendment permitted certification.¹¹⁸ But the amendment was not caused by *Holden*. The revision of Article VIII was precipitated by a dispute between the courts and legislature over judicial nomination and appointment processes. The result was "a complete rewrite of the judicial article of the Utah Constitution that finally settled [that] dispute and several other long-standing issues with a set of wide-ranging compromises that brought all interested parties to the table."¹¹⁹

The new version of Article VIII, Section 3 expressly confers jurisdiction to answer questions from federal courts:

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

¹¹³ In 1975, Justices J. Allen Crockett, F. Henri Henriod, E. R. Callister, R. L. Tuckett, and A. H. Ellett were on the Utah Supreme Court. In 1981, the Utah Supreme Court consisted of Richard J. Maughan, Gordon R. Hall, I. Daniel Stewart, Richard C. Howe, and Dallin H. Oaks.
https://en.wikipedia.org/wiki/List_of_Justices_of_the_Utah_Supreme_Court (last visited January 12, 2018).

¹¹⁴ Goldschmidt, *supra* n.1, at 95.

¹¹⁵ *Id.* at 96.

¹¹⁶ Coby W. Logan, *Certifying Questions to the Arkansas Supreme Court: A Practical Means for Federal Courts in Clarifying Arkansas State Law*, 30 U. Ark. Little Rock L. Rev. 85, 87 (2007).

¹¹⁷ Ark. Const. amend. LXXX, § 2.

¹¹⁸ Goldschmidt, *supra* n.1, at 95 n.244.

¹¹⁹ *In re Young*, 976 P.2d 581, 587 (Utah 1999) (citing Utah Const. Rev. Comm'n Rep., 15-16 (January 1984)).

The Utah Supreme Court is now empowered “to answer questions of state law certified by a court of the United States.”¹²⁰ Thus “[a]ny court of the United States”¹²¹ may certify a question to the Utah Supreme Court, but other state courts may not. And the Utah Court of Appeals may not receive certified questions.¹²²

Effectuating the Constitutional Revision

Utah Code Provision

Utah Code Ann. § 78A-3-102, which defines Utah Supreme Court jurisdiction, states in subsection (1) that “The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.” This is a verbatim mirror of the Utah Constitution provision, which fortunately prevents any separation of powers issue arising from a conflict between the constitutional powers of the court and the legislative enactment.¹²³

Utah Rule of Appellate Procedure 41

Following approval of the 1984 Constitutional Amendment, Utah Rule of Appellate Procedure 41 was adopted.¹²⁴ Rule 41 provides:

RULE 41. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS

(a) Authorization to answer questions of law. The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

(b) Procedure to invoke. Any court of the United States may invoke this rule by entering an order of certification as described in this rule. When invoking this rule, the certifying court may act either sua sponte or upon a motion by any party.

(c) Certification order.

(c)(1) A certification order shall be directed to the Utah Supreme Court and shall state:

¹²⁰ Utah Const. art. VIII, § 3.

¹²¹ Utah R. App. P. 41(b).

¹²² The amendment also expanded writ power to “all extraordinary writs” from “writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus.” Utah Const. art. VII, § 3. Notably, legislative control was limited to appellate jurisdiction.

¹²³ *In re Young*, 976 P.2d 581.

¹²⁴ Unfortunately, no records of adoption of Utah R. App. 41 could be located in the Utah Supreme Court or Utah State Law Library. The year of adoption is not clear. It was likely adopted in 1986 after the massive revision of the Utah Judicial Code was enacted, following the 1984 Constitutional Revision. H.B. 100, Judicial Article Implementation, Utah Session Laws 1986 Ch. 47, was passed February 26, 1986. That was the first statutory recognition of the jurisdiction of the Utah Supreme Court “to answer questions of state law certified by a court of the United States.” Utah Code Ann § 78-2-2 (1986).

- (c)(1)(A) the question of law to be answered;
- (c)(1)(B) that the question certified is a controlling issue of law in a proceeding pending before the certifying court; and
- (c)(1)(C) that there appears to be no controlling Utah law.

(c)(2) The order shall also set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed.

(c)(3) The certifying court may also include in the order any additional reasons for its entry of the certification order that are not otherwise apparent.

(d) Form of certification order; submission of record. A certification order shall be signed by the judge presiding over the proceeding giving rise to the certification order and forwarded to the Utah Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require that all or any portion of the record before the certifying court be filed with the Supreme Court if the record or a portion thereof may be necessary in determining whether to accept the certified question or in answering that question. A copy of the record certified by the clerk of the certifying court to conform to the original may be substituted for the original as the record.

(e) Acceptance or rejection of certification. Upon filing of the certification order and accompanying papers with the clerk, the Supreme Court shall promptly enter an order either accepting or rejecting the question certified to it, and the clerk shall serve copies of the order upon the certifying court and all parties identified in the certification order. If the Supreme Court accepts the question, the Court will set out in the order of acceptance (1) the specific question or questions accepted, (2) the deadline for notifying the Supreme Court as to those portions of the record which shall be copied and filed with the Clerk of the Supreme Court, and (3) information as to when the briefing schedule will be established.

(f) Briefing; oral argument. The form of briefs and proceedings on oral argument will be governed by these rules except as such rules may be modified by the Supreme Court to accommodate the differences between the appeal process and the determination of a certified question. The clerk of the Supreme Court will provide written notice to the parties as to the schedule for the filing of briefs and content requirements, as well as the schedule and procedures for oral argument.

(g) Appearance of counsel pro hac vice. Upon acceptance by the Supreme Court of the question of law presented by the certification order, counsel for the parties not licensed to practice law in the state of Utah may appear pro hac vice upon motion filed pursuant to the Code of Judicial Administration.

The procedure of Utah R. App. P. 41 differs from the 1975 Certification Rule in many respects. The new rule:

allows certification by any “court of the United States,”¹²⁵ rather than enumerating potential certifying federal courts;¹²⁶

refers to a certified “question of law,”¹²⁷ rather than “questions of law”;¹²⁸

permits certification when “the law of Utah is . . . uncertain,”¹²⁹ and that “there appears to be no controlling Utah law,”¹³⁰ rather than referring to certification when “there is no controlling precedent”;¹³¹

requires that the question be a controlling issue of law, and that the order state the same,¹³² while the 1975 Certification Rule permitted certification of a question “which may be determinative”;¹³³

permits certification orders “upon a motion by a party,” in addition to the sua sponte certification permitted in the 1975 Certification Rule;¹³⁴

requires that the certification order include all facts “which are relevant to the determination of the question certified,”¹³⁵ rather than those relevant to the “questions certified”;¹³⁶

requires the certification order to specify “the context in which the questions arose, and the procedural steps by which the question was framed”;¹³⁷

¹²⁵ Utah R. App. P. 41(a).

¹²⁶ 1975 Certification Rule at (a).

¹²⁷ Utah R. App. P. 41(a), (c)(1).

¹²⁸ 1975 Certification Rule at (a).

¹²⁹ Utah R. App. P. 41(a).

¹³⁰ *Id.* at 41(c)(1)(C).

¹³¹ 1975 Certification Rule at (a).

¹³² Utah R. App. P. 41(c)(1)(B).

¹³³ 1975 Certification Rule at (a).

¹³⁴ Utah R. App. P. 41(b), *compare with* 1975 Certification Rule at (b).

¹³⁵ Utah R. App. P. 41(c)(2).

¹³⁶ 1975 Certification Rule at (c)(1)(2).

¹³⁷ Utah R. App. P. 41(c)(2).

permits the certification order to include “any additional reasons for . . . entry of the certification order that are not otherwise apparent”;¹³⁸

refers to the Supreme Court’s determination “whether to accept the certified question,”¹³⁹ and has a new subsection (e) regarding the acceptance process and an order of acceptance (which was not treated in the 1975 Certification Rule, and which implies questions may be rejected);

has a new provision regarding pro hac vice admission of counsel;¹⁴⁰

permits flexibility in briefing and argument, providing that the normal rules and timeframes “may be modified by the Supreme Court to accommodate the differences between the appeal process and determination of a certified question”;¹⁴¹ and

has technical refinements, such as including the state name in places as a descriptor of the “Utah” Supreme Court,¹⁴² referring generally to other rules of the court regarding briefing and oral argument (and actually mentioning oral argument), and providing for certification of a copy of the certifying court’s record.¹⁴³

Comparison with Uniform Act (1995)

Utah Rule 41 varies from the Uniform Act (1995)¹⁴⁴ in several respects, which is to be expected as Rule 41 preceded the Uniform Act (1995) by a decade:

The Utah Rule does not permit the Utah Supreme Court (or the Utah Court of Appeals) to certify a question to another court;¹⁴⁵

The Utah Rule does not permit courts of states, tribes, or Mexican courts to certify questions;¹⁴⁶

¹³⁸ *Id.* at 41(c)(2).

¹³⁹ *Id.* at 41(d).

¹⁴⁰ *Id.* at 41(g).

¹⁴¹ *Id.* at 41(f).

¹⁴² *Id.* at 41(a), (c)(1), (d).

¹⁴³ *Id.* at 41(c)(2).

¹⁴⁴ While the Uniform Act (1995) was promulgated nearly a decade after Utah R. App. 41, it is the most recent uniform law on the subject of certification, so it is the most universal standard for comparison of Utah and national practice.

¹⁴⁵ Uniform Act (1995) § 2.

¹⁴⁶ *Id.* § 3.

The Uniform Act (1995) allows certifying to obtain an answer that “may be determinative of an issue,”¹⁴⁷ while the Utah Rule requires a certified issue to be “controlling”¹⁴⁸ which may mean it must control the federal litigation, not merely an issue in it;¹⁴⁹

While the Utah Rule requires that there be “no controlling Utah Law”¹⁵⁰ and that “the state of the law of Utah applicable to a proceeding before the certifying court [be] uncertain”¹⁵¹ on the certified issue, the Uniform Act (1995) specifies sources of law which might be regarded as controlling—“no controlling appellate decision, constitutional provision, or statute of this State”;¹⁵²

Rule 41 specifies that certification may be raised in the federal court “either sua sponte or upon a motion by any party”;¹⁵³

The Uniform Act (1995) expressly permits the receiving court to “reformulate a question of law certified to it”¹⁵⁴ and also requires the certification order to expressly state that the receiving court may reformulate the question,¹⁵⁵ while the Utah Rule has no such provision;¹⁵⁶

The Uniform Act (1995) requires the certification order to contain “the names and addresses of counsel of record and parties appearing without counsel”;¹⁵⁷

The Uniform Act (1995) contemplates that parties will have an opportunity to “agree upon a statement of facts”¹⁵⁸ in the certification order;

¹⁴⁷ *Id.* § 3.

¹⁴⁸ Utah R. App. P. 41(c)(1)(B).

¹⁴⁹ Some jurisdictions adopt the Uniform Act (1995) with a requirement that the issue be determinative of the “cause” or their courts interpret their enactment in that manner. See Eric C. Surette, *Construction and Application of Uniform Certification of Questions of Law Act*, 69 A.L.R. 6th 415, §§ 27-28 (2011).

¹⁵⁰ Utah R. App. P. 41(c)(1)(C).

¹⁵¹ *Id.* at 41(a).

¹⁵² Uniform Act (1995) § 3.

¹⁵³ Utah R. App. P. 41(b).

¹⁵⁴ Uniform Act (1995) § 4.

¹⁵⁵ *Id.* § 6(a)(3).

¹⁵⁶ The Utah Supreme Court has determined it has this authority. *In re W. Side Prop. Assocs.*, 13 P.3d 168 (Utah 2000).

¹⁵⁷ Uniform Act (1995) § 6(a)(4).

¹⁵⁸ *Id.* § 6(b).

Rule 41 requires a certification order to set forth “the procedural steps by which the question was framed”;¹⁵⁹

The Uniform Act (1995) requires that the accepting court “in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable”;¹⁶⁰

Rule 41 allows the Supreme Court to specify a briefing schedule,¹⁶¹ and applies standard appellate rules to briefs and argument, unless “modified by the Supreme Court to accommodate the differences between the appeal process and the determination of a certified question,¹⁶² while the Uniform Act (1995) suggests application of “the rules and statutes governing briefs, arguments, and other appellate procedures”;¹⁶³

The Uniform Act (1995) specifies that the responding court “shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel”;¹⁶⁴

The Uniform Act (1995) specifies that “[f]ees and costs are the same as in [civil appeals] docketed before the [Supreme Court] of this State and must be equally divided between the parties unless otherwise ordered by the certifying court”;¹⁶⁵

Rule 41 provides for appearance of counsel pro hac vice in certification proceedings, which is apparently not permitted in other proceedings before the Utah Supreme Court;¹⁶⁶ and

The Uniform Act (1995) has technical sections on severability,¹⁶⁷ construction,¹⁶⁸ and citation title.¹⁶⁹

Both Rule 41 and the Uniform Act (1995) require the certification order to state the question of law to be answered,¹⁷⁰ facts relevant to the controversy and the nature of the

¹⁵⁹ Utah R. App. P. 41(c)(2).

¹⁶⁰ Uniform Act (1995) § 7.

¹⁶¹ Utah R. App. P. 41(e)(3).

¹⁶² *Id.* at 41(f).

¹⁶³ Uniform Act (1995) § 8.

¹⁶⁴ *Id.* § 9.

¹⁶⁵ *Id.* § 10.

¹⁶⁶ Utah R. App. P. 41(g).

¹⁶⁷ Uniform Act (1995) § 12.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* § 13.

¹⁷⁰ *Id.* § 6(a)(1); Utah R. App. P. 41(c)(1)(A).

controversy,¹⁷¹ and contain requirements for delivery of the certification order and record to the receiving court.¹⁷²

Comparison with Utah’s Interlocutory Appeal Rule

The Utah Rule can also be compared to Utah’s rule on interlocutory appeals from lower courts.¹⁷³ Certification comes before a federal court adjudication, while interlocutory appeals are taken from an entered order in litigation underway in an inferior court. In interlocutory appeals, the lower court assures the Utah appellate court that enough record exists to adjudicate the question. A certified question is more hypothetical and posed in advance of a decision.

Receipt of certified questions and interlocutory appeals is discretionary with the appellate court. The appellate court controls its review of these matters, and can exercise unrestrained discretion in accepting or rejecting them.

Both processes require the receiving appellate court consider similar issues:

| Interlocutory Appeals | Certification of Questions |
|--|--|
| The issue presented ¹⁷⁴ A concise analysis of the statutes, rules or cases believed to be determinative of the issue stated ¹⁷⁵ | The question of law to be answered ¹⁷⁶ |
| A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed ¹⁷⁷ | All facts which are relevant to the determination of the question certified ¹⁷⁸ |
| The terms and circumstances of the case but without unnecessary detail ¹⁷⁹ | The nature of the controversy, the context in which the question arose, |

¹⁷¹ Uniform Act (1995) § 6(a)(2); Utah R. App. P. 41(c)(2).

¹⁷² Uniform Act (1995) § 5; Utah R. App. P. 41(d).

¹⁷³ [Utah R. App. P. 5](#).

¹⁷⁴ *Id.* at 5(c)(1)(B).

¹⁷⁵ *Id.* at 5(c)(1)(C).

¹⁷⁶ *Id.* at 41(c)(1)(A).

¹⁷⁷ *Id.* at 5(c)(1)(A).

¹⁷⁸ *Id.* at 41(c)(2).

¹⁷⁹ *Id.* at 5(c)(1)(B).

| Interlocutory Appeals | Certification of Questions |
|---|--|
| | and the procedural steps by which the question was framed ¹⁸⁰ |
| <p>A statement of the reasons why an immediate interlocutory appeal should be permitted¹⁸¹</p> <p>The reason why the appeal may materially advance the termination of the litigation¹⁸²</p> | That the question certified is a controlling issue of law in a proceeding pending before the certifying court ¹⁸³ |

Each process requires consideration of unique factors. A party petitioning for interlocutory appeal must demonstrate “that the issue was preserved in the trial court,”¹⁸⁴ and “state the applicable standard of appellate review and cite supporting authority.”¹⁸⁵ Those factors have no corollary in certification. The federal court certifies that the question relates to a “live” issue, to which the answer is required to make a dispositive decision. And the federal court has not made a substantive decision, so no standard of review applies. But the Utah Supreme Court has full discretion with regard to the certifying order—the question(s) may be accepted, reformulated, or rejected.

Certification requires that “[t]he state of the law of Utah applicable to a proceeding before the certifying court is uncertain”¹⁸⁶ and “there appears to be no controlling Utah law.”¹⁸⁷ Because a question presented on interlocutory appeal is often mixed law and fact, that process does not require isolation of a unique, undecided legal issue.

Initiation of the interlocutory and certification processes is different because of the method in which they arise. Utah certification may be initiated by the federal court *sua sponte*¹⁸⁸ and is then ordered by the court,¹⁸⁹ but interlocutory appeals require a party petition.¹⁹⁰ Because

¹⁸⁰ *Id.* at 41(c)(2).

¹⁸¹ *Id.* at 5(c)(1)(C).

¹⁸² *Id.* at 5(c)(1)(D).

¹⁸³ *Id.* at 41(c)(1)(B).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 5(c)(1)(B).

¹⁸⁶ *Id.* at 41(a).

¹⁸⁷ *Id.* at 41(c)(1)(C).

¹⁸⁸ *Id.* at 41(b).

¹⁸⁹ *Id.* at 41(a).

¹⁹⁰ *Id.* at 5(a).

of its decision-making responsibility, the federal court controls the certification process, while parties have the burden of going forward in interlocutory appeals.

Comparing factors relevant in interlocutory appeal and certification informs some recommendations for procedural improvements at the end of this thesis.

Cases Bridging the Certification Processes

*Stubbs v. United States*¹⁹¹ bridged the time between the 1975 Certification Rule and the certification procedure enabled by the 1984 constitutional revision. Stubbs' first appeal, taken in 1979, was from Stubbs' suit against the federal government to quiet title and partition property. The case was largely decided on federal law.

The second appeal involving Stubbs, decided in 1985, was from a separate case the government was compelled to file against Stubbs because he "apparently persisted in asserting rights to the property" ¹⁹² This appeal presented many state law issues. As to one, the circuit court stated "[t]he United States has suggested that we might certify this question [about effect of a deed] to the Supreme Court of Utah for its definitive answer."¹⁹³ But the Tenth Circuit declined to certify because the issue was subordinate to another decisive issue, on which the law and facts were clear. "We do not do so because we are satisfied that even if we have erroneously interpreted Utah law on this issue, the stipulated facts sufficiently establish that the United States had acquired good title by adverse possession by 1955."¹⁹⁴ Apparently, the Tenth Circuit felt that the passage of the constitutional revision in 1984 was sufficient to enable certification even though the statute and rule had not yet been enacted.

*Worthen v. Kennecott Corp.*¹⁹⁵ originated before certification was available and ended after it was available. District Judge David Winder received a motion for certification¹⁹⁶ but "[t]he trial court denied such a motion because, at the time of trial, no such procedure was available under Utah law."¹⁹⁷ Judge Winder was the trial judge in *Holden v. NL Industries*.¹⁹⁸ Undeterred, "Appellant . . . urged [the Tenth Circuit] to certify the question concerning the dual capacity doctrine to the Utah Supreme Court."¹⁹⁹ Apparently, this request was made at argument. Examining Utah law, Circuit Judge McKay (who is from Utah) wrote that "[t]he combination of

¹⁹¹ 620 F.2d 775 (10th Cir. 1980).

¹⁹² *United States v. Stubbs*, 776 F.2d 1472, 1473 (10th Cir. 1985).

¹⁹³ *Id.* at 1475.

¹⁹⁴ *Id.*

¹⁹⁵ 780 F.2d 856 (10th Cir. 1985).

¹⁹⁶ The motion is not listed on the case docket, but it may have been embedded in the summary judgment motion papers filed in 1984 and 1985, or in the motion to amend or alter the decision filed in February 1985.

¹⁹⁷ *Worthen*, 780 F.2d at 860.

¹⁹⁸ 629 P.2d 428.

¹⁹⁹ *Worthen*, 780 F.2d at 860.

the clarity of the issue and the amount of time which has transpired since this matter was first raised leads us to conclude that this is not a case appropriate for the necessarily duplicative efforts of referring the case to the Utah Supreme Court.”²⁰⁰ Judge McKay clarified that he was not generally disposed against certification but that timeliness was a significant consideration. “We do not mean thereby to imply that we are hostile to suggestions of certification of state law to the appropriate state courts. Ordinarily, such suggestions are best raised on appeal by motion before the case has been fully submitted and argued.”²⁰¹

Early Certification Cases Under the New Rule

According to currently available records, District Judge Bruce Jenkins was the first federal judge to certify a question to the Utah Supreme Court under Rule 41, adopted after the constitutional revision. In late 1989, he certified a question to the Utah Supreme Court. The Court accepted the question but the parties settled the case in late 1991, before an answer was received.

The first full use of the new certification process was in 1990-91 in *Grundberg v. Upjohn Co.* District Judge Thomas Greene at the federal court faced a case²⁰² with multiple causes of action arising out of a daughter’s shooting of her mother while the daughter was under the influence of Halcion. One cause of action alleged strict liability, and Judge Greene certified the question “whether Utah adopts the ‘unavoidably unsafe products’ exception to strict products liability as set forth in comment k to section 402A of the Restatement (Second) of Torts (1965) (“comment k”).” His certification order was issued December 19, 1990; the Utah Supreme Court accepted the question January 8, 1991; and the opinion issued only four months later on May 14, 1991.²⁰³ The pace is even more remarkable as the decision was 3-2, with two separate dissenting opinions.²⁰⁴ The majority “characterize[ed] all FDA-approved prescription medications as ‘unavoidably unsafe,’” thus “expanding the literal interpretation of comment k.”²⁰⁵ Following the Utah Supreme Court’s decision, the parties briefed its impact on the case, and settled it in August 1991.²⁰⁶

Over a year before he certified the question in *Grundberg*, Judge Greene received a motion to certify in *Hansen v. Sea Ray Boats, Inc.*²⁰⁷ His order certifying the question did not

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Grundberg*, [2:89-cv-00274-JTG](#). When referring to cases in the District of Utah, the local case citation will be used and where possible, will be linked to the case docket.

²⁰³ *Grundberg v. Upjohn Co.*, [813 P.2d 89](#) (Utah 1991).

²⁰⁴ *Id.* at 99-100.

²⁰⁵ *Id.* at 90.

²⁰⁶ Order Dismissing Case, *Grundberg*, [2:89-cv-00274-JTG](#), docket no. 695, filed August 12, 1991.

²⁰⁷ Motion to Amend Judgment or in the Alternative for Certification, *Hansen*, [2:88-cv-00708-JTG](#), docket no. 95, filed December 29, 1989.

issue for nearly a year,²⁰⁸ just six weeks before his certification order in *Grundberg*. The opinion from the Supreme Court did not come for another 16 months.²⁰⁹ The majority opinion was shorter than *Grundberg*'s and the two concurrences were less than three lines. But *Hansen* took two and a half years in the certification process, compared to *Grundberg* where the process only took five months. *Hansen* did answer three questions, but stayed inside the parameters of the Restatement and prior Utah precedent.

Grundberg and *Hansen* are contrasts in speed and complexity. Oddly, speed was inversely proportional to the complexity of the Utah Supreme Court opinion. These early cases illustrate that delay may – or may not—result from certification and that the delay cannot be predicted accurately by complexity of issues or by the identity of the presiding federal judge.

Statistical Overview

Before examining groups of cases, a statistical overview provides perspective. As far as could be determined, as of February 28, 2018, 134 Tenth Circuit, Utah federal district court and Utah bankruptcy court cases have considered certification or—in cases before 1971²¹⁰—the need for it. Of those cases,²¹¹ about half did not certify a question to the Utah Supreme Court. And about half of the cases did certify a question. In one case,²¹² the district judge is currently considering a motion to certify.

Certification by the Tenth Circuit - Summary Statistics

In 13 of the cases that did certify a question, the certification occurred in the Tenth Circuit Court of Appeals,²¹³ rather than in the district or bankruptcy court. The district judges from whom those appeals were taken are:

²⁰⁸ Order of Certification, *Hansen*, [2:88-cv-00708-JTG](#), docket no. 150, filed November 2, 1990.

²⁰⁹ *Hansen v. Sea Ray Boats, Inc.*, [830 P.2d 236](#) (Utah 1992).

²¹⁰ *Black v. United States*, C138-66 (D. Utah).

²¹¹ The thesis does not consider cases certified to the Utah Supreme Court from courts other than the U.S. District Court for the District of Utah, the Bankruptcy Court for the District of Utah, and the Tenth Circuit Court of Appeals. Nor does it consider cases in those courts which considered certification of questions to the courts of states other than Utah.

²¹² *Roberts v. CR England*, [2:12-cv-00302-RJS-BCW](#).

²¹³ *United States v. Badger*, [818 F.3d 563](#) (10th Cir. 2016); *Hogan v. UTOPIA*, [635 Fed. App'x 509](#) (10th Cir. 2015); *Haik v. Salt Lake City Corp.*, [567 Fed. App'x 621](#) (10th Cir. 2014) ([2:12-cv-00997-TS](#) in the district court); *Krehbiel v. Travelers Ins. Co.*, [387 Fed. App'x 827](#) (10th Cir. 2010); *Century Indem. v. Hanover Ins.*, [417 F.3d 1156](#) (10th Cir. 2005); *Morgan v. McCotter*, [365 F.3d 882](#) (10th Cir. 2004); *Boyd v. Jones*, [85 Fed. App'x 77](#) (10th Cir. 2003) (denied because a recent Utah Supreme Court opinion addressed the issue, resulting in reversal of the trial court decision); *Johnson v. Life Inv'rs Ins. Co. of Am.*, [216 F.3d 1087](#) (10th Cir. 2000); *Hale v. Danny's Constr. Co., Inc.*, [210 F.3d 389](#) (10th Cir. 2000); *Bragg v. Buck*, [1997 WL 474520](#) (10th Cir. 1997) (case reversed on a different issue, making certification unnecessary); *Adams v. Gen. Accident Ins. Co. of Canada*, [133 F.3d 932](#) (10th Cir. 1997); *Lyman v. San Juan Cty.*, [588 Fed. App'x 764](#) (10th Cir. 1994) (certification was sought on appeal by a different party, of a different issue than was sought in a motion to certify in the district court); *Anaconda Minerals Co. v. Stoller Chem. Co.*, [990 F.2d 1175](#), 1178 (10th Cir. 1993) (stating “We remain convinced that the Utah Supreme Court would construe the

| Trial court judge | Certified by Circuit | years on bench²¹⁴ |
|-------------------------------|-----------------------------|-------------------------------------|
| District Judge Dee Benson | 3 | 26 |
| District Judge Paul Cassell | 1 | 5 ½ |
| District Judge Thomas Greene | 1 | 25 |
| District Judge Bruce Jenkins | 2 | 31 |
| District Judge Dale Kimball | 3 | 20 |
| District Judge Ted Stewart | 1 | 18 |
| District Judge Clark Waddoups | 2 | 9 |
| TOTAL | 13 | |

The Tenth Circuit Court of Appeals has also considered motions for certification to the Utah Supreme Court. The Tenth Circuit:

- has never (18 instances) certified a question to the Utah Supreme Court on motion of a party made for the first time on appeal;²¹⁵ and
- has never (7 instances) reversed a district court judge's decision not to certify a question to the Utah Supreme Court.²¹⁶

The Tenth Circuit practice demonstrates the importance of timely motions for certification in the district court and that there is no second chance at the appellate court. The substantial number of sua sponte certifications suggests that certification is not raised often enough in the district court. In nine of the cases in which questions were certified sua sponte, the answer resulted in reversal

pollution exclusion as we did in *Hartford [Accident & Indem. Co. v. U.S. Fid. & Guar. Co., 962 F.2d 1484* (10th Cir. 1992)].”); *Wright v. Deland, 986 F.2d 1432* (10th Cir. 1993); *Littlefield v. Mobil Expl. & Producing, N. Am., Inc., 131 F.3d 152* (10th Cir. 1992); *Harline v. Gladwell, 950 F.2d 669* (10th Cir. 1991); *Jorgensen v. Larsen, 930 F.2d 922* (10th Cir. 1991); *Worthen, 780 F.2d 856* (10th Cir. 1985).

²¹⁴ Years starting in 1986, when certification was first available.

²¹⁵ *Garza v. Burnett, 547 Fed. App'x 908* (10th Cir. 2013); *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Horne, 698 F.3d 1295* (10th Cir. 2012); *In re Reinhart, 505 Fed. App'x 761* (10th Cir. 2012); *In re Reinhart, 477 Fed. App'x 510* (10th Cir. 2012); *Whitney v. Div. of Juvenile Justice Servs., 468 Fed. App'x 871* (10th Cir. 2012); *McArthur v. State Farm Mut. Ins. Co., 467 Fed. App'x 792* (10th Cir. 2012); *Ohio Cas. Ins. Co v. Unigard Ins. Co., 458 Fed. App'x 705* (10th Cir. 2012); *Mecham v. Frazier, 295 Fed. App'x 267* (10th Cir. 2008); *Tabor v. Metal Ware Corp., 251 Fed. App'x 577* (10th Cir. 2007); *Olseth v. Larson, 236 Fed. App'x 443* (10th Cir. 2007); *Robert J. DeBry & Assocs., P.C. v. Quest Dex, Inc., 190 Fed. App'x 685* (10th Cir. 2006); *Richardson v. Navistar Int'l Transp. Corp., 231 F.3d 740* (10th Cir. 2000); *Hirpa v. IHC Hosp., Inc., 141 F.3d 1184* (10th Cir. 1998).

²¹⁶ *Cincinnati Ins. Co. v. AMSCO Windows, 593 Fed App'x 802* (10th Cir. 2014); *Haik, 567 Fed. App'x 621* (this case was 2:13-cv-01051-TS in the district court); *Rawlings v. Gilt Edge Flour Mills, 378 Fed. Appx. 859* (10th Cir. 2010); *Soc'y of Lloyd's v. Reinhart, 402 F.3d 982* (10th Cir. 2005); *Snyder v. Cache Cty., 18 Fed. App'x 693* (10th Cir. 2001); *Copier v. Smith & Wesson Corp., 138 F.3d 833* (10th Cir. 1998). In one other case, the district court did not resolve a certification motion before the appeal, and the Tenth Circuit denied the motion to certify. *Anderson v. Toomey, 324 Fed. App'x 711* (10th Cir. 2009).

of the district court’s opinion.²¹⁷ But in four instances, the Supreme Court’s answer did not change the ruling below.²¹⁸ The Tenth Circuit’s track record for judging the need to certify is impressive—in two thirds of the cases it certifies, the answer results in a reversal of the district court. The Tenth Circuit certified questions to the Utah Supreme Court most frequently in in 2005-07 (three certification orders) and 2009-12 (seven certification orders).

Certification in the District and Bankruptcy Courts - Summary Statistics

When certification is sought by motion in the trial court, the rate of success is about 30%. The rate of success varies widely by judge. District Judge Dee Benson has granted the most motions for certification.

| Trial court judge | motions | granted | per cent granted | years on bench²¹⁹ |
|---|----------------|----------------|-------------------------|-------------------------------------|
| District Judge Aldon Anderson | 2 | 1 | 50% | 10 |
| District Judge Dee Benson | 9 | 6 | 66% | 26 |
| District Judge Tena Campbell | 10 | 1 | 10% | 22 |
| District Judge Paul Cassell | 1 | 1 | 100% | 5 ½ |
| District Judge Thomas Greene | 9 | 5 | 56% | 25 |
| District Judge Bruce Jenkins | 9 | 1 | 11% | 31 |
| District Judge Dale Kimball | 11 | 3 | 27% | 20 |
| District Judge David Nuffer | 2 | 0 | 0% | 14 |
| District Judge Jill Parrish | 1 | 0 | 0% | 2 ½ |
| District Judge David Sam | 3 | 1 | 33% | 31 |
| District Judge Robert Shelby ²²⁰ | 2 | 0 | 0% | 5 |
| District Judge Ted Stewart | 4 | 0 | 0% | 18 |
| District Judge Clark Waddoups | 4 | 1 | 25% | 9 |
| District Judge David Winder ²²¹ | 2 | 2 | 100% | 23 |
| Magistrate Judge Paul Warner | 1 | 0 | 0% | 11 |
| Magistrate Judge Evelyn Furse | 1 | 1 | 100% | 5 ½ |
| Bankr. Judge Judith Boulden | 1 | 1 | 100% | 24 |
| TOTAL | 72 | 24 | 33% | |

²¹⁷ *Garza*, 547 Fed. App’x 908; *Horne*, 698 F.3d 1295; *In re Reinhart*, 505 Fed. App’x 761; *Ohio Cas. Ins. Co.*, 458 Fed. App’x 705; *Mecham*, 295 Fed. App’x 267; *Tabor*, 251 Fed. App’x 577; *Olseth*, 236 Fed. App’x 443; *Richardson*, 231 F.3d 740; *Hirpa*, 141 F.3d 1184.

²¹⁸ *In re Reinhart*, 477 Fed. App’x 510; *Whitney*, 468 Fed. App’x 871; *McArthur*, 467 Fed. App’x 792; *Robert J. DeBry & Assocs., P.C.*, 190 Fed. App’x 685.

²¹⁹ Years starting in 1986, when certification was first available.

²²⁰ One motion is pending decision. *Roberts*, 2:12-cv-00302-RJS-BCW.

²²¹ One case in which Judge Winder granted certification was *Holden v. NL Industries*, 629 P.2d 428, which resulted in overturning the 1975 Certification Rule.

As might be expected, when the judge is the one who thinks of certification, certification is far more likely to happen. But certification is not guaranteed, even then. Trial court judges have sua sponte raised certification five times and later decided not to certify.

| Trial court judge | raised sua sponte | certification occurred | per cent certified | years on bench²²² |
|---|--------------------------|-------------------------------|---------------------------|-------------------------------------|
| District Judge Dee Benson | 5 | 4 | 80% | 26 |
| District Judge Tena Campbell | 5 | 5 | 100% | 22 |
| District Judge Paul Cassell | 2 | 2 | 100% | 5 ½ |
| District Judge Thomas Greene | 1 | 1 | 100% | 25 |
| District Judge Bruce Jenkins | 3 | 2 | 67% | 31 |
| District Judge Dale Kimball | 0 | 0 | 0% | 20 |
| District Judge David Nuffer | 1 | 1 | 100% | 14 |
| District Judge Jill Parrish | 8 | 7 | 75% | 2 ½ |
| District Judge David Sam | 1 | 0 | 0% | 31 |
| District Judge Robert Shelby | 1 | 1 | 100% | 5 |
| District Judge Ted Stewart | 2 | 2 | 100% | 18 |
| District Judge Clark Waddoups | 0 | 0 | 0% | 9 |
| District Judges Waddoups/Shelby/Nuffer | 1 | 1 | 100% | |
| Magistrate Judge Brook Wells | 1 | 1 | 100% | 14 |
| Magistrate Judge Evelyn Furse | 1 | 1 | 100% | 5 ½ |
| Bankruptcy Judge Kevin Anderson | 2 | 2 | 100% | 2 |
| Bankr. Judges Glen Clark / Bill Thurman | 1 | 1 | 100% | |
| Bankruptcy Judge Kimball Mosier | 1 | 1 | 100% | 9 |
| TOTAL | 36 | 32 | 88% | |

Trial court judges have made 50% more certifications sua sponte than on motion. On the average, on motion or sua sponte about 2 cases per year in the trial court have certified questions since 1986. But in 2016 and 2017, 11 cases have certified questions.

Sua sponte certification seems to arise at a hearing on a dispositive motion, when the judge recognizes that a controlling issue is an issue of state law. Motions to certify which are granted also arise in the context of dispositive motions. The motions to certify are more often granted if made in the briefing, with an admission that existing case law is unclear. But the motions are denied if made at the hearing on the motion; after the movant has stated the law is clear in briefing; or after the trial court judge has ruled or indicated an inclination.

Pro se parties fare poorly in attempts to certify, as did certification requests after an adverse ruling. A pro se party has never had an issue certified in the Utah federal district court,

²²² Years starting in 1986, when certification was first available.

though six have tried.²²³ Certification requests after an adverse ruling have succeeded only one out of nine times.²²⁴

While well over 60 federal cases issued certification orders, only 47 opinions from the Utah Supreme Court answer certified questions. In three cases, the request was rejected.²²⁵ No explanation was given in the rejection orders.²²⁶ Nine cases settled while the certified question was pending in the Utah Supreme Court.²²⁷ Six cases with certified questions are currently pending in the Utah Supreme Court.²²⁸

It is clear from the records that 14 of the Utah Supreme Court answers to certified questions were case-dispositive,²²⁹ by causing the case to settle or clarifying grounds for entry of judgment soon after the certified question was answered. And other cases were likely aided by answers but the cases had other issues that required additional motions or trial.

Certification of Questions of Utah Law from Federal Courts

Utah trial level federal courts, including district judges, bankruptcy judges and magistrate judges have certified questions to the Utah Supreme Court. And the Tenth Circuit has also certified questions. This section will examine the processes, standards and case patterns in these courts. The processes in these courts to generate the certification orders are not identical.

Federal Court Certification Processes

The Tenth Circuit Court of Appeals has a rule on certification of questions of state law, adopted in 1999.²³⁰ Very brief, it treats only five subjects:

²²³ See *infra* p. 45.

²²⁴ See *infra* pp. 44-45.

²²⁵ *Novell v. Handiman*, 2:01-cv-00173-TS; *Kennard v. Leavitt*, 2:01-cv-00171-DB; *Stoker v. Salt Lake Cty.*, 2:90-cv-248-BSJ.

²²⁶ In *Kennard*, 2:01-cv-00171-DB, the trial court record reflects that the Utah Supreme Court had two matters pending that likely involved similar issues.

²²⁷ See *infra* pp. 60-61.

²²⁸ *Mitchell v. Roberts*, 2:16-cv-00843-EJF; *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.*, 2:16-cv-00135-JNP-PMW; *GeoMetWatch v. Hall*, 1:14-cv-00060-JNP-PMW; *CR England v Swift*, 2:14-cv-781-DB; *In re Hendry*, 2:14-bk-27398-KA; *Katterman v. Salt Lake Cty.*, 2:13-cv-01122-EJF.

²²⁹ See *infra* pp. 61-63.

²³⁰ Certification of Questions of State Law

(A) Certification; Abatement. When state law permits, this court may:

(1) certify a question arising under state law to that state's highest court according to that court's rules; and

(2) abate the case in this court to await the state court's decision of the certified question.

(B) Motion. The court may certify on its own or on a party's motion.

(C) Time to File. A motion to certify should be filed at the same time as, but separately from, the moving party's brief on the merits.

- authorization of certification and abatement of an appeal;
- certification may be raised by a party or by the court;
- any motion should be filed with, but separate from, a brief;
- any response should be filed with the other party's next brief or, if the motion was filed with a reply brief, 14 days after the reply brief; and
- the motion will be considered by the argument panel, at argument.

While the rule provides guidance, it has never been invoked successfully by a party seeking certification.

In contrast, the Utah federal district and bankruptcy courts have no defined procedures for promulgating certification orders. Because many judges sit on these courts and they always make individual decisions, there is no uniform practice in these courts. As was seen in the statistical summary, many successful certifications begin with the judge's suggestion. In those instances, parties are often directed to meet and confer, or submit proposed certification orders. Sometimes a sua sponte certification may occur without party input.

Other successful certification processes begin with a motion. The motion process includes briefing which may concur in the idea of certification and propose versions of the facts and questions for an eventual order. Or a party may oppose another party's motion to certify, asserting the law is clear.

Certainly, the better orders are those in which parties and the judge participate in formulation. The Utah Supreme Court advised this course: "In formulating the wording of the questions to be certified, a few federal courts ask counsel for both sides to provide assistance. However, most courts prepare the questions themselves without input from counsel which has, at times, led to the wrong questions being asked."²³¹

Federal Court Considerations for Certifying Questions of Utah Law

Because certification is discretionary,²³² there is precedent for the decision to certify and for the decision not to certify. A discretionary decision may only be overturned if it is "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment."²³³ On the background of such discretion, the courts feel free to use broad language supporting their decision on a certification motion. And these broad statements of law permitting certification or refusal

(D) Response; Time to File. A response may be filed at the same time as the answer or reply brief or within 14 days after the motion is served.

(E) When Considered. A motion to certify is ordinarily referred to the panel of judges assigned to decide the appeal on the merits and is considered at the same time as the arguments on the merits.

[10th Cir. R. 27.2.](#)

²³¹ *In re W. Side Prop. Assocs.*, 13 P.3d at 170.

²³² *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) (citing *Lehman Bros.*, 416 U.S. at 391).

²³³ *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994).

buttress future courts looking to support their discretionary, nearly irreversible decisions. Some of the arguments made and authorities cited cannot, however, survive critical examination.

Arguments and Authorities Against Certification

One argument against a federal plaintiff's motion to certify is that forum selection at filing means that the filer trusts the forum to answer all legal questions presented, even if the forum is federal and the question is one of state law. In rejecting a request to certify, the Tenth Circuit stated: "One who chooses to litigate his state action in the federal forum must ordinarily accept the federal court's reasonable interpretation of extant state law rather than seeking extensions via the certification process."²³⁴ The quotation implies that certification is an extension of the case schedule in federal court and assumes, contrary to usual thinking, that plaintiffs favor delay. Usually, plaintiffs are anxious to conclude their claims—but they want the claim decided on accurate, authoritative interpretations of state law. And a plaintiff's selection of a forum may involve many factors beyond selection an interpreter of law.²³⁵

The Tenth Circuit has often, when rejecting a request to certify, reflected attitudes from the era when certification was emerging and less proven. In that era of more dominant federal control, federal courts assumed they were as well or better equipped to decide questions of state law. In one instance, about six years after Utah's certification process was implemented, the Tenth Circuit expressed full confidence in its ability to predict Utah law:

The Utah Supreme Court has not yet considered the meaning of "sudden and accidental" in the context of the pollution exclusion [in an insurance policy]. In such a case of first impression, our responsibility is to give the clause the interpretation we believe the Utah court would. We are informed by decisions of

²³⁴ *Littlefield*, 131 F.3d 152, n.5 (citing *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d. 465, 472 (11th Cir. 1993); *Croteau v. Olin Corp.*, 884 F.2d. 45, 46 (1st Cir. 1989); *Armijo*, 843 F.2d at 407).

²³⁵ A corollary is that a plaintiff who is involuntarily in federal court after removal from state court is not entitled to certification. The Tenth Circuit rejected that absolute rule:

[W]e are unable to discern when a federal district court, under plaintiff-appellant's argument, would ever be able to deny certification in a Utah case that had been removed if there were any possible argument that there is uncertainty on the Utah law. Any plaintiff seeking redress under Utah law whose case was subsequently removed to federal court would be able to raise the same argument Ms. Copier has, and if the district court could not rule out even the slightest degree of uncertainty in the law of the state, it could never deny certification. Such a rule would be clearly wrong.

Copier, 138 F.3d at 839.

Of the six cases removed to Utah federal district court in which certification was sought, certification was granted in three. *Carson v. Am. Family Mut. Ins.*, [2:09-cv-00663-DB](#); *Whitney v. Div. of Juvenile Justice Servs.*, [2:09-cv-00030-DAK](#) (certification granted; answer dispositive); *Anderson v. Toomey*, [2:07-cv-00673-TS](#); *Jensen v. State of Utah*, [2:05-cv-00739-TS](#); *Clark v. United States*, [2:98-cv-00304-DB](#) (certification granted; answer dispositive); *Soter's Inc., v. Deseret Fed.*, [2:89-cv-00979-DB](#) (certification granted; answer dispositive).

the Utah appellate courts and by precedent of federal courts in this and other circuits.²³⁶

That case then decided the issue using cases from the First, Second and Sixth Circuits, the State of New York, and the Utah Court of Appeals. The Tenth Circuit did not consider the possibility of certification to the Utah Supreme Court for an authoritative answer.

The Tenth Circuit has also said “[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law.”²³⁷ One oft-cited reason for the federal court to proceed to answer a state law question was stated in the 1943 U.S. Supreme Court opinion in *Meredith v. City of Winter Haven*.²³⁸ “[I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.”²³⁹ That statement was made, however, long before certification procedures were in place, and in a case in which the Court of Appeals had directed the trial court to dismiss without prejudice so that the plaintiff could refile in state court.²⁴⁰ The U.S. Supreme Court directed that the judgment of the district court, deciding the issue, be reinstated.²⁴¹ *Meredith* was decided when the only alternatives for a federal court considering an issue of state law were to decide the issue or abstain. *Meredith* could not consider certification. Certification, where a forum is maintained, is very different than abstention, where the federal court denies its services. In an era when certification is available in all states but one, *Meredith’s* statement about the duties of trial courts should not be cited.

As recently as 2005, in *Society of Lloyd’s v. Reinhart* the Tenth Circuit stated that “[w]hile certification is appropriate ‘where the legal question at issue is novel and the applicable state law is unsettled,’ it is never compelled.”²⁴² For that last phrase, the *Lloyd’s* opinion cited *Lehman Bros. v. Schein*²⁴³ which is a *pro-certification opinion* that

- does not use the word “compelled,” but states that even where certification is available, it is never “obligatory”;

²³⁶ *Hartford Accident & Indem. Co.*, 962 F.2d at 1487-88.

²³⁷ *Armijo*, 843 F.2d at 407 (citing *L. Cohen & Co. v. Dun & Bradstreet*, 629 F.Supp. 1419, 1425 (D. Conn. 1986)).

²³⁸ 320 U.S. 228 (1943). Despite its age, this precedent continues to be used. *L. Cohen & Co.*, cited above, relied on it and cited other pre-1960’s case law such as *R.R. Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

²³⁹ *Meredith*, 320 U.S. at 234; see also *Copier*, 138 F.3d at 839; Memorandum Decision and Order, *Self v. Teleperformance Grp. USA*, 2:08-cv-00395-PMW, docket no. 126, filed February 4, 2009; Order on Motions to Dismiss, *Jensen*, 2:05-cv-00739-TS, docket no. 52, filed June 16, 2006, 2006 WL 1702585, at *21 (D. Utah June 16, 2006).

²⁴⁰ *Meredith*, 320 U.S. at 230.

²⁴¹ *Id.* at 238.

²⁴² 402 F.3d at 1001 (citations omitted).

²⁴³ 416 U.S. at 390-91.

- led off that paragraph with a sentence and footnote clarifying that certification was only available in nine states at the time of the opinion;²⁴⁴
- noted that certification “does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism”; and
- remanded so the lower court could consider certification.

Lloyd’s and *Lehman* also cited *Meredith v. Winter Haven*, decided in the abstention era. As stated above, that case law is of little value now that certification is readily available. Reliance on *Lehman Bros.* as speaking against certification is flawed.

The Tenth Circuit has also cited a Florida case for the proposition that certification “is to be utilized with restraint and distinction.”²⁴⁵ For several reasons, this citation in *Ormsbee Development Company v. Grace* is misleading.

The careless citation of the case is revealed by *Ormsbee’s* use of the word “distinction.” That word does not appear in the Florida opinion. *Florida ex rel. Shevin v. Exxon Corp.* actually stated: “We use much judgment, restraint and *discretion* in certifying.”²⁴⁶ The erroneous use of the word “distinction” has been perpetuated by its use in *Ormsbee*.²⁴⁷ But it has also been corrected. In spite of *Ormsbee’s* misquotation, District Judge Bruce Jenkins cited *Ormsbee* using the correct word from *Shevin*: “While the decision to certify is discretionary and certification should be used with restraint”²⁴⁸

More important than the use of the wrong word, *Shevin* is actually not a case to use against certification. The case should be seen in its perspective as coming from Florida, the first state with a certification process. Further, the quotation should be placed in context of the opinion’s general endorsement of the certification process:

[O]nly the Florida Supreme Court can decide this state law question in a manner that is, by definition, correct. Thus the defendants’ strong urging that the issue be certified to that Court has considerable force. Both the United States Supreme Court and this Court have lauded the certification process, not only because it produces definitive answers but also because it ‘helps build a cooperative judicial federalism’. However, as has been noted by Chief Judge Brown, one of the strongest advocates of the process, certification should never be automatic or

²⁴⁴ Forty-nine states now have certification rules. Eisenberg, *supra* n.59.

²⁴⁵ *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1149 (10th Cir. 1982) (citing *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), *cert. denied*, 429 U.S. 829 (1976)).

²⁴⁶ 526 F.2d at 274 (emphasis added).

²⁴⁷ *Reynolds v. United States*, CIV.A. 98-B-1003, 2000 WL 134550, at *1 (D. Colo. January 21, 2000); *L. Cohen & Co.*, 629 F.Supp. at 1424.

²⁴⁸ *Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1383 (D. Utah 1997) (citing *Ormsbee Dev. Co.*, 668 F.2d at 1149).

unthinking. ‘We use much judgment, restraint and discretion in certifying. We do not abdicate.’²⁴⁹

[W]e decline to certify the state law question in this case to the Florida Supreme Court. In taking this action, we intend to cast no doubt on the general efficacy of the certification process. And we certainly recognize the supremacy of the Florida Supreme Court as interpreter of state law²⁵⁰

And the case had many reasons certification was not used. The plaintiff was the Attorney General of the State of Florida:

We have before us the Attorney General, elected by the people of Florida, whose opinions on questions involving the duties of various state officials are persuasive, though certainly not binding, in Florida courts. He has brought this action in what he has determined to be the public interest and has proceeded for two years without apparent opposition from the Florida Legislature or the state governmental entities he purports to represent. To impede the progress of this action through the certification process itself seems to us to involve some disregard of the state governmental processes that comity principles require us to respect.²⁵¹

There were also strong practical reasons not to certify in *Shevin*. *Shevin* was an “antitrust action against seventeen major oil companies” which the trial court dismissed, directing the parties to proceed with a declaratory action in state court before the federal court would hear their antitrust claims.²⁵² The *Shevin* appeal was presented after the case had been pending two years and stated only federal claims.²⁵³

And there was abundant state precedent on the question presented:

[T]he narrow issue of the Florida Attorney General’s standing to bring this action does not seem to us an extremely close one. And we come to this conclusion with the aid of a long line of Florida decisions . . . as well as the body of common law dealing with the powers of attorneys general. This clearly is not a case in which we are required to ‘guess’ state law from one or two questionable precedents.²⁵⁴

Shevin’s circumstances, praise of the certification process, comparison with available alternatives, and broad language in favor of certification in its careful—not casual—analysis

²⁴⁹ *Florida ex rel. Shevin*, 526 F.2d at 274 (quoting *Barnes v. Atl. & Pac. Life Ins. Co.*, 514 F.2d 704, 705 n.4 (5th Cir. 1975)) (citations omitted).

²⁵⁰ *Id.* at 276.

²⁵¹ *Id.* at 275.

²⁵² *Id.* at 267.

²⁵³ *Id.* at 275.

²⁵⁴ *Id.*

makes citation of *Shevin* against certification improper. And returning to *Ormsbee*, the Tenth Circuit case citing *Shevin*, certification was never really viable. In *Ormsbee*, the court said “certification . . . is not appropriate when, as here, the issue certified would not be determinative of the issues before us on appeal.”²⁵⁵ So, *Ormsbee* should not be cited against certification.

Criteria for Certification

Two opinions from the Utah district court have stated certification is appropriate “when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.”²⁵⁶ District Judge Dale Kimball’s language was cited by District Judge Jill Parrish, but she added an additional point, extending beyond his last criterion: “And the United States Supreme Court has instructed that federal district courts may avail themselves of state certification procedures when facing ‘[n]ovel, unsettled questions of state law.’”²⁵⁷

Judges Kimball and Parrish list five instances when certification is appropriate:

1. when the case concerns a matter of vital public concern;
2. where the issue will likely recur in other cases;
3. where resolution of the question to be certified is outcome determinative of the case;
4. where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue; and
5. when facing “[n]ovel, unsettled questions of state law.”²⁵⁸

In an extensive footnote, when considering certification sua sponte, Judge Bruce Jenkins cited language from a Tenth Circuit opinion²⁵⁹ which correlates with the last three criteria used by Judges Kimball and Parrish. The Circuit opinion used language from the Uniform Act (1995). When the Circuit opinion borrowed the standards of the Uniform Act (1995) in setting standards for the certifying court, the state law became federal precedent:

The Tenth Circuit has determined that certification is appropriate where it appears that the question to be certified may be determinative of the action now pending

²⁵⁵ *Ormsbee Dev. Co.*, 668 F.2d at 1149.

²⁵⁶ Memorandum Decision and Order Certifying Question to Utah Supreme Court, *Carranza v. Mountainlands Health Clinic*, 2:07-cv-00291-DAK, docket no. 31, filed May 14, 2009, 2009 WL 1392839, at *4 (D. Utah May 14, 2009) (citing *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001); see also Memorandum Decision and Order, *Burningham v. Wright Med. Grp., Inc.*, 2:17-cv-00092-JNP-PMW, docket no. 48, filed January 23, 2018, 2018 WL 542708, at *3 (D. Utah January 23, 2018).

²⁵⁷ Memorandum Decision and Order, *Burningham*, 2:17-cv-00092-JNP-PMW, docket no. 48, filed January 23, 2018, 2018 WL 542708, at *3 (D. Utah January 23, 2018) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997)).

²⁵⁸ *Id.*

²⁵⁹ *Swink v. Sunwest Bank (In re Fingado)*, 955 F.2d 31 (10th Cir. 1992).

before the federal court and where there is no controlling authority on the question from the state's highest court or its intermediate appellate court.²⁶⁰

The Uniform Act (1995) criteria are also the likely foundation of the last three criteria in the Kimball-Parrish list above.

District Judge Jenkins also added that certification is appropriate “where the question has not been addressed by the state courts with ‘sufficient clarity.’”²⁶¹ Thus, even if a question had been addressed by the state court, but without precision, certification could be used as an opportunity for state law to be made more understandable.

The criteria established illustrate the major purposes of certification—some of which are in conflict when the practical impact of certification is considered. One consideration is case specific—the issue certified must be case determinative. But other case specific considerations such as time and expense may push against certification. And other considerations are systemic. The existence of a novel question of law, unsettled by state authority, likely to bear in other cases, requires the court and parties to look beyond their current case. This is an opportunity for counsel and the court to look at the larger purposes of the judicial system and the respective roles of federal and state courts. Comity and federalism are much larger than any current case and future cases. So, those factors external to the case may drive a case to bear a burden for the benefit of others. The parties are most likely to emphasize the case specific factors, unless one of them is a recurrent litigant or a governmental entity. Therefore, the court must require the parties to address factors external to the case and may need to develop those factors itself if the parties do not adequately address them.

Motion to Certify Denied

As stated earlier, in about half of cases in which certification is considered, no question is certified. There are several common reasons.

No State Law Question. Of course, certification is not needed if the state law question is not decisive. Framing the issues in the case can make certification irrelevant. In *SEC v. Merrill Scott Limited*,²⁶² District Judge Tena Campbell rejected an attempt to “certify a question of Utah property and trust law to the Utah Supreme Court regarding a trust beneficiary's ability to control property held in trust.”²⁶³ At the hearing, she stated “This is not a state law question. This is a question of securities transactions, the antifraud provisions.”²⁶⁴ In her later order denying certification she added: “The Tenth Circuit has made clear that certification is appropriate only

²⁶⁰ *Cyprus Plateau Mining Corp.*, 972 F.Supp. at 1383 (citing *Swink*, 955 F.2d at 33), compare with Uniform Act (1995) § 2.

²⁶¹ *Cyprus Plateau Mining Corp.*, 972 F. Supp. at 1383 (citing *Delaney v. Cade*, 986 F.2d 387, 391 (10th Cir. 1993)).

²⁶² 2:02-cv-00039-TC.

²⁶³ Order at 3, *Merrill Scott Ltd.*, 2:02-cv-00039-TC, docket no. 970, filed May 2, 2007.

²⁶⁴ March 8, 2007 Hrg. Tr. at 64, *Merrill Scott Ltd.*, 2:02-cv-00039-TC, docket no. 949, filed March 22, 2007.

where novel or unsettled issues of state law exist. . . . This case turns on the application of federal law”²⁶⁵

Utah Law is Clear. In *Evans v. State of Utah*,²⁶⁶ same-sex couple plaintiffs alleged deprivation of their property and liberty interests resulting from the State of Utah's failure to recognize same-sex marriages solemnized in the time between issuance of an order in the District Court validating such marriages and a stay of that order entered by the U.S. Supreme Court.²⁶⁷ Defendants filed two motions to certify issues to the Utah Supreme Court. District Judge Dale Kimball denied the motions: “Because Utah law is clear and not ultimately controlling of the case before this court, the court concludes that there is no basis for certifying the state law questions to the Utah Supreme Court.”²⁶⁸

No Unusual Difficulty in Deciding. In *Society of Lloyd's v. Reinhart*,²⁶⁹ certification was not used sua sponte by the Tenth Circuit because the issue was not hard to resolve:

While no Utah court has rendered a decision on the precise issue in question, our analysis above establishes that there is no unusual difficulty in deciding the state law question or a likelihood that Lloyd's theory of liability would be adopted by the Utah courts. Thus, given the above conclusions, certification is unnecessary.²⁷⁰

Failure to Disclose Known Authority. While a lack of candor with the court may not doom a certification motion, it certainly played a role in *Self v. Teleperformance Group USA*.²⁷¹ Magistrate Judge Paul Warner noted that the decisive issue on which certification was sought had been ruled on by another judge in the district recently, and that counsel clearly knew of the decision because counsel was also engaged in that other case:

Two weeks after Judge Stewart’s October 1, 2008 decision was rendered in *Sweat*, Plaintiffs’ counsel filed the motion to certify in this case but, for whatever reason, failed to mention Judge Stewart’s ruling in *Sweat*. It is not lost on the court that Plaintiffs’ counsel did not believe it was necessary to request certification of the above-referenced issue until after Judge Stewart ruled against the plaintiffs on the same issue in *Sweat*.²⁷²

²⁶⁵ Order at 3, *Merrill Scott Ltd.*, 2:02-cv-00039-TC, docket no. [970](#), filed May 2, 2007.

²⁶⁶ [2:14-cv-00055-DAK](#).

²⁶⁷ Memorandum Decision and Order, *Evans*, 2:14-cv-00055-DAK, docket no. [45](#), filed May 19, 2014.

²⁶⁸ *Id.* at 34.

²⁶⁹ 402 F.3d 982.

²⁷⁰ *Id.* at 1002.

²⁷¹ [2:08-cv-00395-PMW](#).

²⁷² Memorandum Decision and Order at 4, *Self*, 2:08-cv-00395-PMW, docket no. [126](#), filed February 4, 2009.

Timing of Motion, After Party Asserts Law is Clear. A party seeking certification should at the latest raise it when a dispositive motion raises the issue. In *American National Property v. McNeely*,²⁷³ District Judge Dale Kimball pointed out the danger in waiting too long. The motion was made three days before a hearing and denied a day after the hearing.

The court considers Defendant's present motion to be untimely. A party cannot assert that Utah law is clear on an issue and then seek redress from another court when it receives an unfavorable ruling. At this stage of the litigation, if Defendant disagrees with the court's analysis, his recourse is to file an appeal to the Tenth Circuit. Defendant can ask the Tenth Circuit to certify the issue prior to its analysis of the issue. Prior to this court's analysis of the issue, Defendant's only position was that the issue was clear and that the court should certify the question only if the court thought it was unclear or disagreed with Defendant. [The Court's disagreement with a party's position does not make the issue unclear.]²⁷⁴

When a motion suggests the issue, certification should be raised. Stating that the law is clear will work against a party later seeking certification, who must necessarily claim the law is not settled.

Motion Made After Adverse Decision. A motion is clearly untimely after an adverse decision. Perhaps the untimelest motion was made in another case District Judge Dale Kimball handled. In *Utah Division of Forestry v. United States*,²⁷⁵ the motion was made in 2004, three years after a summary judgment ruling.

In *1.800. Vending v. Wyland*,²⁷⁶ the motion was not as late, and District Judge Clark Waddoups explained why a motion to certify is too late when made after an adverse ruling:

Surprisingly, Defendants believed the court had sufficient guidance to rule in Defendants' favor on the motion for summary judgment and sought certification only after the court rejected its argument. If such a procedure were to be allowed, it would in effect allow a party to make a motion, argue the merits, and then after losing on an issue, use certification as an interlocutory appeal from an interim decision by a federal court to the Utah Supreme Court.²⁷⁷

²⁷³ [1:16-cv-00007-DAK](#).

²⁷⁴ Memorandum Decision and Order Denying Motion to Certify Question to Utah Supreme Court, *McNeely*, 1:16-cv-00007-DAK, docket no. [32](#), filed November 22, 2016.

²⁷⁵ [2:97-cv-00927-DAK](#).

²⁷⁶ [1:14-cv-00121-CW](#).

²⁷⁷ Memorandum Decision and Order Denying Motion to Certify a Question at 3, *Wyland*, 1:14-cv-00121-CW, docket no. [94](#), filed January 11, 2017.

In six other cases a motion to certify was made after an adverse ruling and denied,²⁷⁸ but in one case a district judge granted a motion to certify after an adverse ruling was made against the movant.²⁷⁹

The Tenth Circuit has stated: “We generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court.”²⁸⁰

Prematurity. Sometimes the determinative issues have not emerged, making certification at an early stage unwise. In *Spurlino v. Holcim*, District Judge Jill Parrish denied a motion to certify for that reason: “While the court agrees that certification of the question may eventually be appropriate, it would be premature to do so now. . . . At this early stage of the proceeding, Plaintiff has not developed a factual record showing it would benefit [from the issue of law].”²⁸¹

Pro Se Movants. Pro se parties also fare poorly when asking for certification.²⁸² In *Edwards v. Utah Board of Pardons*,²⁸³ a pro se habeas petitioner sought post-conviction relief from a state criminal sentence and almost a year after the District Court dismissed his petition for failure to exhaust state remedies,²⁸⁴ the petitioner filed a motion for certification.²⁸⁵ The motion did not propose a question to certify—it only requested the clerk certify and transmit all records to the Utah Supreme Court. That motion was found moot²⁸⁶ after the petitioner’s appeal. The Tenth Circuit dismissed the appeal as untimely because the appeal was filed five months after the District Court dismissed his petition.²⁸⁷

²⁷⁸ *Allen v. Bamboo HR*, 2:16-cv-00905-RJS; *First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, 2:15-cv-00229-DN; *Schubert v. Genzyme*, 2:12-cv-00587-DAK; *W. States Contracting v. Spilsbury*, 2:10-cv-01141-TC; *Baker v. D&RG*, 2:94-cv-00017-JTG; *Powderham v. Synergy Worldwide*, 2:92-cv-00516-TC.

²⁷⁹ *Gibbs v. Unum Life Ins. Co.*, 2:00-cv-00549-PGC. The certification and case were resolved the next month, by settlement.

²⁸⁰ *Massengale v. Oklahoma Bd. of Exam’rs in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994) (citing *Armijo*, 843 F.2d at 407).

²⁸¹ Order Denying Without Prejudice Plaintiff’s Motion for Certification of Questions of Law to the Utah Supreme Court at 1-2, *Spurlino*, 2:14-cv-00461-JNP, docket no. 73, filed January 27, 2016.

²⁸² *Stone v. Third Dist. Court*, 2:12-cv-00390-CW; *Anderson*, 2:07-cv-00673-TS; *Anderson*, 324 Fed. App’x 711; *Whiteman v. Friel*, 2:05-cv-00424-TC; *Snyder v. Cache Cty.*, 1:98-cv-00151-DAK; *Snyder*, 18 Fed. App’x 693; *Wright*, 986 F. 2d 1432.

²⁸³ 2:01-cv-00834-TS.

²⁸⁴ Order, *Edwards*, 2:01-cv-00834-TS, docket no. 20, filed February 23, 2004.

²⁸⁵ Motion to [*sic*] Certification and Transmission of Records, *Edwards*, 2:01-cv-00834-TS, docket no. 21, filed January 21, 2005.

²⁸⁶ Order Denying Pending Motions as Moot, *Edwards*, 2:01-cv-00834-TS, docket no. 30, filed October 25, 2005.

²⁸⁷ Ltr re Record on Appeal, *Edwards*, 2:01-cv-00834-TS, docket no. 28, filed October 18, 2005.

No Stated Reason. Sometimes, no reason for denial is given. Because the decision is entirely discretionary, even a brief denial will suffice. In *Whiteman v. Friel*,²⁸⁸ District Judge Tena Campbell denied the motion by endorsement.²⁸⁹

Motion Denied.
2-27-2006
Tena Campbell

Lack of Subject Matter Jurisdiction. In *Haik v. Salt Lake County Board of Health*²⁹⁰ the District Court and Tenth Circuit denied motions to certify because the federal courts lacked subject matter jurisdiction.

Remarkable Cases

For several reasons, cases involving certification may be remarkable. Certification creates a unique interplay between two sovereigns. By the nature of the process, the issues certified are significant. In these first 30 years of the Utah experience, some cases have procedural features worth examining. The personalities of judges involved may impress themselves on the various orders and opinions. Lawyer and party strategies make each case unique. This section of the thesis will examine some cases that deserve attention beyond their contribution to the pattern of cases in which certification was considered and used.

Reformulation: In the first case²⁹¹ which reformulated a certified question, the Utah Supreme Court reviewed the history of certification generally and in Utah. “The practice of certifying questions of state law to a state supreme court is a fairly recent device that arose from the judge-made doctrine of abstention, whereby a federal court would abstain until the state court had resolved the state questions.”²⁹² The opinion noted U.S. Supreme Court approval of certification and the constitutional infirmities in Utah’s 1975 Certification Rule. Then, the opinion explained why the need for reformulation arises (lack of lawyer participation in formulation);²⁹³ how the need is accommodated by the federal court (by an express statement that “the particular phrasing of the question should not restrict the state court from reformulating the question as it sees fit”);²⁹⁴ the power of the receiving court to reformulate a question;²⁹⁵ and why the Utah Supreme Court found it necessary to reformulate the question.²⁹⁶ The opinion did not note the lack of an express reformulation provision in Utah’s Rule 41.

²⁸⁸ [2:05-cv-00424-TC](#).

²⁸⁹ Order, *Whiteman*, 2:05-cv-00424-TC, docket no. 20, filed February 27, 2006.

²⁹⁰ [2:13-cv-01051-TS](#).

²⁹¹ *In re W. Side Prop. Assocs.*, [13 P.3d 168](#).

²⁹² *Id.* at 170.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 171

²⁹⁶ *Id.*

That case is also interesting because it was a 3-2 decision, with the dissent boldly stating it “would advise the bankruptcy court to employ the guidelines set out in this dissenting opinion.”²⁹⁷ The bankruptcy court followed the position of the majority.²⁹⁸

An unfinished order: A mechanical problem required two certification orders in *Gardner v. Galetka*,²⁹⁹ The first certification order³⁰⁰ was unfinished—omitting the certified question—and rejected for not containing the federal court’s statement of the question submitted.³⁰¹ The corrected order containing the questions was submitted after briefing four months later.³⁰²

answered under Utah law and controlling precedent:

** INSERT CERTIFICATION QUESTION HERE **

BACKGROUND

Petitioner filed an initial post-conviction petition in state court in 1990, after the

Public policy exceptions to at-will employment: Among the high-profile cases which have turned on certified questions is *Ray v. Wal-Mart Stores, Inc.*³⁰³ Utah is an at-will employment state, but a wrongful termination suit may be maintained if a termination violates public policy. The plaintiff-employees responded to shoplifting incidents where the shoplifters were armed. They did not follow Wal-Mart policy to withdraw but instead pinned the shoplifters and confiscated the weapons. They were then terminated. The question whether this stated a violation of the Utah policy of self-defense was certified sua sponte and answered. The Utah Supreme court held that self-defense resulting in termination may give rise to a wrongful termination claim and is an exception to the rule of at-will employment, but limited the exception to circumstances where an employee reasonably believes that force is necessary to defend against an imminent threat of serious bodily harm and the employee has no opportunity to withdraw.³⁰⁴

*Ammons v. La-Z-Boy, Inc.*³⁰⁵ is another at-will employment case in which certification was important. In response to the question about another public policy exception to at-will

²⁹⁷ *Id.* at 173.

²⁹⁸ Order Disallowing Salt Lake County’s Request for Allowance of Administrative Expense Claim, *In re W. Side Prop. Assocs.*, 97-20887, docket no. 170, filed March 22, 2001; *see also* Reorganized Debtor’s Motion for Entry of Order (i) Disallowing Salt Lake County’s Request for Allowance of Administrative Expense Claim and (ii) Closing the Case, *In re W. Side Prop. Assocs.*, 97-20887, docket no. 165, filed February 13, 2001.

²⁹⁹ 2:95-cv-00846-TC.

³⁰⁰ Order of Certification, *Gardner*, 2:95-cv-00846-TC, docket no. 641, filed April 27, 2005.

³⁰¹ Order, *Gardner*, 2:95-cv-00846-TC, docket no. 646, filed July 8, 2005.

³⁰² Order of Certification, *Gardner*, 2:95-cv-00846-TC, docket no. 662, filed November 7, 2005.

³⁰³ 1:11-cv-00104-RJS.

³⁰⁴ *Ray v. Wal-Mart Stores Inc.*, 359 P.3d 614, 617 (Utah 2015).

³⁰⁵ 1:04-cv-00067-TC.

employment, the Utah Supreme Court held³⁰⁶ that retaliatory discharge for seeking workers' compensation violates public policy, so that a wrongful discharge claim is recognized as an exception to the general rule of at-will employment. But the court declined to recognize causes of action for harassment or discrimination³⁰⁷ or for retaliatory discharge for an opposing employer's treatment of fellow employees who applied for workers' compensation benefits.³⁰⁸

Certification reviews state court proceedings: Some certification cases illustrate the interplay between state and federal courts, even beyond the certification process. *Richardson v. Navistar International Transportation Corp.*³⁰⁹ was a federal case brought against different defendants following a state case arising out of the same automobile accident. The question was the effect of the state case on the federal case. Plaintiffs brought a negligence action in Utah state court against various parties involved in an accident but did not include Navistar International Transportation Corp. ("Navistar") or Toyota Motor Sales U.S.A., Inc. ("Toyota"). In a bifurcated proceeding, the state court jury returned a special verdict allocating 100% of fault among the named defendants. The parties to that suit settled before the damages stage of the trial, and the state trial court entered a judgment of dismissal with prejudice.

Plaintiffs then filed an action against Navistar and Toyota in federal district court asserting negligence and strict product liability claims. Defendants raised the defense of collateral estoppel and moved to dismiss the suit based on the state jury's allocation of 100% of the fault in the prior state court proceeding. The district court granted Navistar and Toyota's motion for summary judgment. Plaintiffs appealed.

The Tenth Circuit then certified a question³¹⁰ to the Utah Supreme Court. The Utah Supreme Court held that because "the parties reached a settlement before the state court entered a judgment allocating fault pursuant to the Liability Reform Act . . . the jury's verdict on allocation had no binding or preclusive effect on any party or court." The Tenth Circuit then held that the federal action was not barred by collateral estoppel, and the law of the case doctrine applied after the Utah Supreme Court opinion to preclude a federal court from considering whether Utah's comparative negligence law required allocation of all fault in one action.³¹¹ The District Court was reversed and the case remanded for further proceedings. On remand, the parties stipulated to dismissal, presumably in settlement.³¹²

Soter's Inc., v. Deseret Federal Savings & Loan Association,³¹³ is another federal case showing the inter-relations of state and federal courts. The case was tried to a jury in state

³⁰⁶ *Touchard v. La-Z-Boy, Inc.*, [148 P.3d 945](#), 955 (Utah 2006).

³⁰⁷ *Id.* at 955-956.

³⁰⁸ *Id.* at 956.

³⁰⁹ [2:95-cv-00752-DB](#).

³¹⁰ *Richardson v. Navistar Int'l Transp. Corp.*, [170 F.3d 1264](#) (10th Cir. 1999).

³¹¹ *Richardson*, [231 F.3d 740](#).

³¹² Judgment of Dismissal, *Richardson*, [2:95-cv-00752-DB](#), docket no. [53](#), filed March 4, 2002.

³¹³ [2:89-cv-00979-DB](#).

court.³¹⁴ Post-trial motions raised issues with the meaning of the jury’s answers to interrogatories on issues of waiver. But before the motions could be resolved, the defendant was put into a federal receivership.³¹⁵ The receiver then removed the action to federal court. District Judge Bruce Jenkins certified seven questions on the Utah law of waiver.³¹⁶ The Supreme Court decided that the state court jury was improperly instructed, which effectively required a new trial. But because the Supreme Court was hearing certified questions rather than an appeal, the Supreme Court did not even suggest a new trial. That procedural decision was for the federal judge, who then re-tried the case in federal court.³¹⁷ On request of a federal court, the Utah Supreme Court decided that a state trial court had misapplied Utah law.

In a third case, the Utah Supreme Court was asked to determine the effect of one of its own orders. In *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Wisan*,³¹⁸ the Tenth Circuit asked the Utah Supreme Court whether its dismissal of an application for an extraordinary writ due to laches was a final decision on the merits so that res judicata applied to bar similar claims in a federal civil suit. The district court “attempted to discern the Utah Supreme Court’s likely approach.”³¹⁹ But the Tenth Circuit, on appeal, decided to certify the question to the Utah Supreme Court, noting that “[c]ertification by this court in no way implies an abuse of discretion by the district court in failing to certify, but only indicates our independent judgment on the question.”³²⁰ The Utah Supreme Court determined that its decision on the writ had preclusive effect,³²¹ so the Tenth Circuit vacated the district court’s decision and remanded.³²² Following the Tenth Circuit’s directive, the district court dismissed the action on res judicata grounds.³²³

Tenth Circuit Recommends Certification: *McArthur v. State Farm Mut. Ins. Co.*,³²⁴ like *Fundamentalist Church*, is a case in which the Tenth Circuit certified a question decided by the district judge. The Circuit stated its view of the need to certify a little differently than it had stated it in *Fundamentalist Church*:

³¹⁴ *Soter’s, Inc. v. Deseret Fed. Savings & Loan Ass’n*, 857 P.2d 935, 937 (Utah 1993).

³¹⁵ *Id.* at 937.

³¹⁶ *Id.* at 938.

³¹⁷ Minute Entry, *Soter’s, Inc.*, 2:89-cv-00979-DB, docket no. 187, filed May 1, 1995. After the Utah Supreme Court decision but before trial, Judge Jenkins recused and the case was tried by Judge Dee Benson. Notice of Recusal and Reassignment, *Soter’s, Inc.*, 2:89-cv-00979-DB, docket no. 155, filed October 31, 1994.

³¹⁸ 465 Fed. App’x 768 (10th Cir. 2012).

³¹⁹ *Id.* at 772.

³²⁰ *Id.*

³²¹ *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Horne*, 289 P.3d 502 (Utah 2012).

³²² *Horne*, 698 F.3d at 1302.

³²³ Order of Dismissal, *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Wisen*, 2:08-cv-00772-DB, docket no. 197, filed February 7, 2013.

³²⁴ 2:09-cv-00416-TS.

Needless to say, the outcome of this proceeding turns upon important state law questions of public policy, statutory interpretation, and insurance contract construction which we believe the Supreme Court of Utah should have the opportunity to address in the first instance. Therefore, we conclude certification of the above questions would further the interests of comity and federalism by giving the Supreme Court of Utah an opportunity to answer the questions should it elect to do so under Utah R.App. P. 41(e).³²⁵

The Utah Supreme Court agreed with the trial judge and the Tenth Circuit affirmed in a very brief opinion.³²⁶

Multiple attempts at certification: *Iverson v. State Farm Mutual Insurance Company*³²⁷ tells counsel seeking certification to keep trying. District Judge Dee Benson refused to certify a question about automobile insurance, stating “[i]n light of Utah statutory language, as well as cases from this and other jurisdictions, there is enough guidance for this Court to make a determination without the need to certify.”³²⁸ But after a chambers conference four months later,³²⁹ and another chambers conference two months after that,³³⁰ he certified a differently stated question.³³¹ From the first motion³³² to the order certifying, nine months elapsed.

Quick certification: Tight cooperation between the federal district court and the Utah Supreme Court was demonstrated in *Utah Republican Party v. Herbert*.³³³ The case, filed on January 15, 2016, challenged election procedures modified by the Utah State Legislature in 2015. Four days after the case was filed, the district court ordered the parties to meet, confer and

³²⁵ *McArthur v. State Farm Mut. Ins. Co.*, 407 Fed. App’x 264 (10th Cir. 2010).

³²⁶ *Id.* at 267.

³²⁷ 1:06-cv-00113-DB.

³²⁸ Order on Motion to Certify Question of State Law, *Iverson*, 1:06-cv-00113-DB, docket no. 41, filed April 16, 2008.

³²⁹ Minute Entry, *Iverson*, 1:06-cv-00113-DB, docket no. 48, filed August 21, 2008; August 21, 2008 Hrg. Tr., *Iverson*, 1:06-cv-00113-DB, docket no. 60 filed March 11, 2009.

³³⁰ Minute Entry, *Iverson*, 1:06-cv-00113-DB, docket no. 52, filed October 1, 2008; October 1, 2008 Hrg. Tr., *Iverson*, 1:06-cv-00113-DB, docket no. 62, filed March 11, 2009.

³³¹ Order Certifying Question of Law to the Utah Supreme Court, *Iverson*, 1:06-cv-00113-DB, docket no. 55, filed December 8, 2008.

³³² Motion to Certify Question of State Law, *Iverson*, 1:06-cv-00113-DB, docket no. 33, filed February 25, 2008.

³³³ 2:16-cv-00038-DN.

submit questions to certify.³³⁴ Ten days later, the plaintiff and defendant filed a joint motion to certify.³³⁵ A certification order issued six days later.³³⁶

The next day, the Utah Democratic Party moved to intervene and moved to certify another question. Six days later, after accelerated briefing, a second certification order issued with two questions.³³⁷

The Utah Supreme Court's opinion issued April 8, 2016.³³⁸ It declined to answer the third question, stating that it was “based on ambiguous statements of intent by different representatives of the Republican Party.”³³⁹ “[R]elief, premised on hypothetical future facts, is inappropriate in this procedural setting.”³⁴⁰ “[T]here is no controversy ripe for resolution”³⁴¹

The certification process, from the suggestion of the need on January 19, 2016, to the opinion of the Utah Supreme Court on April 8th, took less than three months.

Construing a clear statute under the rule against absurdity: In *Garfield County v. United States*,³⁴² the Utah Supreme Court construed a clear statute contrary to its language to avoid an absurd result. The case was one of dozens brought by Utah counties to declare rights of way across federal land. Litigants in multiple cases had raised as a defense Utah Code § 78B–2–201(1), which imposes a seven-year time period for the state to bring an action for title to property. The federal courts questioned whether this statute and its predecessor were statutes of limitations or statutes of repose. Three district judges joined in a sua sponte certification order, formulated with input from the parties. The Utah Supreme Court accepted the question:

We hold that the plain language of both versions of the statute reveals them to be statutes of repose. . . . Because of the absurdity that results from applying section 201 and its predecessor as statutes of repose in this context, we construe these statutes as statutes of limitations with respect to R.S. 2477 right of way claims.

³³⁴ Order, Utah Republican Party, 2:16-cv-00038-DN, docket no. 7, filed January 19, 2016.

³³⁵ Joint Motion to Certify Question to the Utah Supreme Court, Utah Republican Party, 2:16-cv-00038-DN, docket no. 14, filed January 29, 2016.

³³⁶ Memorandum Decision and Order of Certification, Utah Republican Party, 2:16-cv-00038-DN, docket no. 22, filed February 4, 2016.

³³⁷ Second Memorandum Decision and Order of Certification, Utah Republican Party, 2:16-cv-00038-DN, docket no. 34, filed February 11, 2016.

³³⁸ *Utah Republican Party v. Cox*, 373 P.3d 1286 (Utah 2016).

³³⁹ *Id.* at 1289.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² 2017 WL 3187505 (Utah 2017).

The Utah Supreme Court found that the plain language of the statute, applied in a dispute with the federal government, created the absurd result of terminating causes of action before they existed.

We hold that the plain language of both versions of the statute reveals them to be statutes of repose. The application of this interpretation to the State's R.S. 2477 rights of way leads to the result that the State effectively and inevitably lost title to any such rights of way after seven years without any opportunity to prevent such loss. This result—the automatic expiration of the State's title to R.S. 2477 rights of way—is absurd³⁴³

The opinion has a strong dissent by two Utah Court of Appeals judges who sat on the case. Judge Fred Voros, the author, summarized:

[T]he claimed absurd result—that Utah would enjoy rights of way granted by the United States without a judicial remedy for quieting title to them against the United States—was the prevailing law nationwide for 106 years, from the passage of the Mining Act in 1866 until the passage of the Quiet Title Act in 1972.

For this reason, I believe the majority opinion represents the most expansive application of the absurdity doctrine in American law. I am unaware of the absurdity doctrine ever being employed, in Utah or elsewhere, to reject as absurd not a proposed rule of law, but a long-existing rule of law—in this case, a rule of law governing all American states and territories for over a century. If that rule of law in fact mandated absurd results, surely in 106 years some court somewhere would have noticed. Yet no party cites, nor am I able to discover, any court questioning the rationality of the rule of law that we today declare absurd.³⁴⁴

In *Garfield County*, the Utah Supreme Court was of divided views, as it had been in *In re West Side Property Associates*.³⁴⁵ But in *Garfield County*, the dissent did not “advise the [federal] court to employ the guidelines set out in this dissenting opinion.”³⁴⁶

Significant Legal Issues

Answers to certified questions have clarified many significant aspects of Utah law. The unique questions presented by certification have enhanced Utah law, by authoritative declarations from the Utah Supreme Court.

³⁴³ *Id.* at *1.

³⁴⁴ *Id.* at *16.

³⁴⁵ 13 P.3d 168.

³⁴⁶ *Id.* at 173.

In *Hansen v. Sea Ray Boats, Inc.*,³⁴⁷ District Judge Thomas Greene, with input from counsel, certified three questions.³⁴⁸ These questions arose out of Mrs. Hansen’s presence while four other plaintiffs, including her son, received electric shocks in the waters behind a Sea-Ray boat at Lake Powell. The Utah Supreme Court summarized the threshold issue: “Plaintiffs ask us to expand the zone of danger rule [for negligent infliction of emotional injury] found in the Restatement to include recovery for persons who are not actually within the zone of danger but who reasonably and subjectively believe they are in danger.”³⁴⁹ The Court answered in the negative: “We decline to extend recovery to those outside the zone of danger even though they may reasonably fear for their own safety and even though they may witness injury to a close relative.”³⁵⁰

In *Burkholz v. Joyce*,³⁵¹ a victim of years of alleged sexual abuse sued her abuser. The case was filed before enactment of a Utah statute of limitation specific to child abuse claims which provided additional time to assert these claims. The plaintiff also alleged tolling by minority, mental disability, and the discovery rule.³⁵² On these difficult facts, the Utah Supreme Court determined the statute of limitations barred the claims: “In making this decision we in no way mean to discount the trauma Burkholz has suffered. However, . . . we find ourselves constrained by the policy underlying the statute of limitations and principles underlying the discovery rule’s narrow exception to the statute of limitations and conclude that under these circumstances, no other result is tenable.”³⁵³

Carranza v. Mountainlands Health Clinic,³⁵⁴ raised the issue of existence of a claim for wrongful death of an unborn child. The Utah Supreme Court determined—with a two-justice majority, a two justice concurrence in the result, and a one justice dissent—that such a claim does exist.³⁵⁵ From acceptance of the difficult question to issuance of its multi-part opinion, the Utah Supreme Court required 28 months.

In *Miller v. United States*,³⁵⁶ John and Joan Miller filed a suit in federal court to recover for injuries in an auto accident. The defendant was an employee of the United States Air Force who had been drinking liquor at the Noncommissioned Officers Club at Hill Air Force Base. The Millers’ complaint included a claim under the Federal Tort Claims Act (“FTCA”) alleging that Mr. Valle had been negligently and carelessly served alcohol at the club in violation of the Utah

³⁴⁷ [2:88-cv-00708-JTG](#).

³⁴⁸ *Hansen*, [830 P.2d 236](#).

³⁴⁹ *Id.* at 240.

³⁵⁰ *Id.* at 243.

³⁵¹ [2:96-cv-00252-TC](#).

³⁵² *Burkholz v. Joyce*, [972 P.2d 1235](#), 1236 (Utah 1998).

³⁵³ *Id.* at 1237.

³⁵⁴ [2:07-cv-00291-DAK](#).

³⁵⁵ *Carranza v. Mountainlands Health Clinic*, [267 P.3d 912](#) (Utah 2009).

³⁵⁶ [1:02-cv-00037-TC](#).

Dramshop Act and that the federal government, as the dramshop, was liable for the Millers' injuries. District Judge Tena Campbell's certification order³⁵⁷ cited Utah cases holding that the strict liability Utah Dramshop Act is an exclusive remedy, eliminating a state law claim for negligence which is an essential predicate to an FTCA claim. Judge Campbell's order also cited a Seventh Circuit case³⁵⁸ holding that even if a state dramshop act eliminated a state court claim for negligence, the negligence claim should survive for the limited purpose of supporting an FTCA claim. In essence, the Seventh Circuit (without certifying the question to the Illinois Supreme Court) declared a narrow exception to the exclusive remedy of the Illinois dramshop act for purposes of the FTCA.

In response to the questions in *Miller*, the Utah Supreme Court held³⁵⁹ that Utah's Dramshop Act was a strict liability statute, and that "Utah does not recognize a common law cause of action in negligence for the sale of alcohol to persons who cause injury to third parties while under the influence of alcohol."³⁶⁰ A separate opinion concurred in the result but dissented, because the majority's opinion went beyond the question certified.³⁶¹

Certifications by Article I Judges

In several cases, judges appointed under Article I of the U.S. Constitution have issued certification orders when they are responsible to decide controlling issues. This occurs when a bankruptcy judge is conducting an adversary proceeding or when a magistrate judge handles a civil case on consent of the parties.

Cases certified by bankruptcy judges include *In re West Side Properties*,³⁶² from Bankruptcy Judge Judith Boulden; *In re Kunz*³⁶³ and *In re Rockwell*³⁶⁴ jointly certified by Bankruptcy Judges Glen Clark and William Thurman; *In re Simmons*³⁶⁵ certified by Bankruptcy Judge Kimball Mosier; and *In re Hendry*³⁶⁶ and *In re Kiley*³⁶⁷ certified by Bankruptcy Judge Kevin Anderson.

³⁵⁷ Order, *Miller*, 1:02-cv-00037-TC, docket no. 22, filed January 3, 2003.

³⁵⁸ *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980).

³⁵⁹ *Miller v. United States*, 104 P.3d 1202 (Utah 2004).

³⁶⁰ *Id.* at 1206.

³⁶¹ *Id.* at 1207.

³⁶² 97-20887 (Utah Bankr.).

³⁶³ 2:02-bk-40422-GEC.

³⁶⁴ 2:02-bk-42013-WTT.

³⁶⁵ 2:13-bk-33821-RKM.

³⁶⁶ 2:14-bk-27398-KA.

³⁶⁷ 2:15-bk-27838-KA.

Cases certified by Magistrate Judges include *National Indemnity et al v. United States Sports Specialty*³⁶⁸ certified by Magistrate Judge Brooke Wells while the case was pending consent and *Katterman v. Salt Lake County*³⁶⁹ and *Mitchell v. Roberts*³⁷⁰ certified by Magistrate Judge Evelyn Furse. Magistrate Judge Paul Warner considered but rejected certification in *Self v. Teleperformance Group USA*.³⁷¹

The Role of Justice and Judge Parrish

Of all judges and justices involved in certification from the federal courts to the Utah Supreme Court, save perhaps Justice Dallin Oaks who wrote the opinion invalidating the 1975 Certification Rule, Jill Parrish has the most prominent role. She served as a justice of the Utah Supreme Court from 2003 to 2015 and in that capacity wrote six opinions on questions certified from federal courts. Serving as a district judge in the District of Utah since August 2015, she has already certified more questions to the Utah Supreme Court than any other federal judge. She is the only person who has served in a judicial capacity on both sides of the certification process.

Opinions on Utah Supreme Court

In *Smith v. United States* she wrote the opinion³⁷² responding to questions certified by District Judge Dee Benson.³⁷³ The issue was whether a legislative cap on noneconomic damages in medical malpractice cases applied in cases of wrongful death and, if so whether the limitation was valid under the Utah Constitution's prohibition of such damage caps in wrongful death cases. Justice Parrish's unanimous opinion declared the cap unconstitutional in such cases. This is the only opinion Justice Parrish wrote in response to questions certified from a trial court judge.

Justice Parrish responded³⁷⁴ to the Tenth Circuit's certification³⁷⁵ in *In re Reinhart* about the effect of Utah garnishment exemptions in bankruptcy. The district court had affirmed a decision of the bankruptcy court finding the Utah statutory exemption created a bankruptcy exemption,³⁷⁶ but on further appeal, the Tenth Circuit certified questions. Justice Parrish held

³⁶⁸ [2:07-cv-00996-TS](#) (certified by Magistrate Judge Brooke Wells while the case was pending consent to exercise of jurisdiction by a magistrate judge).

³⁶⁹ [2:13-cv-01122-EJF](#).

³⁷⁰ [2:16-cv-00843-EJF](#).

³⁷¹ [2:08-cv-00395-PMW](#).

³⁷² [356 P.3d 1249](#) (Utah 2015). The opinion was released the week before Judge Parrish came to the federal district bench.

³⁷³ *Smith v. U.S. Dep't of Veterans Affairs*, [2:12-cv-00968-DB](#).

³⁷⁴ *In re Reinhart*, [291 P.3d 228](#) (Utah 2012).

³⁷⁵ *In re Reinhart*, [416 Fed. App'x 761](#) (10th Cir. 2011).

³⁷⁶ Order, *Gladwell v. Reinhart*, 2:06-cv-00325-BSJ, docket no. [34](#), filed March 12, 2010.

that the garnishment exemption did not, by its terms, create a bankruptcy exemption. Then, the Tenth Circuit remanded to the district court to remand to the bankruptcy court.³⁷⁷

Justice Parrish's opinion was the second she had written in *In re Reinhart*. Her first was written a year earlier.³⁷⁸ The earlier opinion was also in response to a Tenth Circuit certification.³⁷⁹ The issue on this appeal was an exemption of a retirement plan. Following the answer of the Utah Supreme Court, the Tenth Circuit affirmed the exemption on the principal but not on the earnings, reversing the trial court in part.³⁸⁰

In *Whitney v. Division of Juvenile Justice Services*³⁸¹ Justice Parrish again wrote in response to certification from the Tenth Circuit.³⁸² While the possibility of certification was raised in the district court, the nine-line motion had only cursory argument.³⁸³ The response to the certified question confirmed the correctness of the district court decision, so the Tenth Circuit affirmed.³⁸⁴

Justice Parrish also wrote for the court in *Ohio Casualty Insurance Company v. Unigard Insurance Company*³⁸⁵ in response to a question from the Tenth Circuit.³⁸⁶ No question of certification arose in the District Court on the issue of allocation of defense costs between insurers, but the Utah Supreme Court answered the question of first impression supporting the Tenth Circuit reversal of the District Court.³⁸⁷

Justice Parrish responded to questions certified by the Tenth Circuit in *Mecham v. Frazier*.³⁸⁸ Justice Parrish held that immunity protected the state officers from suit, requiring the Tenth Circuit to reverse the district judge's denial of immunity on the state law claims.³⁸⁹ Because a separate opinion of the Tenth Circuit had already reversed the district judge's denial of

³⁷⁷ *In re Reinhart*, 505 Fed. App'x 761.

³⁷⁸ *In re Reinhart*, 267 P.3d 895.

³⁷⁹ *In re Reinhart*, 362 Fed. App'x 919 (10th Cir. 2010).

³⁸⁰ *In re Reinhart*, 477 Fed. App'x 510.

³⁸¹ 274 P.3d 906 (Utah 2012).

³⁸² *Whitney v. Div. of Juvenile Justice Servs.*, 404 Fed. App'x 316 (10th Cir. 2010).

³⁸³ Motion for Certification of Law [sic] by United States District Court, District of Utah, *Whitney*, 2:09-cv-00030-DAK, docket no. 37, filed April 23, 2009.

³⁸⁴ *Whitney*, 468 Fed. App'x 871.

³⁸⁵ 268 P.3d 180 (Utah 2012).

³⁸⁶ *Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 564 F.3d 1192 (10th Cir. 2009).

³⁸⁷ *Ohio Cas. Ins. Co.*, 458 Fed. Appx. 705.

³⁸⁸ 193 P.3d 630 (Utah 2008).

³⁸⁹ *Mecham v. Frazier*, 295 Fed. App'x 267 (10th Cir. 2008).

qualified immunity on the federal claims,³⁹⁰ the federal case was then dismissed by the federal district court.

Five of the six opinions written by Justice Parrish were in response to questions from the Tenth Circuit Court of Appeals. Of those, four resulted in trial court reversals. During her tenure on the Utah Supreme Court, the Court issued twenty-seven opinions in response to certified questions, eleven of which were certified from the Tenth Circuit. This background may in part explain her readiness, as a district judge, to certify questions. She raises the possibility *sua sponte* more than she faces it on motions—having received only one motion to certify in her cases. And she denied that motion.

Questions Certified as District Court Judge

Judge Parrish first faced certification as a district court judge in *Spurlino v. Holcim*³⁹¹ Judge Parrish denied a motion to certify questions about the Utah Uniform Unfair Practices Act. She stated:

While the court agrees that certification of the question may eventually be appropriate, it would be premature to do so now. . . . Plaintiff has not developed a factual record showing it would benefit from the [competitive injury] inference, if such an inference is indeed permissible under Utah law. Additionally, Defendants argue they have defenses that will defeat Plaintiff's claims even if the . . . inference applies.³⁹²

At almost the same time, in *Dircks v. Travelers Indemnity Company of America*,³⁹³ Judge Parrish suggested that claims for declaratory relief regarding underinsured motorist coverage required interpretation of the Utah statute, making certification advisable.³⁹⁴ The parties provided input and a certification order issued with a single question.³⁹⁵ The question was answered³⁹⁶ and judgment was entered for the plaintiff.³⁹⁷

³⁹⁰ *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007).

³⁹¹ [2:14-cv-00461-JNP](#).

³⁹² Order Denying Without Prejudice Plaintiff's Motion for Certification of Questions of Law to the Utah Supreme Court, *Spurlino*, 2:14-cv-00461-JNP, docket no. [73](#) at 2, filed January 27, 2016.

³⁹³ [2:14-cv-00118-JNP-DBP](#).

³⁹⁴ Order Staying Case, *Dircks*, 2:14-cv-00118-JNP-DBP, docket no. [38](#), filed December 17, 2015.

³⁹⁵ Order Certifying Questions to the Utah Supreme Court, *Dircks*, 2:14-cv-00118-JNP-DBP, docket no. [41](#), filed January 29, 2016.

³⁹⁶ *Dircks v. Travelers Indem. Co. of Am.*, [2017 WL 4675471](#) (Utah 2017).

³⁹⁷ Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, *Dircks*, 2:14-cv-00118-JNP-DBP, docket no. [50](#), filed December 1, 2017; Judgment, *Dircks*, 2:14-cv-00118-JNP-DBP, docket no. [51](#), filed December 1, 2017.

Two questions regarding Utah insurance laws were certified in *Lancer Insurance Co. v. Lake Shore Motor Coach Lines*,³⁹⁸ after Judge Parrish obtained input from the parties. Both questions were answered,³⁹⁹ resulting in declaratory judgment against the insurer.⁴⁰⁰

In *Zimmerman v. University of Utah*, simultaneous with an order on two dispositive motions, Judge Parrish certified three questions⁴⁰¹ regarding Utah's constitutional free speech clause and employment law. The questions were accepted, but only one was answered due to poor briefing by the parties.⁴⁰²

Judge Parrish suggested certification of questions about a Utah statute of limitations at argument of a motion to dismiss in *Loveridge v. Prudential Insurance Company of America*.⁴⁰³ The defendant-movant requested a 21-day stay and then withdrew the motion. The case settled shortly thereafter.

In *GeoMetWatch v. Hall*,⁴⁰⁴ Judge Parrish certified three questions about governmental immunity to the Utah Supreme Court sua sponte⁴⁰⁵ but on the parties' motions, substantially amended the questions and expanded the order.⁴⁰⁶ The questions are pending at the Utah Supreme Court.⁴⁰⁷

In *Flores v. Unified Police Department of Greater Salt Lake*,⁴⁰⁸ Judge Parrish certified two governmental immunity questions,⁴⁰⁹ but revoked her order 21 days later when the case settled.⁴¹⁰

³⁹⁸ Order Certifying Questions to the Utah Supreme Court, *Lancer Ins. Co.*, [2:14-cv-00785-JNP](#), docket no. 58, filed March 28, 2016.

³⁹⁹ *Lancer Ins. Co. v. Lake Shore Motor Coach Lines, Inc.*, [391 P.3d 218](#) (Utah 2017).

⁴⁰⁰ Order Denying [32] Motion for Summary Judgment and Granting [42] Motion for Summary Judgment, *Lancer Ins. Co.*, [2:14-cv-00785-JNP](#), docket no. 65, filed February 17, 2017.

⁴⁰¹ Order Certifying Questions to the Utah Supreme Court, *Zimmerman*, [2:13-cv-01131-JNP-BCW](#), docket no. 76, filed July 1, 2016, [2016 WL 3647857](#) (D. Utah July 1, 2016).

⁴⁰² *Zimmerman v. Univ. of Utah*, [2018 WL 523483](#) (Utah January 23, 2018).

⁴⁰³ Minute Entry, *Loveridge*, [2:16-cv-00377-JNP](#), docket no. 18, filed August 22, 2016.

⁴⁰⁴ [1:14-cv-00060-JNP-PMW](#).

⁴⁰⁵ Order Certifying Questions to the Utah Supreme Court, *GeoMetWatch*, [1:14-cv-00060-JNP-PMW](#), docket no. 475, filed March 29, 2017.

⁴⁰⁶ Memorandum Decision and Amended Order Certifying Questions to the Utah Supreme Court, *GeoMetWatch*, [1:14-cv-00060-JNP-PMW](#), docket no. 489, filed April 21, 2017.

⁴⁰⁷ *GeoMetWatch v. Hall*, 20170264-SC.

⁴⁰⁸ [2:16-cv-00224-JNP-BCW](#).

⁴⁰⁹ Amended Order Certifying Questions to the Utah Supreme Court, *Flores*, [2:16-cv-00224-JNP-BCW](#), docket no. 19, filed April 3, 2017.

⁴¹⁰ Order Striking Certification of Questions to the Utah Supreme Court, *Flores*, [2:16-cv-00224-JNP-BCW](#), docket no. 23, filed April 24, 2017.

The application of the economic loss rule to fraudulent inducement claims was certified by Judge Parrish in *HealthBanc International, LLC v. Synergy Worldwide, Inc.*⁴¹¹ The case is pending at the Utah Supreme Court.⁴¹²

Recently Judge Parrish ordered “the parties to meet, confer, and submit a proposed statement of facts and proposed questions for certification” in *Burningham v. Wright Medical Group*.⁴¹³ They did so, and she signed the certification order.⁴¹⁴ The case is pending at the Utah Supreme Court.

The influence of Justice and Judge Parrish is unique because of her positions the Utah federal district court and the Utah Supreme Court. Those courts are most involved in certified questions of Utah law. Her inclination to raise the issue sua sponte may influence other judges to consider certification more often.

Impact of Certification on Cases

The certification process impacts cases. While an authoritative decision on state law is the desired result of the process, there are other benefits. The mere filing of a motion to certify, or the pendency of a motion, or entry of a certification order may cause a case to settle. And as would be expected, the answer to a certified question may provide a basis for settlement or for entry of an order deciding a dispositive motion.

Certification Motion Causes Cases to Settle

The mere suggestion of certification may advance a case—perhaps by focusing a critical issue, or perhaps by creating a concern about delay. In *Loveridge v. Prudential Insurance Company of America*,⁴¹⁵ District Judge Jill Parrish expressed the inclination to certify a question of applicability of a statute of limitations after hearing arguments on a motion to dismiss.⁴¹⁶ Defendant then requested a three-week stay of the case, withdrew the motion to dismiss and a few months later, the parties filed a stipulated notice of dismissal.⁴¹⁷

⁴¹¹ Order Certifying Questions to the Utah Supreme Court, *HealthBanc Int’l, LLC*, [2:16-cv-00135-JNP-PMW](#), docket no. [97](#), filed July 6, 2017.

⁴¹² *HealthBanc Int’l, LLC v. Synergy Worldwide, Inc.*, 20170591-SC.

⁴¹³ Memorandum Decision and Order, *Burningham*, [2:17-cv-00092-JNP](#), docket no. [48](#), filed January 23, 2018.

⁴¹⁴ Order Certifying Questions to the Utah Supreme Court, *Burningham*, [2:17-cv-00092-JNP](#), docket no. [51](#), filed February 15, 2018.

⁴¹⁵ [2:16-cv-00377-JNP](#).

⁴¹⁶ Minute Entry, *Loveridge*, [2:16-cv-00377-JNP](#), docket no. [18](#), filed August 2, 2016.

⁴¹⁷ Joint Stipulation of Dismissal With Prejudice, *Loveridge*, [2:16-cv-00377-JNP](#), docket no. [23](#), filed February 22, 2017.

At a final pretrial conference in *Jeppson v. Thoman*,⁴¹⁸ District Judge David Sam directed the parties to prepare an order certifying an issue under the Utah Governmental Immunity Act. Instead, a motion for summary judgment was filed six weeks later, and the case settled six months after that. In the interim, time had been extended for any response to the motion.

In *Davis County Construction v. Davis County*,⁴¹⁹ the case settled eighteen months after the certification motion was filed. On the same day the motion was filed, an order from District Judge David Sam set an accelerated briefing schedule and gave notice of a hearing five days later—which was apparently never held.

Cases Settle While Questions Pend in Utah Supreme Court

In at least nine other instances, cases have settled while certification is pending after a certification order is sent to the Utah Supreme Court. The time between entry of the order and settlement may range from days to a year. During that time, the parties examine—and perhaps brief—their positions. The close look at the controlling issues which are certified, and the spectre of additional time and expense to complete litigation facilitates settlement.

*Flores v. Unified Police Department of Greater Salt Lake*⁴²⁰ moved very quickly. The question was certified April 3, 2017, and amended April 21, 2017—and the case was dismissed April 24, 2017.

*Gibbs v. Unum Life Insurance Company of America*⁴²¹ settled a week after the certification order issued.

*Pace v. Swerdlow*⁴²² settled less than two months after a question was certified.

In *Westport Insurance v. Ong*,⁴²³ an order of certification was followed within two weeks by a motion to amend it. In the course of resolution of that motion, the parties settled the case less than four months later.

*Hights Creek Irrigation Company v. United Technologies*⁴²⁴ was dismissed less than four months after the certification order issued.

⁴¹⁸ 2:94-cv-00519-DS.

⁴¹⁹ 1:89-cv-00054-DS.

⁴²⁰ 2:16-cv-00224-JNP-BCW.

⁴²¹ 2:00-cv-00549-PGC.

⁴²² 2:06-cv-00027-DB.

⁴²³ 1:07-cv-00010-DAK.

⁴²⁴ 1:91-cv-00042-DKW.

*Johnson v. Riddle*⁴²⁵ and *In re Hendry*⁴²⁶ settled six months after the certification order issued.

In *McCourt v. Semken*,⁴²⁷ the Utah Supreme Court did not respond to accept or reject a November 1989 certification order until January 1991 and then the plaintiff voluntarily dismissed the case in December 1991.

*Gines v. Ingersoll-Rand Company*⁴²⁸ settled a year after the certification order issued.

Answer to Certified Questions Causes Cases to Settle

In another 12 cases, the answer to the certified issues apparently assisted in settlement.

A retaliatory termination cause of action based on reporting co-worker law violations was determined not to exist in the Utah Supreme Court's answer⁴²⁹ to the question posed in *Fox v. MCI Communications Corp.*⁴³⁰ The case promptly resolved.

In *Spackman v. Board of Education of Box Elder County*,⁴³¹ the Utah Supreme Court's determination⁴³² that two state constitutional provisions were self-executing, thus validating two of the plaintiff's causes of action, enabled a settlement.

*Egbert, v. Nissan North America*⁴³³ resolved after two certification orders issued by District Judges Paul Cassell and Dee Benson (successively presiding in the case). Issues certified related to Utah tort law. The parties settled before resolution of a summary judgment motion filed after the opinions⁴³⁴ were received from the Utah Supreme Court.

A claim for descendant's benefits came before the district court in *Burns v. Astrue*.⁴³⁵ The parties stipulated to certification of whether an agreement to be a sperm donor constituted a record of consent to being a parent for purposes of intestacy, entitling the child to social

⁴²⁵ [2:98-cv-00599-TS](#).

⁴²⁶ [2:14-bk-27398-KA](#).

⁴²⁷ [2:87-cv-01052-BSJ](#).

⁴²⁸ [2:89-cv-00543-JTG](#).

⁴²⁹ *Fox v. MCI Commc'ns Corp.*, [931 P.2d 857](#) (Utah 1997).

⁴³⁰ [2:93-cv-00042-BSJ](#).

⁴³¹ [1:98-cv-00120-TC](#).

⁴³² *Spackman v. Bd. Educ. Box Elder Cty.*, [16 P.3d 533](#) (Utah 2000).

⁴³³ [2:04-cv-00551-DB](#).

⁴³⁴ *Egbert v. Nissan N. Am., Inc.*, [167 P.3d 1058](#) (Utah 2007); *Egbert v. Nissan Motor Co., Ltd.*, [228 P.3d 737](#) (Utah 2010).

⁴³⁵ [2:09-cv-00926-DAK](#).

security survivor's benefits. After the Utah Supreme Court opinion⁴³⁶ declaring that the donation agreement did not constitute consent to being a parent, the parties stipulated to dismiss the federal case.

In *Whitney v. Division of Juvenile Justice Services*⁴³⁷ the Tenth Circuit (in an interlocutory appeal) determined that a district judge's decision denying governmental immunity was correct—after the Circuit received an answer from the Utah Supreme Court⁴³⁸ to the question certified from the Circuit. The case settled shortly after remand.

In *Thayer v. Washington County School District*⁴³⁹ settlement was reached after the Utah supreme Court's determined⁴⁴⁰ that governmental immunity did not bar suit for death of a student by a firearm used in a school play rehearsal.

The statutory interpretations provided by the Utah Supreme Court⁴⁴¹ to a question certified by two bankruptcy judges together in *In re Kunz*⁴⁴² and *In re Rockwell*⁴⁴³ enabled settlement by clarifying status of funds transferred between two IRA accounts.

After the Utah Supreme Court's opinion issued,⁴⁴⁴ both parties in *Iverson v. State Farm Mutual Insurance Company*⁴⁴⁵ moved for summary judgment, and filed settlement papers five months later.

*Ray v. Wal-Mart Stores, Inc.*⁴⁴⁶ settled after the Utah Supreme Court's opinion⁴⁴⁷ defining the parameters of a public policy which could be the basis of a claim for wrongful termination of employment. Wal-Mart provoked the settlement by filing a motion for summary judgment.

⁴³⁶ *Burns v. Astrue*, 289 P.3d 551 (Utah 2012).

⁴³⁷ 2:09-cv-00030-DAK.

⁴³⁸ *Whitney*, 274 P.3d 906.

⁴³⁹ 2:09-cv-00565-DB.

⁴⁴⁰ *Thayer v. Washington Cty. Sch. Dist.*, 285 P.3d 1142 (Utah 2012).

⁴⁴¹ *In re Kunz*, 99 P.3d 793 (Utah 2004).

⁴⁴² 2:02-bk-40422-GEC.

⁴⁴³ 2:02-bk-42013-WTT.

⁴⁴⁴ *Iverson v. State Farm Mut. Ins. Co.*, 256 P.3d 222 (Utah 2011).

⁴⁴⁵ 1:06-cv-00113-DB.

⁴⁴⁶ 1:11-cv-00104-RJS.

⁴⁴⁷ *Ray*, 359 P.3d 614.

After the opinion from the Utah Supreme Court⁴⁴⁸ in *Grundberg v. Upjohn Company*,⁴⁴⁹ District Judge Thomas Greene invited the parties to brief the impact of the ruling and the case settled three months later.

The role of the answer of the Utah Supreme Court⁴⁵⁰ is not as clear in *Peterson v. Browning*⁴⁵¹ because the case settled a year and a half after the appellate opinion and records are not available.

Certification Answer Dispositive for Motion in Federal Case

In two federal district cases, the answer to the certified question was dispositive for a federal court motion.

Just two days after the Utah Supreme Court's opinion⁴⁵² in *Lancer Insurance Co. v. Lake Shore Motor Coach Lines*,⁴⁵³ District Judge Jill Parrish granted one previously pending motion for summary judgment and denied the other party's motion.

In *Clark v. United States*⁴⁵⁴ the answer of the Utah Supreme Court⁴⁵⁵ spawned a motion to dismiss based on governmental immunity. The motion was granted six months after the certified question was answered.

Certified Answer Irrelevant

In at least one case, a certified question turned out to be irrelevant to the case outcome. In *Waddoups v. Noorda*⁴⁵⁶ the question was whether a statute barring claims for negligent credentialing of physicians was retroactive. But two weeks after the Utah Supreme Court opinion,⁴⁵⁷ the plaintiff agreed to dismiss the claim⁴⁵⁸ after determining it had no factual basis.

⁴⁴⁸ *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991).

⁴⁴⁹ 2:89-cv-00274-JTG.

⁴⁵⁰ *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992).

⁴⁵¹ 1:87-cv-00121-JTG.

⁴⁵² *Lancer Ins. Co.*, 391 P.3d 218.

⁴⁵³ 2:14-cv-00785-JNP.

⁴⁵⁴ 2:98-cv-00304-DB.

⁴⁵⁵ *Clark v. United States*, 998 P.2d 268 (Utah 2000).

⁴⁵⁶ 1:11-cv-00133-CW.

⁴⁵⁷ *Waddoups v. Noorda*, 321 P.3d 1108 (Utah 2013).

⁴⁵⁸ Notice of Non-Opposition to Intermountain Healthcare, Inc. dba Logan Regional Hospital's Motion for Summary Judgment on Plaintiffs' Negligent Credentialing Claim, *Waddoups*, 1:11-cv-00133-CW, docket no. 233, filed November 14, 2013.

Deference for Answers to Certified Questions

Utah’s federal trial courts seem to have had no question about applying the answer to certified questions, but have not expressly considered the possibility of acting otherwise. When the Utah Supreme Court has responded to a certified question, the Tenth Circuit gives full deference;

[T]he Utah Supreme Court issued a clear statement of the applicable law in Utah. Whether we would answer the question differently is immaterial. The Utah Supreme Court has spoken, and on this issue of state law, we are in no position to question the propriety of that distinguished court's decision.⁴⁵⁹

This regard for the decision of the state court is in marked contrast to “one Ohio federal district court, [which] having received a divided opinion from the Ohio Supreme Court, chose to dismiss the disputed state law claim without prejudice, anticipating that the Court could change its mind in the future.”⁴⁶⁰

Utah Supreme Court Responses to Certification Orders

Utah Supreme Court Standards When Responding to Certified Questions

The Utah Supreme Court has substantial control over the certification process. While its rule authorizes certification, the Court retains the right to “enter an order either accepting or rejecting the question certified to it.”⁴⁶¹

The Court has rejected questions at the outset, without comment.⁴⁶² And it has rejected questions it has previously accepted, with explanatory commentary;

While it is clear that we have original jurisdiction to answer the certified question, there does appear to be significant uncertainty as to whether the federal district court has jurisdiction over these claims. Accordingly, we revoke our acceptance of the certified question as improvident.⁴⁶³

In that instance of revocation, the Court added some advice, even though the certification was revoked:

⁴⁵⁹ *Burkholz v. Joyce*, 211 F.3d 1277 (Table), *3 (10th Cir. 2000).

⁴⁶⁰ Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157, 208 (2002-2003).

⁴⁶¹ Utah R. App. P. 41(e).

⁴⁶² Findings of Fact, Conclusions of Law and Final Judgment, *Kennard*, 2:01-cv-00171-DB, docket no. 43, filed August 1, 2002, 246 F.Supp.2d 1177, 1181 (D. Utah 2002).

⁴⁶³ Order [of Utah Supreme Court] at 1, *Endow*, 1:13-cv-00108-TC, docket no. 36, filed July 20, 2015, 2015 WL 4394047 (Utah July 17, 2015).

While we do not decide whether the federal district court has jurisdiction over the Plaintiff's UADA claims, we note that Ms. Endow faces serious jurisdictional problems as to these claims, problems that were not brought to the attention of the federal district court in the Defendants' motion to dismiss. The court therefore had no opportunity to consider them. First, the commencement of the Plaintiff's federal law claims may bar the continuation of her UADA claims under the plain language of the Act. Further, she may have failed to exhaust her administrative remedies under the UADA with respect to the individual defendants. Because of these serious jurisdictional concerns, any opinion we issue on the certified question may be advisory, and we do not issue advisory opinions.⁴⁶⁴

The Court further elaborated in a footnote to draw the line between observing, advising and deciding:

We underscore that we do not decide whether the federal district court has jurisdiction over the Plaintiff's UADA claims. We were not presented with full briefing or a full record concerning these issues. For instance, while it does not appear that the Plaintiff filed an administrative claim against the individual defendants, we were only given one of the many documents relating to her administrative claim.⁴⁶⁵

The federal district court eventually dismissed the UADA claims.⁴⁶⁶

The Utah Supreme Court reformulated questions or gave partial answers to certified questions in three cases. In *In re West Side Properties*,⁴⁶⁷ one of two questions was reformulated (after a lengthy discussion of the certification process) because as it was submitted, "there is no unclear issue of state law for us to address, and therefore, the exercise of certification would be futile."⁴⁶⁸

One of three certified questions was not accepted in *TruGreen Companies v. Bitton*⁴⁶⁹ The questions certified were:

1. Whether under Utah law a former employer is entitled to an award of lost profits damages, or instead an award of restitution or unjust enrichment damages, where a former employee has breached contractual non-competition, non-disclosure, and employee nonsolicitation provisions?

⁴⁶⁴ *Id.* at 1-2.

⁴⁶⁵ *Id.* at 2 n.4.

⁴⁶⁶ Order Dismissing the Fourth, Sixth and Eighth Causes of Action, *Endow*, 1:13-cv-00108-TC, docket no. 52, filed October 23, 2015.

⁴⁶⁷ 13 P.3d 168.

⁴⁶⁸ *Id.* at 171.

⁴⁶⁹ 1:06-cv-00024-BSJ.

2. Whether Utah law recognizes an unjust enrichment measure of damages for tortious interference with a competitor’s contractual and economic relations?

3. Whether “actual damages” under Utah Code Ann. § 13-5a-103(1)(b)(i), the Utah Unfair Competition Act, means the plaintiff’s lost profits or an award of damages defined by the defendant’s revenues?⁴⁷⁰

Without comment, the court accepted only the first two of the questions.⁴⁷¹

The recent opinion in *Zimmerman v. University of Utah*⁴⁷² declined to answer two accepted questions and made clear that the Utah Supreme Court’s power to accept or reject did not end at an initial acceptance order:

The power to elect to decide a certified question encompasses the power to decline to resolve it conclusively in appropriate circumstances. And on reflection we see reasons not to render a conclusive answer to the first two questions certified in this case. Because these questions are not adequately briefed by the parties we decline to resolve them here. Instead we answer only the third question, which is squarely presented and amply addressed in the parties’ briefs.⁴⁷³

In nine paragraphs the Court discussed how the inadequacies of the briefing made answers ill-advised.⁴⁷⁴ “The answer to these questions may yet prove crucial to the disposition of this case. But the parties have not given us the kind of adversary briefing that we would need to resolve these important issues with confidence, and we therefore decline to do so.”⁴⁷⁵

After the hurdle of acceptance is passed, the Utah Supreme Court has defined standards for proceeding.

First, the Court will not revisit facts stated in the certification order from the District Court. When one party “attempted to reargue the facts as found by the federal district court,” the Court declared that “[i]n answering a question on certification from the district court, we do not refind the facts; we simply answer the certified question of law.”⁴⁷⁶ This restraint is well suited to the role of the Utah Supreme Court as an arbiter of law and not a court of evidentiary

⁴⁷⁰ Order Certifying Questions of Law to the Utah Supreme Court, *TruGreen Cos.*, 1:06-cv-00024-BSJ, docket no. 287, filed June 8, 2007.

⁴⁷¹ Order of Acceptance, *TruGreen Cos.*, 1:06-cv-00024-BSJ, docket no. 293, filed August 16, 2007.

⁴⁷² 2018 WL 523483.

⁴⁷³ *Id.* at *2.

⁴⁷⁴ *Id.* at *5-10.

⁴⁷⁵ *Id.* at *11.

⁴⁷⁶ *Burkholz*, 972 P.2d at 1237 (citing *Hansen*, 830 P.2d at 239).

presentation. The prohibition against refinding facts prevents unnecessary distractions from the legal issues presented for decision, and retains respect for the role of the certifying court.

Second, the Court has also stated that it accepts the decision of the federal court as to the dispositive nature of the certified question. “[T]hose courts’ conclusion that these statutes could be dispositive is a legal conclusion that we are not in a position to review on certification and must accept for purposes of answering the certified question.”⁴⁷⁷

Third, a certified question presents a unique procedural setting for application of legal standards. The Court has said:

“A certified question from the federal district court does not present us with a decision to affirm or reverse a lower court’s decision; as such, traditional standards of review do not apply.” Accordingly, we merely answer the question presented, leaving “resolution of the parties’ competing claims and arguments . . . up to the federal courts, which of course retain jurisdiction to decide [the] case.”⁴⁷⁸

Fourth, the Court may answer a question broadly. In *Egbert v. Nissan Motor Co., Ltd.*,⁴⁷⁹ a party argued that an issue raised by the other party “exceeds the scope of the certified question and thus we should only look to the narrow question [certified].”⁴⁸⁰

This court has noted that it “will reformulate the question if necessary regardless of whether the federal court has expressly stated this in the certification.” Therefore, even if the question were limited to the narrow reading proposed . . . , we would reformulate the question . . . in order for our answer of the certified question to clarify the disputed issue of law and to assist the federal district court.⁴⁸¹

This approach is similar to the “speaking rejection” used to advise the federal court in *Endow v. Utah Transit Authority*.⁴⁸²

Finally, the Utah Supreme Court does not attempt to impose its views on the certifying federal court.

⁴⁷⁷ *Garfield Cty*, 2017 WL 3187505, at *5.

⁴⁷⁸ *Id.* (citing and quoting *U.S. Fid. & Guar. Co. v. U.S. Sports Specialty Ass’n*, 270 P.3d 464 (Utah 2012); *Horne*, 289 P.3d 502); see also *Ray*, 359 P.3d at 619.

⁴⁷⁹ 228 P.3d 737.

⁴⁸⁰ *Id.* at 740.

⁴⁸¹ *Id.*

⁴⁸² Order [of Utah Supreme Court] at 1, *Endow*, 1:13-cv-00108-TC, docket no. 36, filed July 20, 2015, 2015 WL 4394047 (Utah July 17, 2015).

[E]xcept to clarify our law, we do not pretend to possess or exercise the authority to dictate the preclusive effect of our decision to the courts of a separate sovereign. Those courts retain the independent authority to decide whether and to what extent to apply our law or to recognize limitations on or caveats to it.”⁴⁸³

Is Certification Worth It?

The last 30 years of certification practice have demonstrated its value, and exposed its weaknesses. One’s opinion on the value of certification depends on the point of view. If certification is examined only from the point of view of an individual case, the deficiencies in certification—time and expense, and uncertainty about both while the parties are in the process and the federal court is waiting—raise serious questions. When a systemic view is taken, considering certification in the American federalist structure, the value of certification is more apparent. But certification involves real cases, so the problems for those cases and benefits to our federal-state system must both be regarded.

Costs and Benefits for the Parties

In most cases which pass through the certification process, the parties benefit by an authoritative declaration of Utah law. Many cases demonstrate that the answer resolves the case or important issues in it. But other cases in which certification is raised also benefit. Discussion of certification focuses the parties and may resolve issues. Motions to certify questions often resolve a case. So, the process has value to parties in a practical sense.

But what is the value of a decision by the Utah Supreme Court compared to a decision by the federal court? A decision by the federal court on an issue of state law is not authoritative and is subject to question—and to appeal to the Tenth Circuit, if the decision is made by a trial court judge, and even possible certification by the Tenth Circuit—whereas a decision by the Utah Supreme Court terminates debate on the issue.⁴⁸⁴ So, the parties not only benefit by the answer but by the finality of the answer to a certified question. And there is clearly enhanced benefit to having a decision thought through by a team of judges rather than by one federal trial judge.

But certification also costs the parties. Years may elapse between the suggestion of certification and the eventual answer from the Utah Supreme Court. Some of this delay can be attributable to the undefined process for certifying questions in federal court. It has taken over a year, in some instances, for the federal trial court to certify a question. The cost of briefing and argument may, due to formalities in the Utah Supreme Court briefing process, be greater than the same briefing and argument in the federal court, if the federal court were to decide the question. The time to decide an issue in the Utah Supreme Court is usually longer than the time required for such a decision in a federal trial court. The Utah Supreme Court treats certification as a standard appeal, with a time frame which may be as long as the entire complaint-to-trial process in federal court. The decision of the Utah Supreme Court may be slower than a federal trial court

⁴⁸³ *Horne*, 289 P.3d at 506. A later footnote in the opinion noted the fine points of relations of federal and state court decisions and rules. *Id.* at n.14.

⁴⁸⁴ *Burkholz*, 211 F.3d 1277 (Table), at *3.

decision because the Utah Supreme Court is better equipped—and accustomed—to consider broader issues, including state law context, implications for other areas of the law, and state policy, than a federal trial court might consider. Decisions also take longer in the Utah Supreme Court because five judges must make a decision—or decisions, in the case of concurrences and dissents—while in the trial court, one judge makes the decision.

If an issue is legitimately subject to certification, efficiency for the parties dictates that certification occur in the trial court. Certification often terminates or narrows a case in the trial court, and may prevent appeals to the Tenth Circuit. A party aggrieved by a failure to certify an issue will harbor the hope that the Tenth Circuit will certify, and is motivated to appeal. An answer by the Utah Supreme Court to the trial court removes that hope and likely resolves, at least partially, the case, preventing a federal appeal. As is the case in most litigation, an early decision benefits the parties' need for resolution.

The parties will expend more time and perhaps more money in receiving an answer to a certified question from the Utah Supreme Court. But they receive an authoritative answer, from a system designed to render a decision, formulated through debate among the justices, that is not subject to appeal. The value of a Utah Supreme Court decision on an issue of state law is much greater than the decision of a federal trial court. The facts of a specific case will, however, dictate whether certification is advisable in that case, based on the benefits to the parties.

Costs and Benefits for the Federal and State Systems

The value of the certification process and the value of certification in a specific case must also consider the value of certification to the federal and state judicial systems. The Utah Supreme Court is the constitutionally designated authority for decisions on Utah state law. Federal courts are authorized and required to apply state law but they do not have the assignment to declare state law. State and federal authority are always debated, but the constitutional roles of these separate courts are respected and acknowledged by certification of questions.

Old precedent, from a time when certification was unavailable or novel, sometimes referred to the abilities and resources of federal trial courts, implying that they were as well suited to define state law as a state appellate court. Use of this aged guidance in the present time when certification is readily available can appear to demonstrate a lack of humility and lack of respect by the federal trial court. The federal courts have limited jurisdiction and while applying state law is necessary for federal courts, the boundary between applying and declaring needs to be observed. The federal court may do its best, but get the answer wrong, with terrible consequences for the case before the court and for future cases.⁴⁸⁵ By assignment and constitutional role, the federal court cannot speak with authority on state law.

The five justices of the Utah Supreme Court are authoritative specialists in Utah state law and the Utah constitution. The Utah Supreme Court is able to concentrate on the issue(s) certified, with more focused briefing than that which might occur in a state appeal. Undistracted

⁴⁸⁵ *McCarthy*, 119 F.3d at 160, *supra*, at n.82.

by a multitude of issues after trial, the justices are able to turn full attention to the legal issue(s), on a clear and simply summarized factual and procedural record.⁴⁸⁶

Federal court recognition of the value of the answer to a certified question is a demonstration of comity between the courts of different sovereigns. Certification is a clear statement of support for the federal-state division of authority, which not only benefits the state but also benefits the federal system. Our branches of government need more opportunity to demonstrate the mutual respect that is shown by certification of questions.

Even if a question is rejected or reformulated, the federal court which issues a certification order has reflected the respect due the Utah Supreme Court. If the Utah Supreme Court feels an issue is clear—or that a forthcoming opinion in an appeal will answer the question—it is able to so state in rejecting a certified question.

Summary and Reconciliation of Costs and Benefits

When evaluating certification in a specific case, the parties and court must consider the values of the judicial system, in addition to the demands of their case. The existence of a novel question of law, unsettled by state authority, likely to bear in other cases, requires the court and parties to look beyond their current dispute. This is an opportunity for counsel and the court to look at the larger purposes of the judicial system and the respective roles of federal and state courts. Comity and federalism are much larger than any current case and future cases. So, those factors external to the case may drive a case to bear a burden for the benefit of others. The parties are, unless one of them is a recurrent litigant or a governmental entity, most likely to emphasize case specific factors. The court must require the parties to address factors external to the case and may need to develop those factors itself if the parties do not adequately address them. Focus on these multiple considerations is challenging but will ensure that certification is wisely employed.

Recommendations for Improvement of the Utah Certification Process

The process of certification to the Utah Supreme Court can be improved based on the experience of the last 30 years. The wide variations in the federal trial court

- in suggesting certification by motion or sua sponte;
- in time taken to promulgate a certification order after certification is suggested; and
- in the process of generating the certification order

can all be standardized through a local federal court rule on certification. Defining the current ad hoc certification process in the federal trial court would likely save time and money, and introduce clarity for the parties and for judges.

The process in the Utah Supreme Court may also be clarified and accelerated. Improvements might include statement of a reason for rejection of a certified question, including

⁴⁸⁶ *Burkholz*, 972 P.2d at 1237, *supra* at n.476.

express reference to a case pending before the Court in which the question will likely be answered; reduction of timeframes for delivery of the record, briefing; and issuance of opinion(s); and introduction of a process for revision of deficient certification orders.

Reducing the time to receive an answer to a certified question would be the single greatest benefit to the parties in a case with a certified question, and to the federal court in which the case is pending.

Changes in Federal Practice

In contrast to the Tenth Circuit Court of Appeals, which has a rule on certification of questions, and the more comprehensive rule of the Utah Supreme Court, certification practice in the District of Utah is less defined, arising ad hoc in each case. A rule is likely the best way to formalize the practice, to raise awareness of the availability of certification, and to reduce sua sponte certification on appeal—and perhaps reduce appeals.

Recommendation of a Local Federal Rule

Because a federal court may certify questions to any other court capable of receiving the question, a local federal court rule must be broadly drawn. But such a rule will draw on the experience deepest experience of the court—which for the Utah federal district court is with the Utah Supreme Court. The Tenth Circuit has a rule on certification⁴⁸⁷ which is quite complete compared to the rule in the Second Circuit.⁴⁸⁸ But neither are as complete as needed for a local rule in the District of Utah. The text of a proposed rule follows uninterrupted with a later explanation of the sources and rationale for the rule components.

DUCivR __ - __ Certification of Questions of Law

By certification of questions of law, the district court federal court respects the role of other tribunals, agencies, and courts. Answers to certified questions are authoritative, issued by the institution entrusted with the responsibility of interpretation. The relationships of federal and state governments are properly respected by certification of questions of law to a state court.

(a) Certification of Questions of Law

⁴⁸⁷ 10th Cir. R. 27.2.

⁴⁸⁸ Certification of Questions of State Law:

(a) General Rule. If state law permits, the court may certify a question of state law to that state's highest court. When the court certifies a question, the court retains jurisdiction pending the state court's response to the certified question.

(b) Motion or Request. A party may move to certify a question of state law by filing a separate motion or by including a request for certification in its brief.

2d Cir. R. 27.2.

When the law or rule of another jurisdiction, agency, tribunal, or court permits, this court may certify a question arising under the law of that jurisdiction to the appropriate agency, tribunal, or court as designated and under the procedures in that law or rule, if:⁴⁸⁹

- (1) the pending litigation involves a question to be decided under the law of the other jurisdiction;
- (2) the answer to the question may be determinative of an issue in the pending litigation; and
- (3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.⁴⁹⁰

(b) Motion or Suggestion for Certification

A party should move to certify the question of law at the earliest opportunity. Or the court may suggest certification of the question. Any motion or response to a suggestion by the court should discuss:

- (1) the question and its role in the case as determinative of an issue;
- (2) the relationship of that question to the case as a whole and the effect of certification on other procedures in the case such as discovery and motions;
- (3) available authority on the question from appellate decisions, constitutional provisions, or statutes of the other jurisdiction;
- (4) available guidance on the question from decisions of other sources;
- (5) the facts which are relevant to the determination of the question and which show the nature of the controversy and the context in which the question arises;⁴⁹¹
- (6) the anticipated time and expense of receiving an answer to the question;
- (7) the benefits of an authoritative decision to other litigation or disputes in this or other courts, tribunals, or agencies;
- (8) the relationship of the issue to the policy of the other jurisdiction;
- (9) how comity and federalism will be affected by a decision to certify or not certify; and

⁴⁸⁹ Broadened from Tenth Circuit rule. [10th Cir. R. 27.2](#).

⁴⁹⁰ Uniform Act (1995) § 2.

⁴⁹¹ Utah R. App. P. 41(c)(2).

- (10) other matters material to the decision to certify or not to certify.
- (c) When the court suggests certification or when a motion is filed, the court shall set a hearing to be held within 28 days.
- (d) Any response to the motion or suggestion shall be filed within 14 days.
- (e) If, at the hearing, the court determines that a question shall be certified, the court shall expressly state which, if any, activities in the case shall abate pending the decision on the certified question.
- (f) If, at the hearing, the court determines that a question shall be certified, the parties shall meet, confer and within 7 days of the hearing propose an Order Certifying Question which shall clearly state, with adequate discussion and support:
- (1) the question of law to be answered;⁴⁹²
 - (2) that the question certified is a controlling issue of law in the proceeding⁴⁹³ and why the answer to the question will materially advance the termination of the litigation;
 - (3) that there appears to be no controlling Utah law;⁴⁹⁴
 - (4) that the agency, tribunal, or court receiving the question may reformulate the question;⁴⁹⁵
 - (5) all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed;
 - (5) any additional reasons for its entry of the certification order that are not otherwise apparent;⁴⁹⁶
 - (6) a listing of the record documents which the parties believe should be sent to court, agency or tribunal, receiving the certified question;

⁴⁹² *Id.* 41(c)(1)(A).

⁴⁹³ *Id.* 41(c)(1)(B).

⁴⁹⁴ *Id.* 41(c)(1)(C).

⁴⁹⁵ Uniform Act (1995) § 6(a)(3).

⁴⁹⁶ Utah R. App. P. 41(c)(3).

(7) the names and addresses of counsel of record and parties appearing without counsel;⁴⁹⁷

(8) such other matters as may be appropriate.

(g) This rule shall be construed broadly to permit and enable timely certification of questions.

(h) The answer to the certified question shall be considered binding on that issue.⁴⁹⁸

The following table lists the components of the proposed local rule with explanation as to the source and function.

| DUCivR __ - __ Certification of Questions of Law | Explanation |
|--|--|
| By certification of questions of law, the district court federal court respects the role of other tribunals, agencies, and courts. Answers to certified questions are authoritative, issued by the institution entrusted with the responsibility of interpretation. The relationships of federal and state governments are properly respected by certification of questions of law to a state court. | This statement of purpose places the policy reasons for certification in front of the parties, who are more concerned about the practical effects on their own case. The rule's provisions require the court to consider both. |
| (a) Certification of Questions of Law When the law or rule of another jurisdiction, agency, tribunal or court permits, this court may certify a question arising under the law of that jurisdiction to the appropriate agency, tribunal or court as designated and under the procedures in that law or rule, if: | This subparagraph is drawn from the Tenth Circuit rule, but broadened to match language in the Uniform Act (1995) § 1 to include all possible entities to which certification might be made. |

⁴⁹⁷ Uniform Act (1995) § 6(a)(4).

⁴⁹⁸ *Burkholz*, 211 F.3d 1277 (Table), at *3.

| DUCivR __ - __ Certification of Questions of Law | Explanation |
|--|--|
| <p>(1) the pending litigation involves a question to be decided under the law of the other jurisdiction;</p> <p>(2) the answer to the question may be determinative of an issue in the pending litigation; and</p> <p>(3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.</p> | <p>These subparagraphs are drawn from the Uniform Act (1995) § 2.</p> |
| <p>(b) Motion or Suggestion for Certification</p> <p>A party should move to certify the question of law at the earliest opportunity. Or the court may suggest certification of the question. Any motion or response to a suggestion by the court should discuss</p> <p>(1) the question and its role in the case as determinative of an issue;</p> <p>(2) the relationship of that issue to the case as a whole and the effect of certification on other procedures in the case such as discovery and motions;</p> <p>(3) available authority on the issue from appellate decisions, constitutional provisions, or statutes of the other jurisdiction;</p> <p>(4) available guidance from decisions of other courts on the question;</p> <p>(5) the facts which are relevant to the determination of the question and which show the nature of the controversy and the context in which the question arises;</p> <p>(6) the anticipated time and expense of receiving an answer to the question;</p> | <p>This subparagraph is drawn to meet the requirements of Utah R. App. P. 41.</p> <p>It adds many considerations for the district court which may not be as relevant to the entity receiving the certified question.</p> <p>Subparagraph (5) includes language from Utah R. App. P 41(c)(2).</p> |

| DUCivR __ - __ Certification of Questions of Law | Explanation |
|--|---|
| <p>(7) the benefits of an authoritative decision to other litigation or disputes in this or other courts, tribunals or agencies;</p> <p>(8) the relationship of the issue to the policy of the other jurisdiction;</p> <p>(9) how comity and federalism will be affected by a decision to certify or not certify; and</p> <p>(10) other matters material to the decision to certify or not to certify.</p> | |
| <p>(c) When the court suggests certification or when a motion is filed, the court shall set a hearing to be held within 28 days.</p> | <p>Setting a hearing at the earliest date will reduce time in the certification process.</p> |
| <p>(d) Any response to the motion or suggestion shall be filed within 14 days.</p> | <p>Defining response time for sua sponte suggestions of certification is new but otherwise this subparagraph conforms to DUCivR 7-1(b)(3)(B).</p> |
| <p>(e) If, at the hearing, the court determines that a question shall be certified, the court shall expressly state which, if any, activities in the case shall abate pending the decision on the certified question.</p> | <p>Requiring the court and parties to consider the effect of certification on the case schedule will cause the realities of that effect to be carefully considered.</p> |
| <p>(f) If, at the hearing, the court determines that a question shall be certified, the parties shall meet, confer and within 7 days of the hearing propose an Order Certifying Question which shall clearly state, with adequate discussion and support:</p> | <p>The requirement that the parties meet and confer takes the advice offered in <i>In re West Side Property Associates</i>⁴⁹⁹ that attorney input creates better certification orders.</p> |

⁴⁹⁹ 13 P.3d at 170-71.

| DUCivR __ - __ Certification of Questions of Law | Explanation |
|---|---|
| <p>(1) the question of law to be answered;</p> <p>(2) that the question certified may be determinative of an issue in the proceeding and why the answer to the question will materially advance the termination of the litigation;</p> <p>(3) that there appears to be no controlling Utah law;</p> | <p>These subparagraphs are drawn from Utah R. App. P 41(c)(1) but modified consistent with Uniform Act (1995) § 3, to refer to questions “determinative of an issue” rather than “controlling issues of law.” The additional requirement that the answer materially advance the termination of the litigation places the issue in context of the entire case.</p> |
| <p>(4) that the agency, tribunal, or court receiving the question may reformulate the question;</p> | <p>This subparagraph is drawn from the Uniform Act (1995) § (6)(a)(3).</p> |
| <p>(5) all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed;</p> | <p>From Utah R. App. P. 41(c)(2).</p> |
| <p>(5) any additional reasons for its entry of the certification order that are not otherwise apparent;</p> | <p>From Utah R. App. P. 41(c)(2).</p> |
| <p>(6) a listing of the record documents which the parties believe should be sent to court, agency or tribunal receiving the certified question;</p> | <p>This subparagraph anticipates (and may accelerate) transmission of the record under Utah R. App. P. 41(d).</p> |
| <p>(7) the names and addresses of counsel of record and parties appearing without counsel; and</p> | <p>From Uniform Act (1995) § 6(a)(4).</p> |
| <p>(8) such other matters as may be appropriate.</p> | |
| <p>(e) Within 28 days of the motion or suggestion, the court shall set a hearing or issue an Order Certifying Question.</p> | <p>This subparagraph sets a sense of urgency in certification.</p> |
| <p>(f) If an Order Certifying Question issues, the court shall expressly state in a separate order which, if any activities in the case shall abate pending the decision on the certified question.</p> | <p>This provision requires that the status of the pending case be expressly treated.</p> |
| <p>(g) This rule shall be construed broadly to permit and enable timely certification of questions.</p> | |

| DUCivR __ - __ Certification of Questions of Law | Explanation |
|---|--|
| (h) The answer to the certified question shall be considered binding on that issue. | Consistent with <i>Burkholz v. Joyce</i> , ⁵⁰⁰ this provision encourages due regard for an answer to a certified question, which is received at personal and institutional costs. |

Changes in State Rule and Practice

Some potential changes in state practice and the state rule have been noted above. Reformulation of questions was implemented by decision in Utah,⁵⁰¹ while the Uniform Act (1995) includes it in rule text.⁵⁰² Rejection orders might state reasons for rejection to guide future practitioners, and if the reason for rejection is a pending appeal dealing with the issue, that other case might be identified. And time frames might be defined.

The following table shows recommended revisions in Utah Rule of Appellate Procedure 41. The variations from the Uniform Act (1995) are noted..

| RULE 41. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS | Explanation |
|---|--|
| <p>(a) Authorization to answer questions of law. The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.</p> <p>(b) Procedure to invoke. Any court of the United States may invoke this rule by entering an order of certification as described in this rule. When invoking this rule, the certifying court may act either sua sponte or upon a motion by any party.</p> | The limitations of Utah Const. Art. VIII, Sec. 3 prohibit broadening subparagraphs (a) and (b) to match the Uniform Act (1995) § 3 to add “by [an appellate [the highest] court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state] |

⁵⁰⁰ 211 F.3d 1277 (Table), at *3.

⁵⁰¹ *In re W. Side Prop. Assocs.*, 13 P.3d 168.

⁵⁰² Uniform Act (1995) § 4.

| RULE 41. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS | Explanation |
|--|---|
| <p>(c) Certification order.</p> <p>(c)(1) A certification order shall be directed to the Utah Supreme Court and shall state:</p> <p>(c)(1)(A) the question of law to be answered;</p> <p>(c)(1)(B) that the question certified is a controlling issue of law <u>may be determinative of an issue in a the proceeding pending before the certifying court and that the answer to the question will materially advance the termination of that proceeding;</u> and</p> <p>(c)(1)(C) that there appears to be no controlling Utah law-; <u>and</u></p> | <p>Subparagraph (c) reflects the odd function of a certification rule in a receiving court, defining the order to issue from a certifying court. It may be that a conference between rules committees of the Utah Supreme Court and District of Utah can correlate expectations and deliveries and consistency of rules in each court.</p> <p>Compare the proposal for a local federal rule, subparagraph (d)(2), derived from Utah R. App. P. 41(c)(1)(B) but modified consistent with Uniform Act (1995) § 3.</p> |
| <p><u>(c)(1)(C) that this Court may reformulate a question of law certified to it.</u></p> | <p>From Uniform Act (1995) § 4. Adding this subparagraph makes clear the holding of <i>In re West Side Property Associates</i>.⁵⁰³</p> |
| <p>(c)(2) The order shall also set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed <u>including opportunities for the parties to meet, confer and contribute to the content of the certification order.</u></p> <p>(c)(3) The certifying court may also include in the order any additional reasons for its entry of the certification order that are not otherwise apparent.</p> | <p>The new text reflects the assumption in Uniform Act (1995) § 6(b) that the parties will contribute to the certification order. <i>In re West Side Property Associates</i> observed that when “courts prepare the questions themselves without input from counsel . . . the wrong questions [may be] asked.”⁵⁰⁴</p> |
| <p>(d) Form of certification order; submission of record. A certification order shall be signed by the judge presiding over the proceeding giving rise to the certification order and forwarded to the Utah Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may</p> | <p>Record transmission should be accelerated by the new federal rule subparagraph (d)(6).</p> |

⁵⁰³ 13 P.3d 168.

⁵⁰⁴ *Id.* at 170.

| RULE 41. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS | Explanation |
|--|---|
| <p>require that all or any portion of the record before the certifying court be filed with the Supreme Court if the record or a portion thereof may be necessary in determining whether to accept the certified question or in answering that question. A copy of the record certified by the clerk of the certifying court to conform to the original may be substituted for the original as the record.</p> | |
| <p>(e) Acceptance, reformulation or rejection of certification. Upon filing of the certification order and accompanying papers with the clerk, the Supreme Court shall promptly enter an order either accepting, reformulating or rejecting the question certified to it, and the clerk shall serve copies of the order upon the certifying court and all parties identified in the certification order. If the Supreme Court accepts the question, the Court will set out in the order of acceptance (1) the specific question or questions accepted, (2) the deadline for notifying the Supreme Court as to those portions of the record which shall be copied and filed with the Clerk of the Supreme Court, and (3) information as to when the briefing schedule will be established. <u>If the Supreme Court rejects the question, the Court may set out in the order of rejection any reasons for rejection and any pending appeal which already presents the certified question.</u></p> | <p>The specific reference to reformulation puts parties on notice of that possibility. The suggestion that a rejection order may provide information beyond a bare rejection may allow parties to be informed as to better practice or the possibility that a question may be answered by an appellate case in process. A rejection order that comments on the basis for rejection may assist the federal court in reframing a deficient certification order.</p> |
| <p>(f) Briefing; oral argument. The form of briefs and proceedings on oral argument will be governed by these rules except as such rules may be modified by the Supreme Court to accommodate the differences between the appeal process and the determination of a certified question <u>and the schedule of proceeding giving rise to the certification order and the implications of delay on the proceeding.</u> The clerk of the Supreme Court will provide written notice to the parties as to the schedule for the filing of briefs and content requirements, as well as the schedule and procedures for oral argument. <u>In recognition of the narrowness of the issue(s) presented and the defined record, in accordance with notions of</u></p> | <p>The new language is drawn in part from the proposed local federal rule (b) and Uniform Act (1995) § 7.</p> |

| RULE 41. CERTIFICATION OF QUESTIONS OF LAW BY UNITED STATES COURTS | Explanation |
|---|---|
| <u>comity and fairness, the Supreme Court will respond to an accepted or reformulated certified question as soon as practicable.</u> | |
| (g) Appearance of counsel <i>pro hac vice</i>. Upon acceptance by the Supreme Court of the question of law presented by the certification order, counsel for the parties not licensed to practice law in the state of Utah may appear <i>pro hac vice</i> upon motion filed pursuant to the Code of Judicial Administration. | This subparagraph might be better placed as a separate Rule of Appellate Procedure. |

These refinements of the Utah Rules of Appellate Procedure may contribute to more clarity in the certification process.

Conclusions

Certification has been successfully implemented in Utah. Though the first effort in 1975 was unsuccessful, a constitutional amendment in 1984 made possible certification of legal questions to the Utah Supreme Court. The experience of the last 30 years confirms the value of certification. Some of the most interesting and important issues in state law are resolved in the answers to certified questions.⁵⁰⁵

Certification confirms the relative roles of the state and federal courts, and helps resolve cases. Answers to certified questions are authoritative, issued by the court with constitutional responsibility to interpret state law. Those answers put to rest hopes of obtaining a different answer from a different federal judge at the trial or appellate level.

The rate of certification and the rate of acceptance of certified questions by the Utah Supreme Court suggests the utility of the process and that relationships of the federal courts and the Utah Supreme Court are good. The transition of former Justice Jill Parrish to the federal district bench has increased the use of certification.

With changes, the process can be improved to reduce burdens in individual cases, by more clearly defining processes and time frames in the federal court and clarifying the state appellate rule. This thesis proposes a new rule for the federal district court, and changes to the Utah Rule of Appellate Procedure.

⁵⁰⁵ See Appendix listing certified questions.

Beyond the rule proposals, defining and reducing timeframes in the Utah Supreme Court would also reduce burdens on individual cases. As was demonstrated in *Grundberg* (5 months)⁵⁰⁶ and *Utah Republican Party* (4 months),⁵⁰⁷ the certification process can be completed in a very short time. Not every case needs such accelerated treatment, but if a defined timeframe were available, the relative burden on parties would decrease, allowing more certifications to occur, thus recognizing more often the rightful place of the Utah Supreme Court in declaring Utah law.

Increased awareness of the process and definition of criteria for its use will likely increase wise use of certification, and contribute to the achievements already made by the federal courts and by the Utah Supreme Court, for the benefit of citizens, litigants and counsel.

⁵⁰⁶ *Supra*, at 30 n.202-06.

⁵⁰⁷ *Supra*, at 50-51 n.333-341.

Appendices

Appendix - Recommendations for Further Study

In the somewhat unstudied area of certification of questions to the Utah Supreme Court, numerous byways for further study were encountered. Some of these were within the original scope of the thesis but deferred due to the time available for the thesis.

More detailed study within the scope of the thesis

Several projects could be undertaken within the scope of this thesis which confines itself to the cases involved with certification of questions to the Utah Supreme Court.

What were the origins of the 1975 Certification Rule?

How do counsel and parties involved in certification evaluate the process and its effect on time and expense in a case?

How do judges and justices evaluate certification processes and the substantive impact of certification on the case at hand and (in the Utah Supreme Court) on other appellate caseload?

Would informal discussions, outside the context of any specific case, between judges of federal courts and justices of the Utah Supreme Court cause improvements in the certification process?

Would an interactive process between the Utah Supreme Court and the federal court help improve the quality of certification orders and answers to certified questions?

How do the internal procedures of the Utah Supreme Court differ for interlocutory appeals and answering certified questions? Are the internal standards and processes for evaluation, acceptance and rejection the same or different? Are the time frames for processing these cases similar or different? In both instances, the trial court awaits a decision to move forward with resolution of a pending case, as contrasted with an appeal in which the parties have reached decision on most issues before the Utah Supreme Court considers the case.

Did the federal court in *Miller v. United States* properly analyze the Federal Tort Claims Act issue after the Utah Supreme Court ruled? When a federal tort case is dependent on state common law is the state court decision final as was suggested in *Miller* or does the federal court have the ability to find a limited claim present as was done in *Smith v. Pena*?

Would a comprehensive review of all certification orders from the trial courts and Tenth Circuit reveal best practices for such orders?

Tenth Circuit involvement in certification

The brief look at the practices of the Tenth Circuit in certification of questions to Utah has suggested many areas for future study.

Which judges on the Tenth Circuit have been the most active in certification?

Does the Tenth Circuit deny all motions for certification in all its cases or just in those involving Utah?

How does the Tenth Circuit rate of sua sponte certification to the Utah Supreme Court compare to the Tenth Circuit rate of sua sponte certification to other courts?

In nine of the cases in which questions were certified sua sponte by the Tenth Circuit to the Utah Supreme Court, the answer resulted in reversal of the district court's opinion. In four instances, the Supreme Court's answer did not change the ruling below. How was the Tenth Circuit so well able to target cases for certification which affected the trial court result?

Study of inter-institutional dynamics of certification

If certification procedures originate in the legislature are they more or less used than procedures originating in the courts?

How is acceptance of certified questions affected by other relationships of state courts and federal counterparts?

How does certification compare with the EU Preliminary Ruling Process?

Other Topics

Study of certification practices in other states would yield helpful comparative information.

Review of opinions written on the subject of certification by Judge Guido Calabresi of the Second Circuit, an advocate of certification, would provide guidance from a judge who is possibly the most published on the subject.

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Eric C. Surette, *Construction and Application of Uniform Certification of Questions of Law Act*, 69 A.L.R. 6th 415, §§ 27-28 (2011).

Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 Geo. Wash. L. Rev. 1310 (2010).

Uniform Certification of Questions of Law Act (1967); 12 U.L.A. 86 (1996).

Uniform Certification of Questions of Law Act (1995); 12 U.L.A. 71 (1995).

Appendix—Uniform Acts

Uniform Certification of Questions of Law Act 1967

§ 1. [Power to Answer].

The [Supreme Court] 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, the United States Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Claims Court, the United States Court of Military Appeals, the United States Tax 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 be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state.

§ 2. [Method of Invoking].

This [Act] [Rule] may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

§ 3. [Contents of Certification Order].

A certification order shall set forth

- (1) the questions of law to be answered; and
- (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

§ 4. [Preparation of Certification Order].

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the [Supreme Court] by the clerk of the certifying court under its official seal. The [Supreme Court] may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the [Supreme Court], the record or portion thereof may be necessary in answering the questions.

§ 5. [Costs of Certification].

Fees and costs shall be the same as in [civil appeals] docketed before the [Supreme Court] and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§ 6. [Briefs and Argument].

Proceedings in the [Supreme Court] shall be those provided in [local rules or statutes governing briefs and arguments].

§ 7. [Opinion].

The written opinion of the [Supreme Court] stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

§ 8. [Power to Certify].

The [Supreme Court] [or the intermediate appellate courts] of this state, on [its] [their] own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.]

§ 9. [Procedure on Certifying].

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.]

§ 10. [Severability].

If any provision of this [Act] [Rule] or the application thereof to any person, court, or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] [Rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable

§ 11. [Construction].

This [Act] [Rule] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 12. [Short Title].

This [Act] [Rule] may be cited as the Uniform Certification of Questions of Law [Act] [Rule].

§ 13. [Time of Taking Effect].

This [Act] [Rule] shall take effect _____.

Uniform Certification of Questions of Law [Act] [Rule] (1995)

§ 1. Definitions[s].

In this [Act] [Rule]:

(1) “State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

[(2) “Tribe” means a tribe, band, or village of native Americans which is recognized by federal law or formally acknowledged by a State.]

§ 2. Power to Certify.

The [Supreme Court] [or an intermediate appellate court] of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state] if:

- (1) the pending litigation involves a question to be decided under the law of the other jurisdiction;
- (2) the answer to the question may be determinative of an issue in the pending litigation; and
- (3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

§ 3. Power to Answer.

The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state], if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

§ 4. Power to Reformulate Question.

The [Supreme Court] of this State may reformulate a question of law certified to it.

§ 5. Certification Order; Record.

The court certifying a question of law to the [Supreme Court] of this State shall issue a certification order and forward it to the [Supreme Court] of this State. Before responding to a certified question, the [Supreme Court] of this State may require the certifying court to deliver all or part of its record to the [Supreme Court] of this State.

§ 6. Contents of Certification Order.

(a) A certification order must contain:

- (1) the question of law to be answered;
- (2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;
- (3) a statement acknowledging that the [Supreme Court] of this State, acting as the receiving court, may reformulate the question; and
- (4) the names and addresses of counsel of record and parties appearing without counsel.

(b) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

§ 7. Notice; Response.

The [Supreme Court] of this State, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

§ 8. Procedures.

After the [Supreme Court] of this State has accepted a certified question, proceedings are governed by [the rules and statutes governing briefs, arguments, and other appellate procedures]. Procedures for certification from this State to a receiving court are those provided in the rules and statutes of the receiving forum.

§ 9. Opinion.

The [Supreme Court] of this State shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.

§ 10. Cost of Certification.

Fees and costs are the same as in [civil appeals] docketed before the [Supreme Court] of this State and must be equally divided between the parties unless otherwise ordered by the certifying court.

§ 11. Severability.

If any provision of this [Act] [Rule] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] [Rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable.

§ 12. Uniformity of Application and Construction.

This [Act] [Rule] shall be applied and construed to effectuate its general purpose to make uniform law with respect to the subject of the [Act] [Rule] among States [enacting] [adopting] it.

§ 13. Short Title.

This [Act] [Rule] may be cited as the Uniform Certification of Questions of Law [Act] [Rule] (1995).

§ 14. Effective Date.

This [Act] [Rule] takes effect on _____.

Appendix—List of All Cases Considering Certification

| All Certification Cases - sorted by trial court judge | | | Dist. Ct. | | DB ID |
|---|----------------------------------|-------------|-----------|------|-------|
| Case name | Case number | Judge | Cert? | Cir. | |
| United States v Stubbs | C 76 67 | A. Anderson | No | | 43 |
| Stoker v. Salt Lake Cty. | 2:90-cv-248-BSJ | A. Anderson | Y | | 67 |
| In re Hendry | 2:14-bk-27398-KA | Anderson | Y | | 156 |
| In re Kiley | 2:15-bk-27838-KA | Anderson | Y | | 157 |
| Pace v. Swerdlow | 2:06-cv-00027-DB | Benson | Y | | 111 |
| CR England v Swift | 2:14-cv-00781 DB | Benson | Y | | 153 |
| Compressor Pump v. Allis-Chalmers | 2:89-cv-00451-DB | Benson | No | | 134 |
| Land v. EG&G Defense Materials | 2:04-cv-00479-DB | Benson | No | | 40 |
| Kennard v. Leavitt | 2:01-cv-00171-DB | Benson | Y | | 123 |
| Carson v. Am. Family Mut. Ins. | 2:09-cv-00663-DB | Benson | No | | 130 |
| Clark v. United States | 2:98-cv-00304-DB | Benson | Y | | 133 |
| Egbert et al v. Nissan North America et | 2:04-cv-00551-DN | Benson | Y | | 142 |
| Fundamental Church of Jesus Christ | 2:08-cv-00772-DB | Benson | No | Y | 72 |
| Iverson v. State Farm Mut. Ins. Co. | 1:06-cv-00113-DB | Benson | Y | | 109 |
| Ohio Cas. Ins. Co. v. Cloud Nine | 1:05-cv-00088-DB | Benson | No | Y | 151 |
| Richardson v. Navistar Int'l Transp. | 2:95-cv-00752-DB | Benson | No | Y | 100 |
| Smith v. U.S. Dep't of Veterans Affairs | 2:12-cv-00968-DB | Benson | Y | | 59 |
| Thayer v. Washington Cty. Sch. Dist. | 2:09-cv-00565-DB | Benson | Y | | 32 |
| In re W. Side Prop. Assocs. | 97-20887 | Boulden | Y | | 107 |
| SEC v. Merrill Scott, Ltd. | 2:02-cv-00039-TC | Campbell | No | | 53 |
| Society of Lloyd's v. Bennett | 2:02-cv-00204-TC | Campbell | No | | 62 |
| Shipley v. Forest Labs. | 1:06-cv-00048-TC | Campbell | No | | 58 |
| Bower v. Temple Mountain Energy | 2:09-cv-01141-TC | Campbell | No | | 124 |
| Whiteman v. Friel | 2:05-cv-00424-TC | Campbell | No | | 49 |
| Hale v. Fingerhut Co., Inc. | 2:95-cv-00660-TC | Campbell | No | | 89 |
| Utah Life & Disability v. Teacher Ins. | 2:00-cv-00530-TS | Campbell | No | | 45 |
| Pay Less Drug Stores v. Tender II, Ltd. | 2:95-cv-00179-TC | Campbell | No | | 110 |
| W. States Contracting v. Spilsbury | 2:10-cv-01141-TC | Campbell | No | | 16 |
| Morgan v. McCotter | 2:99-cv-00073-TC | Campbell | No | | 149 |
| United Pac. Ins. Co v. Knudsen Constr. | 2:97-cv-00235-TC | Campbell | No | | 44 |
| Adams v. Gen. Accident Ins. Co. | 2:92-cv-00516-TC | Campbell | No | | 22 |

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|--|-----------------------------------|-------------|----|---|-----|
| Burkholz v. Joyce | 2:96-cv-00252-TC | Campbell | Y | | 127 |
| Endow v. Utah Transit Auth. | 1:13-cv-00108-TC | Campbell | Y | | 143 |
| Gardner v. Galetka | 2:95-cv-00846-TC | Campbell | Y | | 73 |
| Miller v. United States | 1:02-cv-00037-TC | Campbell | Y | | 85 |
| Spackman v. Bd. Ed. Box Elder Cty. | 1:98-cv-00120-TC | Campbell | Y | | 64 |
| Ammons v. La-Z-Boy, Inc. | 1:04-cv-00067-TC | Campbell | Y | | 27 |
| Gibbs v. Unum Life Ins. Co. | 2:00-cv-00549-PGC | Cassell | Y | | 77 |
| Machan v. Unum Life Ins. Co. | 2:00-cv-00904-PGC | Cassell | Y | | 56 |
| Robert J. DeBry & Assocs. v. Quest Dex | 1:03-cv-00099-PGC | Cassell | No | Y | 138 |
| TruGreen Cos. v. Bitton | 1:06-cv-00024-BSJ | Cassell | Y | | 36 |
| Black v United States | C 138-66 | Christensen | No | | 14 |
| In re Kunz | 2:02-bk-40422-GEC | Clark | Y | | 154 |
| In re Rockwell | 2:02-bk-42013-WTT | Thurman | Y | | 154 |
| Mitchell v. Roberts | 2:16-cv-00843-EJF | Furse | Y | | 147 |
| Katterman v. Salt Lake Cty. | 2:13-cv-01122-EJF | Furse | Y | | 122 |
| Baker v. D&RG | 2:94-cv-00017-JTG | Greene | No | | 30 |
| Bills v. Utah Farm Bur. Ins. Co. | 2:91-cv-00193-JTG | Greene | No | | 119 |
| Jorgensen v. Larsen | 2:88-cv-00761-JTG | Greene | No | | 121 |
| Young v. Delta Airlines | 2:99-cv-00859-JTG | Greene | No | | 18 |
| Albright v. Granite Bd. of Ed. | 2:90-cv-00639-JTG | Greene | No | | 23 |
| Gines v. Ingersoll-Rand Co. | 2:89-cv-00543-JTG | Greene | Y | | 78 |
| Grundbergl v. Upjohn Co. | 2:89-cv-00274-JTG | Greene | Y | | 79 |
| Hansen v. Sea Ray Boats, Inc. | 2:88-cv-00708-JTG | Greene | Y | | 90 |
| Hirpa v. IHC Hosp., Inc. | 1:90-cv-00086-JTG | Greene | No | Y | 92 |
| Peterson v. Browning | 1:87-cv-00121-JTG | Greene | Y | | 105 |
| Steiner Corp. v. Johnson & Higgins | 2:88-cv-00410-JTG | Greene | Y | | 66 |
| Sullivan v. Scoular Grain Co. | 2:87-cv-00330-JTG | Greene | Y | | 70 |
| United W. Bank v. Moyes | 2:08-cv-00218-BSJ | Jenkins | No | | 51 |
| McCourt v. Semken | 2:87-cv-01052-BSJ | Jenkins | Y | | 83 |
| MacArthur v. San Juan Cty. | 2:00-cv-00584-BSJ | Jenkins | No | | 55 |
| Wright v. Deland | 2:90-cv-00829-BSJ | Jenkins | No | | 19 |
| Strawberry Water v. United States | 2:01-cv-00295-BSJ | Jenkins | No | | 69 |
| Jensen v. NSLC | 1:93-cv-00134-BSJ | Jenkins | No | | 115 |
| MacArthur v. San Juan Cty. | 2:00-cv-00584-BSJ | Jenkins | No | | 139 |

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|--|-----------------------------------|---------|----|---|-----|
| Cyprus Plateau Mining v. Commonwealth | 2:96-cv-00401-BSJ | Jenkins | No | | 136 |
| Copier v. Smith & Wesson | 2:95-cv-00723-BSJ | Jenkins | No | | 135 |
| Cincinnati Ins. Co. v. AMSCO Windows | 2:10-cv-00542-BSJ | Jenkins | No | | 132 |
| Century Indem. v. Hanover Ins. | 2:97-cv-00925-BSJ | Jenkins | No | | 131 |
| Fox v. MCI Commc'ns Corp. | 2:93-cv-00042-BSJ | Jenkins | Y | | 71 |
| Gladwell v. Reinhart | 2:06-cv-00325-BSJ | Jenkins | No | Y | 106 |
| Mecham v. Frazier | 1:04-cv-00033-CW | Jenkins | No | Y | 146 |
| Soter's, Inc. v. Deseret Fed. | 2:89-cv-00979-DB | Jenkins | Y | | 63 |
| Rose v. Utah State Bar | 2:10-cv-1001-WPJ | Johnson | No | | 96 |
| Johnson v. Life Inv'rs Ins. | 2:96-cv-00283-DAK | Kimball | No | | 117 |
| Rawlings v. Gilt Edge Flour Mills | 1:07-cv-00031-DAK | Kimball | No | | 102 |
| Am. Nat. Prop. & Cas. V. McNeely | 1:16-cv-00007-DAK | Kimball | No | | 25 |
| Westport Ins. v. Ong | 1:07-cv-00010-DAK | Kimball | Y | | 50 |
| Utah Div. Forestry v United States | 2:97-cv-00927-DAK | Kimball | No | | 46 |
| Snyder v. Cache Cty. | 1:98-cv-00151-DAK | Kimball | No | | 61 |
| Evans v. State of Utah | 2:14-cv-00055-DAK | Kimball | No | | 145 |
| Schubert v. Genzyme | 2:12-cv-00587-DAK | Kimball | No | | 38 |
| Burns v. Astrue | 2:09-cv-00926-DAK | Kimball | Y | | 128 |
| Carranza v. Mountainlands Health Clinic | 2:07-cv-00291-DAK | Kimball | Y | | 129 |
| Garza v. Burnett | 1:06-cv-00134-DAK | Kimball | No | Y | 75 |
| Gladwell v. Reinhart | 2:08-cv-00562-DAK | Kimball | No | Y | 103 |
| Whitney v. Div. of Juvenile Justice Servs. | 2:09-cv-00030-DAK | Kimball | N | Y | 5 |
| In re Simmons | 2:13-bk-33821-RKM | Mosier | Y | | 155 |
| Hahn v. Reyes | 2:16-cv-00666-DN | Nuffer | No | | 80 |
| First Am. Title Ins. Co. v. Nw. Title Ins. | 2:15-cv-00229-DN | Nuffer | No | | 26 |
| Utah Republican Party v. Herbert | 2:16-cv-00038-DN | Nuffer | Y | | 47 |
| Spurlino v. Holcim | 2:14-cv-00461-JNP | Parrish | No | | 65 |
| Burningham v Wright Med. Grp. | 2:17-cv-00092-JNP | Parrish | | | 159 |
| Loveridge v. Prudential Ins. Co. of Am. | 2:16-cv-00377-JNP | Parrish | No | | 54 |
| Dircks v. Travelers Indem. Co. of Am. | 2:14-cv-00118-JNP | Parrish | Y | | 140 |
| Flores v. Unified Police Dep't | 2:16-cv-00224-JNP | Parrish | Y | | 60 |
| GeoMetWatch v. Hall | 1:14-cv-00060-JNP | Parrish | Y | | 76 |
| HealthBanc Int'l v. Synergy Worldwide | 2:16-cv-00135-JNP | Parrish | Y | | 91 |
| Lancer Ins. Co. v. Lake Shore Motor | 2:14-cv-00785-JNP | Parrish | Y | | 21 |

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|--------------------------------------|-----------------------------------|----------|----|---|-----|
| Zimmerman v. Univ. of Utah | 2:13-cv-01131-JNP | Parrish | Y | | 17 |
| Equitable Life Ins. v. Research Park | 2:87-cv-00866-DS | Sam | No | | 144 |
| Davis Cty. Constr. v. Davis Cty. | 1:89-cv-00054-DS | Sam | No | | 137 |
| Bragg v. Buck | 1:94-cv-00127-DS | Sam | No | | 126 |
| Littlefield v. Mobil Expl. | 2:94-cv-01078-DS | Sam | No | | 52 |
| Harline v. Gladwell | 1:90-cv-00117-DS | Sam | No | | 95 |
| Jeppson v. Thoman | 2:94-cv-00519-DS | Sam | No | | 116 |
| Scott v. Hammock | 2:89-cv-00267-TC | Sam | Y | | 39 |
| United States v. Badger | 2:10-cv-00935-DB | Shelby | No | | 42 |
| Roberts v. C.R. England | 2:12-cv-00302-RJS | Shelby | | | 97 |
| Allen v. Bamboo HR | 2:16-cv-00905-RJS | Shelby | No | | 24 |
| Ray v. Wal-Mart Stores, Inc. | 1:11-cv-00104-RJS | Shelby | Y | | 101 |
| Jensen v. State of Utah | 2:05-cv-00739-TS | Stewart | No | | 12 |
| Johnson v. Riddle | 2:98-cv-00599-TS | Stewart | Y | | 99 |
| Hogan v. Utah Telecomms. | 1:11-cv-00064-TS | Stewart | No | | 93 |
| Edwards v. Utah Bd. of Pardons | 2:01-cv-00834-TS | Stewart | No | | 141 |
| Novell v. Handleman | 2:01-cv-00173-TS | Stewart | Y | | 112 |
| Haik v. Salt Lake Cty. Bd. of Health | 2:13-cv-01051-TS | Stewart | No | | 88 |
| Anderson v. Toomey | 2:07-cv-00673-TS | Stewart | No | | 29 |
| Boyd v. Jones et al. | 2:00-cv-00472-TS | Stewart | No | | 125 |
| Haik v. Salt Lake City Corp. | 2:12-cv-00997-TS | Stewart | No | | 87 |
| McArthur v. State Farm Mut. Ins. Co. | 2:09-cv-00416-TS | Stewart | No | Y | 82 |
| 1.800. Vending v. Wyland | 1:14-cv-00121-CW | Waddoups | No | | 20 |
| Stone v. Third Dist. Court | 2:12-cv-00390-CW | Waddoups | No | | 68 |
| Powderham v. Synergy Worldwide | 2:08-cv-00548-CW | Waddoups | No | | 104 |
| Krehbiel v. Travelers Ins. Co. | 2:08-cv-00110-CW | Waddoups | No | | 118 |
| Olseth v. Salt Lake City Corp. | 2:02-cv-01122-CW | Waddoups | No | Y | 152 |
| Tabor v. Metal Ware Corp. | 2:99-cv-00503-CW | Waddoups | No | Y | 31 |
| Waddoups v Noorda | 1:11-cv-00133-CW | Waddoups | Y | | 15 |
| Garfield Cty. v. United States | 2:11-cv-01045-CW | Waddoups | Y | | 74 |
| Self v. Teleperformance Grp. USA | 2:08-cv-00395-PMW | Warner | No | | 57 |
| Nat'l Indem. & Guar. v. U.S. Sports | 2:07-cv-00996-TS | Wells | Y | | 37 |
| Anaconda Minerals v. Stoller | 2:87-cv-00118-DKW | Winder | No | | 28 |
| Worthen v. Kennecott Corp. | C 84 0468 | Winder | No | | 48 |

| | | | | |
|--|-----------------------------------|--------|----|----|
| Hights Creek Irriga. Co. v. United Tech. | 1:91-cv-00042-DKW | Winder | Y | 86 |
| Holden v NL Indus., Inc. | C-79-0391 | Winder | No | 94 |

Appendix—Questions Certified to the Utah Supreme Court

Utah Supreme Court

Hansen v. Sea Ray Boats, Inc. 900512 [830 P.2d 236 \(Utah 1992\)](#)

Federal Trial Court

Hansen v. Sea Ray Boats, Inc. [2:88-cv-00708-JTG](#) Dist. Ct. Cert.? Y Y

(1) whether a person not actually threatened with bodily harm who incorrectly but reasonably believes that he or she is actually threatened with bodily harm has a claim for negligent infliction of emotional distress that satisfies the “threat of harm” requirement of section 313 of the Restatement (Second) of Torts (1965), as adopted by this court in Johnson v. Rogers;

(2) whether a person who witnesses others receiving bodily harm and fears for his or her own safety, although that person does not comprehend the source of the harm and therefore does not fear harm from that particular source, has a claim for negligent infliction of emotional distress that satisfies the “fear for one's own safety” requirement of section 313 of the Restatement (Second) of Torts (1965), as adopted by this court in Johnson v. Rogers;

Tenth Circuit

Circ. Ct. Cert.?

Utah Supreme Court

In re W. Side Prop. Assocs. 981425 [13 P.3d 168 \(Utah 2000\)](#)

Federal Trial Court

In re W. Side Prop. Assocs. [97-20887](#) Dist. Ct. Cert.? Y Y

1. Does Salt Lake County's assessment of property tax on a building omitted from West Side Property Associates' tax assessment notices for 1992 through 1996, when other buildings and the land were assessed, constitute an escaped property assessment as defined by Utah Code Ann. § 59–2–102(8)(a)(i).1

2. If Salt Lake County's assessment is a valid escaped property assessment, upon what date was the tax incurred.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Garfield Cty. v. United States 20150335 [2017 WL 3187505 \(Utah 2017\)](#)

Federal Trial Court

Garfield County (1) et al. v. United [2:11-cv-01045-CW](#) Dist. Ct. Cert.? Y Y
Are Utah Code § 78B-2-201(1) and its predecessor statutes of limitations or statutes of repose?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Garza v. Burnett 20120180 [321 P.3d 1104 \(Utah 2013\)](#)

Federal Trial Court

Garza v. Burnett [1:06-cv-00134-DAK](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

Under Tenth Circuit decisions at the time Gerardo Thomas Garza filed his complaint, approximately two years remained in limitations period. A Supreme Court decision soon after filing, however, overturned those decisions and rendered his complaint approximately ten months late. Under Utah law, does an intervening change in controlling circuit law merit equitable tolling under these circumstances?

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Utah Supreme Court

GeoMetWatch v. Hall

20170264-SC

Federal Trial Court

GeoMetWatch v. Hall

[1:14-cv-00060-JNP](#)

Dist. Ct. Cert.? Y

Y

1. Are the Utah State University Research Foundation and the Utah State University Advanced Weather Systems Foundation entitled to immunity under the Governmental Immunity Act of Utah ("Immunity Act" or the "Act") as a "public corporation" and/or an "instrumentality of the state?"

2. Utah Code sections 63G-7-501 and -502 vest "exclusive, original jurisdiction over any action brought under" the Immunity Act in "the district courts" and venue "in the county in which the claim arose or in Salt Lake County." Do these provisions reflect an intent by the State of Utah to limit the Immunity Act's waiver of sovereign immunity to suits brought in Utah district courts?

3. If question 2 is answered in the affirmative, does the Office of the Attorney General for the State of Utah or any litigant have authority under Utah law to waive the jurisdictional and venue provisions enacted by the Utah Legislature in the Immunity Act?

Tenth Circuit

Circ. Ct. Cert.?

=====

Utah Supreme Court

Gibbs v. Unum Life Ins. Co.

20030277-SC

Federal Trial Court

Gibbs v. Unum Life Insurance

[2:00-cv-00549-PGC](#)

Dist. Ct. Cert.? Y

Y

1. In a first party insurance situation, may an insured recover consequential damages, other than attorney's fees, for breach of the express terms of an insurance contract? If so, what are the consequential damages that are recoverable for breach of the express terms of an insurance contract and how are they distinguished from the consequential damages for breach of the implied covenant of good faith and fair dealing that are recoverable under Beck v. Farmers Insurance Exchange, 701 P.2d 795, 801 (Utah 1985)?

2. Did Utah Code Ann. § 31 A-26-30 I, entitled "Timely Payment of Claims," allow a private cause of action by the insured against his or her insurer for violation of the

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Gines v. Ingersoll-Rand Co. 910516

Federal Trial Court

Gines v. Ingersoll-Rand Co. [2:89-cv-00543-JTG](#) Dist. Ct. Cert.? Y Y
Not available

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Grundberg v. Upjohn Co. 900573 [813 P.2d 89 \(Utah 1991\)](#)

Federal Trial Court

Grundberg v. Upjohn Co. [2:89-cv-00274-JTG](#) Dist. Ct. Cert.? Y Y
Whether Utah adopts the “unavoidably unsafe products” exception to strict products liability as set forth in comment k to section 402A of the Restatement (Second) of Torts (1965) (“comment k”).

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Federal Trial Court

McCourt v. Semken, et al [2:87-cv-01052-BSJ](#) Dist. Ct. Cert.? Y Y
No digital documents available.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Fundamentalist Church of Jesus Christ 20120158 [289 P.3d 502 \(Utah 2012\)](#)

Federal Trial Court

Fundamentalist Church of Jesus [2:08-cv-00772-DB](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

Under Utah preclusion law, is the Utah Supreme Court's discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds a decision "on the merits" when it is accompanied by a written opinion, such that later adjudication of the same claim is barred?

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Utah Supreme Court

Federal Trial Court

Haight Creek Irriga. v. United Tech [1:91-cv-00042-DKW](#) Dist. Ct. Cert.? Y Y
Not available

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Fox v. MCI Commc'ns Corp. 950280 [931 P.2d 857 \(Utah 1997\)](#)

Federal Trial Court

Fox v. MCI Commc'ns Corp. [2:93-cv-00042-BSJ](#) Dist. Ct. Cert.? Y Y
Does the termination of a private sector employee in retaliation for the good faith reporting to company management of the alleged violation by one or more co-workers of computer fraud and embezzlement laws, implicate "a clear and substantial public

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

HealthBanc Int'l v. Synergy Worldwide 20170591-SC

Federal Trial Court

HealthBanc Int'l v. Synergy Worldwide [2:16-cv-00135-JNP](#) Dist. Ct. Cert.? Y Y
Does Utah's economic loss rule apply to a fraudulent inducement claim?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Hirpa v. IHC Hosps., Inc. 960180 [948 P.2d 785 \(Utah 1997\)](#)

Federal Trial Court

Hirpa v. IHC Hosps., Inc. [1:90-cv-00086-JTG](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

(1) Do the provisions of the Utah Good Samaritan Statute, particularly Utah Code Ann. § 58–12–23, apply to grant a licensed physician immunity when that physician provides emergency care at an emergency occurring in a hospital which has employed the responding physician as its medical director?
(2) If section 58–12–23 does apply in the circumstances appearing here, does the section violate the Utah Constitution?

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Utah Supreme Court

Holden v. N L Indus., Inc. 17159 [629 P.2d 428 \(Utah 1981\)](#)

Federal Trial Court

Holden v NL Indus., Inc. [C-79-0391](#) Dist. Ct. Cert.? No Y

Whether the exclusive remedy provision of Utah's Workmen's Compensation Act, s 35-1-60, bars plaintiffs' claims against defendant-employer, or whether, as an exception to that rule, plaintiffs can collect (1) for the tort of fraud, which caused his death, or (2) for actions, conduct and relationships attributable to defendant's status as manufacturer and supplier independent of its status as an employer, the so-called "dual capacity

Tenth Circuit

Circ. Ct. Cert.?

=====
Utah Supreme Court

Federal Trial Court

Johnson v. Riddle [2:98-cv-00599-TS](#) Dist. Ct. Cert.? Y Y

Is Plaintiff's Utah Consumer Sales Practices Act ("UCSPA") claim against Defendants, who are attorneys, barred by the judicial proceedings privilege when the claim is based upon collection activities such as notices, phone calls, and documents made pursuant to a collection lawsuit?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Richardson v. Navistar Int'l Transp. 990253 [8 P.3d 263 \(Utah 2000\)](#)

Federal Trial Court

Richardson v. Navistar Int'l Transp. [2:95-cv-00752-DB](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

Under Utah law, may plaintiffs who have entered into a judicially approved settlement with multiple defendants after a trial in which a jury allocated 100% of the fault among the parties pursuant to the Utah comparative fault scheme, Utah Code Ann. §§ 78-27-37 to -43, maintain a subsequent tort action for the same injuries, arising out of the same transaction or occurrence, against additional known defendants who were not parties to

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Utah Supreme Court

Ray v. Wal-Mart Stores, Inc. 20130940 [359 P.3d 614 \(Utah 2015\)](#)

Federal Trial Court

Ray v. Wal-Mart Stores, Inc. [1:11-cv-00104-RJS](#) Dist. Ct. Cert.? Y Y

Is the right of self-defense a substantial public policy exception to the at-will employment doctrine, which provides the basis for a wrongful discharge action?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

In re Reinhart 20091087 [267 P.3d 895 \(Utah 2011\)](#)

Federal Trial Court

Gladwell v. Reinhart [2:08-cv-00562-DAK](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

Can a Keogh plan be “described in” section 401(a) of the IRC despite failing to fulfill that section's requirements for qualification, thereby entitling debtor to exempt the plan from his bankruptcy estate property?

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Utah Supreme Court

Peterson v. Browning

900401

[832 P.2d 1280 \(Utah 1992\)](#)

Federal Trial Court

Peterson v. Browning

[1:87-cv-00121-JTG](#)

Dist. Ct. Cert.? Y Y

Does an action for termination of employment based upon the public policy exception to the employment-at-will doctrine for violation of or refusal to violate federal, other state, or Utah law sound in tort or contract?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

In re Reinhart

20110257

[291 P.3d 228 \(Utah 2012\)](#)

Federal Trial Court

Gladwell v. Reinhart

[2:06-cv-00325-BSJ](#)

Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

1. Does Utah Code Ann. § 70C-7-103 create an exemption in bankruptcy, or does it only limit a judgment creditor's garnishment remedy outside bankruptcy?
2. If § 70C-7-103 does create an exemption in bankruptcy, do pre-petition wages such as those claimed by the debtor in this case qualify as "disposable earnings" under the statute?
3. If § 70C-7-103 does create an exemption in bankruptcy, and the debtor's pre-petition wages qualify as "disposable earnings" under the statute, do the debts in this case

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Utah Supreme Court

Federal Trial Court

Burningham v Wright Med. Grp. [2:17-cv-00092-JNP](#) Dist. Ct. Cert.? Y

1. Under Utah law, does the unavoidably unsafe exception to strict products liability in design defect claims recognized in Comment k to Section 402A of the Restatement (Second) of Torts apply to implanted medical devices?
2. If the answer to Question 1 is in the affirmative, does the exception apply categorically to all implanted medical devices, or does the exception apply only to some devices on a case-by-case basis?
3. If the exception applies on a case-by-case basis, what is the proper analysis to determine whether the exception applies?
4. If the answer to Question 1 is in the affirmative, does the exception require a showing that such devices were cleared for market through the FDA's premarket approval process as opposed to the § 510(k) clearance process?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Utah Republican Party v. Cox 20160077 [373 P.3d 1286 \(Utah 2016\)](#)

Federal Trial Court

Utah Republican Party v. Herbert [2:16-cv-00038-DN](#) Dist. Ct. Cert.? Y Y

In interpreting Utah Code § 20A-9-101(12)(d), § 20A-9-406(3) and § 20A-9-406(4), does Utah law require that a QPP permit its members to seek its nomination by "either" or "both" of the methods set forth in § 20A-9-407 and § 20A-9-408, or may a QPP preclude a member from seeking the party's nomination by gathering signatures under § 20A-9-408? The statutes that may be at issue include: Utah Code § 20A-9-101(12)(d), Utah Code § 20A-9-406(3), Utah Code § 20A-9-406(4) and Utah Code § 20A-9-401.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Tabor v. Metal Ware Corp. 20060504 [168 P.3d 814 \(Utah 2007\)](#)

Federal Trial Court

Tabor v. Metal Ware Corp. [2:99-cv-00503-CW](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

1. Does Utah law recognize an exception to the general rule of successor nonliability under the circumstances of this case?
2. Does Utah law impose on successor corporations a post-sale duty to independently warn customers of defects in products manufactured and sold by the predecessor corporation? If so, what factors should determine whether a successor has discharged

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Utah Supreme Court

Thayer v. Washington Cty. Sch. Dist. 20100648 [285 P.3d 1142 \(Utah 2012\)](#)

Federal Trial Court

Thayer v. Washington Cty. Sch. Dist. [2:09-cv-00565-DB](#) Dist. Ct. Cert.? Y Y

Because the disposition of the state immunity claim turns on important and unsettled questions of Utah law, I certify the following legal question to the Utah Supreme Court: Considering the facts discussed above, did the conduct of the school district officials and those acting on the school district’s behalf constitute the issuance of a “permit, license, certificate, approval, order, or similar authorization” under Utah Code Ann. §63G-7-301(5)(c) such that the state actors are entitled to immunity from liability pursuant to the Utah Governmental Immunity Act?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

TruGreen Cos., LLC v. Mower Bros. 20070451 [199 P.3d 929 \(Utah 2008\)](#)

Federal Trial Court

TruGreen Cos. v. Bitton [1:06-cv-00024-BSJ](#) Dist. Ct. Cert.? Y Y

- 1. Whether under Utah law a former employer is entitled to an award of lost profits damages, or instead an award of restitution or unjust enrichment damages, where a former employee has breached contractual non-competition, non-disclosure, and employee nonsolicitation provisions?
- 2. Whether Utah law recognizes an unjust enrichment measure of damages for tortious interference with a competitor’s contractual and economic relations?
- 3. Whether “actual damages” under Utah Code Ann. § 13-5a-103(1)(b)(i), the Utah Unfair Competition Act, means the plaintiff’s lost profits or an award of damages defined by the defendant’s revenues?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

U.S. Fid. & Guar. v. U.S. Sports Specialty 20090657 [270 P.3d 464 \(Utah 2012\)](#)

Federal Trial Court

Nat’l Indem. v. U.S. Sports Specialty [2:07-cv-00996-TS](#) Dist. Ct. Cert.? Y Y

- 1. Does an insurer have a right to reimbursement or restitution against an insured?
- 2. If an insurer does have a right to reimbursement or restitution against an insured are there any prerequisites to receiving such a right?
- 3. And finally, if such a right exists, does an insurer’s payment in excess of a policy’s limit impact any such right.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Whitney v. Div. Juvenile Justice Servs. 20100983 [274 P.3d 906 \(Utah 2012\)](#)

Federal Trial Court

Whitney v. Div. Juvenile Justice Servs. [2:09-cv-00030-DAK](#) Dist. Ct. Cert.? N Y

Tenth Circuit

Circ. Ct. Cert.? Y

Is a juvenile delinquent placed in a community-based proctor home incarcerated in a place of legal confinement, such that Utah has not waived its state sovereign immunity for injuries arising out of, in connection with, or resulting from his placement, pursuant to the Governmental Immunity Act of Utah, Utah Code § 63G-7-301(5)(j)?

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Utah Supreme Court

Waddoups v Noorda 20120310 [321 P.3d 1108 \(Utah 2013\)](#)

Federal Trial Court

Waddoups v Noorda [1:11-cv-00133-CW](#) Dist. Ct. Cert.? Y Y

Does section § 78B-3-425 of the Utah Code clarify existing law and therefore retroactively apply to bar negligent credentialing claims filed prior to its enactment?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Zimmerman v. Univ. of Utah 20160572-SC [2018 WL 523483 \(Utah 2018\)](#)

Federal Trial Court

Zimmerman v. Univ. of Utah [2:13-cv-01131-JNP](#) Dist. Ct. Cert.? Y Y

1. Is the Free Speech Clause of the Utah Constitution self-executing?
2. If question 1 is answered in the affirmative, what are the elements of a claim brought under the clause?
3. Does an employee who receives notice that his or her employment will be terminated effective on a future date suffer an adverse employment action for purposes of the Utah Protection of Public Employees Act when he or she receives the notice, when the employment is actually terminated, or both?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Lancer Ins. Co. v. Lake Shore Motor 20160244 [391 P.3d 218 \(Utah 2017\)](#)

Federal Trial Court

Lancer Ins. Co. v. Lake Shore Motor [2:14-cv-00785-JNP](#) Dist. Ct. Cert.? Y Y

1. Does Utah Code Ann. § 31A-22-303(1)(a)(v) impose liability on an insured driver for damages to third parties resulting from the driver's unforeseeable loss of consciousness while driving, thereby abrogating the common law principle that liability for personal injury may not be imposed absent fault or negligence?
2. If question 1 is answered in the affirmative, is the driver's liability limited to the limits of the applicable insurance policy or the applicable minimum statutory limit?

Tenth Circuit

Circ. Ct. Cert.?

Utah Supreme Court

Gardner v. Galetka

20051029

[151 P.3d 968 \(Utah 2007\)](#)

Federal Trial Court

Gardner v. Galetka

[2:95-cv-00846-TC](#)

Dist. Ct. Cert.? Y Y

If Gardner had presented the ineffective assistance claim at issue in Gardner v. Galetka, 2004 UT 42, 94 P.3d 263 in State court in a successive petition in 1990, would the petition have been procedurally barred?

Tenth Circuit

Circ. Ct. Cert.?

Utah Supreme Court

Scott v Hammock

910112

[870 P.2d 947 \(Utah 1994\)](#)

Federal Trial Court

Scott v. Hammock

[2:89-cv-00267-TC](#)

Dist. Ct. Cert.? Y Y

Not available.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Miller v United States 20030054 [104 P.3d 1202 \(Utah 2005\)](#)

Federal Trial Court

Miller v. United States [1:02-cv-00037-TC](#) Dist. Ct. Cert.? Y Y

Whether a federal government employee who ordinarily would be immune from suit in cases of strict liability, may be liable under Utah's Dramshop Act if the Plaintiffs

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Federal Trial Court

Westport Ins. v. Ong [1:07-cv-00010-DAK](#) Dist. Ct. Cert.? Y Y

1. Under Utah law, can a liability insurance company seek reimbursement of defense costs from its insured in the absence of a policy provision permitting such reimbursement?

2. If the answer to Question No. 1 is yes, on what state law theory is the cause of

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Machan v. Unum Life Ins. Co. 20030789 [116 P.3d 342 \(Utah 2005\)](#)

Federal Trial Court

Machan v. Unum Life Ins. Co. [2:00-cv-00904-PGC](#) Dist. Ct. Cert.? Y Y

1. In a first party insurance situation, may an insured recover consequential damages, other than attorney's fees, for breach of the express terms of an insurance contract? If so, what are the consequential damages that are recoverable for breach of the express terms of an insurance contract and how are they distinguished from the consequential damages for breach of the implied covenant of good faith and fair dealing that are recoverable under Beck v. Farmers Insurance Exchange, 701 P.2d 795, 801 (Utah 1985)?
2. Did Utah Code Ann. § 3 IA-26-301, entitled "Timely Payment of Claims," allow a private cause of action by the insured against his or her insurer for violation of the

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Smith v. United States No. 20131030 [356 P.3d 1249 \(Utah 2015\)](#)

Federal Trial Court

Smith v. U.S. Dep't Veterans Affairs [2:12-cv-00968-DB](#) Dist. Ct. Cert.? Y Y

1. Does the limitation on a plaintiff's recovery of noneconomic damages in Utah Code Ann. § 78B-3-410 apply to claims alleging wrongful death caused by medical malpractice?
2. If the answer to Question No.1 is in the affirmative, is Utah Code Ann. § 78B-3 410

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Flores v. Unified Police Dep't 20170268-SC

Federal Trial Court

Flores v. Unified Police Dep't [2:16-cv-00224-JNP](#) Dist. Ct. Cert.? Y Y

Utah Code sections 63G-7-501 and -502 vest "exclusive, original jurisdiction over any action brought under" the Immunity Act in "the district courts" and venue "in the county in which the claim arose or in Salt Lake County." Do these provisions reflect an intent by the State of Utah to limit the Immunity Act's waiver of sovereign immunity to suits brought in Utah district courts?

2. If question 1 is answered in the affirmative, does the Unified Police Department of Greater Salt Lake have authority under Utah law to waive the jurisdictional and venue provisions enacted by the Utah Legislature in the Immunity Act?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Soter's, Inc. v. Deseret Fed. Savings 920015 [857 P.2d 935 \(Utah 1993\)](#)

Federal Trial Court

Soter's Inc., v. Deseret Fed. Savings [2:89-cv-00979-DB](#) Dist. Ct. Cert.? Y Y

Materials are not available.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Spackman v. Bd. Ed. Box Elder Cty. 990553 [16 P.3d 533 \(Utah 2000\)](#)

Federal Trial Court

Spackman v. Bd. Ed. Box Elder Cty. [1:98-cv-00120-TC](#) Dist. Ct. Cert.? Y Y

Whether the Free and Equal Public Education Clause of the Utah Constitution (Art. X, § 1) and/or the Due Process Clause of the Utah Constitution (Art. I, §7) are self-executing constitutional provisions that may be directly enforced without implementing

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Steiner Corp. v. Johnson & Higgins No. 981732 [996 P.2d 531 \(Utah 2000\)](#)

Federal Trial Court

Steiner Corp. v. Johnson & Higgins [2:88-cv-00410-JTG](#) Dist. Ct. Cert.? Y Y

(1) whether, under Utah law, the negligent acts of a plaintiff in causing or contributing to the situation that the plaintiff hired a professional to resolve can be the basis for comparative or contributory negligence defense; and (2) how a plaintiff's negligent acts in causing or contributing to the situation that the plaintiff hired a professional to resolve can be considered in determining causation and damages.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Federal Trial Court

Stoker v. Salt Lake Cty. [2:90-cv-00248-BSJ](#) Dist. Ct. Cert.? Y Y
Not available.

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Sullivan v. Scoular Grain Co. of Utah No. 910482 [853 P.2d 877 \(Utah 1993\)](#)

Federal Trial Court

Sullivan v. Scoular Grain Co. of Utah [2:87-cv-00330-JTG](#) Dist. Ct. Cert.? Y Y
Unknown - documents not available

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Touchard v. La-Z-Boy, Inc.

No. 20050361

[148 P.3d 945 \(Utah 2006\)](#)

Federal Trial Court

Ammons v. La-Z-Boy, Inc.

[1:04-cv-00067-TC](#)

Dist. Ct. Cert.? Y

Y

Whether the exercise of rights under the Utah Workers' Compensation Act, Utah Code Ann. §34A-2-101, et. seq., ("UWCA") implicates "a clear and substantial public policy" of the State of Utah that would provide a basis for a claim of wrongful termination in violation of public policy; and if so,

Whether this cause of action applies in the following circumstances: (a) where the employee has not filed for benefits under the UWCA but is retaliated against for opposing an employer's treatment of other injured employees who are entitled to file for benefits under the UWCA; (b) the employee is not fired but resigns under circumstances that constitute a "constructive discharge"; and (c) the employee who has filed for benefits under the UWCA is neither fired nor constructively discharged, but experiences other discriminatory treatment or harassment from an employer because

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Katterman v. Salt Lake Cty. 0170324-SC

Federal Trial Court

Katterman v. Salt Lake Cty. [2:13-cv-01122-EJF](#) Dist. Ct. Cert.? Y Y

1. Does Utah’s Governmental Immunity Act, Utah Code sections 63G-7-101 through -904, apply to dog bite claims against governmental entities and their employees brought pursuant to Utah Code section 18-1-1, “Liability of Owners-Scienter-Dogs Used in Law Enforcement”?

2. Utah Code section 63G-7-202(3)(a) provides that “an action under this chapter [Utah’s Governmental Immunity Act] against a governmental entity for an injury caused by an act or omission that occurs during the performance of an employee’s duties, within the scope of employment, or under color of authority is a plaintiff’s exclusive remedy.” Is the “exclusive remedy” provision of Utah Code section 63G-7-202(3)(a) preempted or limited by Utah Code section 18-1-1, “Liability of Owners-Scienter-Dogs Used in Law Enforcement”?

3. Utah Code section 63G-7-101(2) provides that “[t]he scope of the waivers and retentions of immunity found in this comprehensive chapter: (a) applies to all functions of government, no matter how labeled; and (b) governs all claims against governmental entities or against their employees or agents rising out of the performance of the employee’s duties, within the scope of employment, or under color of authority.” Does Utah Code section 63G-7-101(2) apply to dog bite claims against governmental entities and employees brought pursuant to Utah Code section 18-1-1, “Liability of Owners-

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Clark v. Pangan 981694 998 P.2d 268 (Utah 2000)

Federal Trial Court

Clark v. United States 2:98-cv-00304-DB Dist. Ct. Cert.? Y Y

"As a matter of Utah state law is it possible for the intentional tort of battery to be within the scope of a person's employment, and if it is possible for battery to be within the scope of one's employment, what test is to be employed to determine whether the batter was within the scope of employment."

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Mecham v. Frazier No. 20070730. 193 P.3d 630 (Utah 2008)

Federal Trial Court

Mecham v. Frazier 1:04-cv-00033-CW Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

1. Does the Utah Governmental Immunity Act confer to state officers an immunity from suit (immediately appealable) or merely an immunity from liability (not immediately appealable)?
2. Does the Utah Governmental Immunity Act require that a Notice of Claim against state officials in their individual capacity expressly aver "fraud" or "malice"?

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Utah Supreme Court

Mitchell v. Roberts

20170447-SC

Federal Trial Court

Mitchell v. Roberts

[2:16-cv-00843-EJF](#)

Dist. Ct. Cert.? Y

Y

1. Can the Utah Legislature expressly revive time-barred claims through a statute?

2. Specifically, does the language of Utah Code section 78B-2-308(7), expressly reviving claims for child sexual abuse that were barred by the previously applicable statute of limitations as of July 1, 2016, make unnecessary the analysis of whether the change enlarges or eliminates vested rights?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Carranza v. United States

20090409

[267 P.3d 912 \(Utah 2011\)](#)

Federal Trial Court

Carranza v. Mountainlands Health

[2:07-cv-00291-DAK](#)

Dist. Ct. Cert.? Y

Y

"Does Utah's wrongful death statute allow an action for the wrongful death of an unborn child?"

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Burns v. Astrue 20100435 [289 P.3d 551 \(Utah 2012\)](#)

Federal Trial Court

Burns v. Astrue [2:09-cv-00926-DAK](#) Dist. Ct. Cert.? Y Y

"Is a signed agreement to donate preserved sperm to the donor's wife in the event of his death sufficient to constitute 'consent[] in a record' to being the 'parent' of a child conceived by artificial means after the donor's death under Utah intestacy law, Utah

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Egbert v. Nissan N. Am., Inc. 20060433-SC [167 P.3d 1058 \(Utah 2007\)](#)

Federal Trial Court

Egbert v. Nissan N. Am., Inc. [2:04-cv-00551-DN](#) Dist. Ct. Cert.? Y Y

First Certification (docket no. 277):

1. In a product liability case where a manufacturer's product complies with applicable government safety standards, should the jury be instructed that a presumption of non-defectiveness has arisen under Utah Code Ann. 78-15-6(3)? If so, should the instruction require clear and convincing evidence of a defect to rebut the presumption, or is proof by a preponderance of the evidence sufficient for rebuttal?
2. Does Utah recognize the "enhanced injury" theory of liability outlined in 16(a) of the Restatement (Third) of Torts: Products Liability?

Second certification (docket no. 330, filed 10/1/2008):

1. Is Utah Code Ann. 78-15-6(3) constitutional?
2. Does Utah recognize Restatement (Third) of Torts: Products Liability 16 (b)-(d)?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Robert J. DeBry & Assocs. v. Quest Dex 20050299 [144 P.3d 1079 \(Utah 2006\)](#)

Federal Trial Court

Robert J. DeBry & Assocs. v. Quest Dex [1:03-cv-00099-PGC](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

"Whether Defendants violated Utah Code Ann. 13-11a-3(1)(b), (d), or (t) when they published in their 2003-2004 Ogden -area telephone directory a table of numerical prefixes associated with a 'local calling area' and advertisements by third parties that include a market expansion line telephone number without any physical business address; and if so, whether Defendants are exempt from liability under Utah Code Ann.

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Utah Supreme Court

Dircks v. Travelers Indem. Co. 20160065-SC [2017 WL 4675471 \(Utah 2017\)](#)

Federal Trial Court

Dircks v. Travelers Indem. Co. [2:14-cv-00118-JNP](#) Dist. Ct. Cert.? Y Y

"Does Utah Code Ann. 31A-22-305.3 require that all vehicles covered under the liability provisions of a motor vehicle insurance policy also be covered under the underinsured motorist provisions of that policy with equal coverage limits, unless a named insured signs an acknowledgment form meeting the requirements of the statute?"

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Federal Trial Court

Kennard v. Leavitt [2:01-cv-00171-DB](#) Dist. Ct. Cert.? Y Y

1. Does Utah Code Ann. § 24–1–15(2)(a)(iii) of the Utah Property Protection Act authorize a state court judge to approve a law enforcement officer's transfer of property in obedience to a federal forfeiture order, because disobeying the federal order would place the officer in jeopardy of being found in contempt and thus “unduly burden” the officer for purposes of that provision? For purposes of this question, “federal forfeiture order” includes a federal court order, federal warrant for arrest in rem, federal agency administrative order, or seizure order obtained by a federal agency.

2. Alternatively, does Utah Code Ann. § 24–1–15(2)(a) even require a seizing agency or prosecuting attorney to petition a state court to authorize such a transfer when the seizing agency or prosecuting attorney is already under a federal forfeiture order? For purposes of this question, “federal forfeiture order” includes a federal court order, federal warrant for arrest in rem, federal agency administrative order, or seizure order

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Burkholz v. Joyce 970252 [972 P.2d 1235 \(Utah 1998\)](#)

Federal Trial Court

Burkholz v. Joyce [2:96-cv-00252-TC](#) Dist. Ct. Cert.? Y Y

"Whether the exceptional circumstances version of the discovery rule tolls the applicable statute of limitations, where, during the limitations period, the plaintiff's knowledge of the operative facts underlying his cause of action is interrupted by a period of psychological repression during which plaintiff is unaware of such facts."

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Ohio Cas. Ins. Co v. Unigard Ins. Co. 20090340. [268 P.3d 180 \(Utah 2012\)](#)

Federal Trial Court

Ohio Cas. Ins. Co. v. Cloud Nine [1:05-cv-00088-DB](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

Should the defense costs in the EdiZone case be allocated between Ohio Casualty and Unigard under the “equal shares” method set forth in the “other insurance clause” of Ohio Casualty's policy, or, in the alternative, because the policies were issued for successive periods, should those defense costs be allocated using the time-on-risk method described in Sharon Steel Corp. v. Aetna Casualty & Surety Co., 931 P.2d 127, 140

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Utah Supreme Court

Iverson v. State Farm Mut. Ins. 20081016 [256 P.3d 222 \(Utah 2011\)](#)

Federal Trial Court

Iverson v. State Farm Mut. Ins. [1:06-cv-00113-DB](#) Dist. Ct. Cert.? Y Y

How should Utah Code Ann. 31A-22-305(9)(b) and 31A-22-305(9)(h) [now codified as Utah Code 31A-22-305.3] be interpreted and applied to the undisputed background facts of this case?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

In re Simmons 20140514-SC [73](#)

Federal Trial Court

In re Simmons [2:13-bk-33821-RKM](#) Dist. Ct. Cert.? Y Y

Is an individual entitled to a homestead exemption under UCA 78B-5-503(2) in "Property," as defined in UCA 78-5-503(1)(d), that is titled in the name of a self-settled revocable trust created by the individual?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Endow v. Utah Transit Auth. 20140024-SC [2015 WL 4394047 \(Utah 2015\)](#)

Federal Trial Court

Endow v. Utah Transit Auth. [1:13-cv-00108-TC](#) Dist. Ct. Cert.? Y Y

"Does the Utah Antidiscrimination Act, Utah Code Ann. 34A-5-101 et seq., provide for individual liability?"

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Federal Trial Court

Pace v. Swerdlow [2:06-cv-00027-DB](#) Dist. Ct. Cert.? Y Y

To what extent, if any, does Utah law provide witness immunity for retained expert

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Federal Trial Court

Novell v. Handleman [2:01-cv-00173-TS](#) Dist. Ct. Cert.? Y Y

Does the Utah version of the UCC govern transactions involving the "licensing" of software products (when software is "sold" on computer disks, but the developer retains the intellectual property rights)?

Does the Utah version of the UCC apply to distribution agreements?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

In re Kiley 20170472-SC

Federal Trial Court

In re Kiley [2:15-bk-27838-KA](#) Dist. Ct. Cert.? Y Y

1. What is the nature and scope of a party's interest in marital property as of the filing of a divorce complaint -- contrasted with the nature and scope of such interest upon the entry of a divorce decree allocating such marital property? Stated differently, upon the filing for divorce, is a spouse's interest in marital property merely contingent, unliquidated, and inchoate until the entry of a divorce decree creating a vested right to receive a specific sum of money or a specific marital asset?

2. Is an individual entitled to an exemption under Utah Code Ann. 78B-5-505(1)(a)(xv) in money or other assets payable to that individual as an alternate payee under a QDRO? Stated more simply, is the Debtor entitled under Utah law to exempt the Retirement

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

In re Hendry 20170484-SC

Federal Trial Court

In re Hendry [2:14-bk-27398-KA](#) Dist. Ct. Cert.? Y Y

What is the nature and scope of a party's interest in marital property as of the filing of a divorce complaint -- contrasted with the nature and scope of such interest upon the entry of a divorce decree allocating such marital property? Stated differently, upon the filing for divorce, is a spouse's interest in marital property merely contingent, unliquidated, and inchoate until the entry of a divorce decree creating a vested right to receive a specific sum of money or a specific marital asset?

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

Olseth v. Larson 20051180 [158 P.3d 532 \(Utah 2007\)](#)

Federal Trial Court

Olseth v. Salt Lake City Corp. [2:02-cv-01122-CW](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

“Is the statute of limitations tolled under Utah Code Ann. § 78–12–35 when a person against whom a claim has accrued has left the state of Utah and has no agent within the state of Utah upon whom service of process can be made instead, but the person is amenable to service pursuant to Utah's long-arm statute, Utah Code Ann. § 78–27–24?”

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Utah Supreme Court

In re Kunz & In re Rockwell 20030502 [99 P.3d 793 \(Utah 2004\)](#)

Federal Trial Court

In re Kunz & In re Rockwell [2:02-bk-40422-GEC](#) Dist. Ct. Cert.? Y Y

Do funds transferred directly from on exempt account, as described in Utah Code Ann. 78-23-5(1)(a)(x), to another exempt account within one year before a debtor files bankruptcy constitute "amounts contributed" within the meaning of Utah Code Ann. 78-

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

20170561-SC

Federal Trial Court

CR England v Swift Transp. [2:14-cv-00781-DB](#) Dist. Ct. Cert.? Y Y

1. Does the tort of intentional interference with contract require proof of “improper means”?
2. If so, what constitutes “improper means” in the context of tortious interference with

Tenth Circuit

Circ. Ct. Cert.?

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Utah Supreme Court

McArthur v. State Farm Mut. Ins. Co. No. 20100847 [274 P.3d 981 \(Utah 2012\)](#)

Federal Trial Court

McArthur v. State Farm Mut. Ins. Co. [2:09-cv-00416-TS](#) Dist. Ct. Cert.? No Y

Tenth Circuit

Circ. Ct. Cert.? Y

A. Whether an exhaustion clause, which excludes underinsured motorist coverage contained in an automobile insurance policy absent a condition precedent, is generally unenforceable in the State of Utah as contrary to the State’s public policy, to wit:

THERE IS NO COVERAGE UNTIL:

1. THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENTS TO OTHER PERSONS; OR

2. SUCH LIMITS OF LIABILITY OR REMAINING PART OF THEM HAVE BEEN OFFERED TO THE INSURED.

B. Provided that the aforementioned exhaustion clause is not generally unenforceable in the State of Utah as contrary to the State's public policy, whether the enforceability of such clause is contingent upon the insurer establishing actual prejudice to its economic interest.

Appendix—Methods of Gathering Utah Cases Related to Certification

We attempted to gather every Utah case involving certification and log the cases into a Microsoft Access database. Contact the author to obtain a copy of the database file.

Explanation of Case Document Locations:

Cases actually certified from one court to another will result in documents in two courts, the certifying court and the Utah Supreme Court. The procedural history of the case will affect the number of relevant case documents and their location.

If a case in the **federal district court grants certification**, there will be a federal district court case and a Utah Supreme Court case. The case may be appealed to the Tenth Circuit and the appeal may or may not involve certification. All appeals were listed. If the appeal involves certification, that was noted. One case originating in district court certified two questions. Some cases have multiple appeals.

Some cases in the **district court deny certification**. They have no corresponding case in the Utah Supreme Court but may have been appealed to the Tenth Circuit. All appeals were listed. If the appeal involves certification, that was noted.

Cases certified from the Tenth Circuit always have an origination in the Utah federal District Court and a corresponding case in the Utah Supreme Court. These cases are interesting because they demonstrate a decision by the Utah federal District Court *not* to certify which is thought to be in error by the Tenth Circuit. That error is not usually called out in the appellate opinion. In some instances, these cases are remanded after the certification and may be appealed a second time. We did/did not find any interlocutory appeals/writs mandating certification.

Utah Federal Trial Courts:

To gather Utah federal district court cases, we searched the U.S. District Court for the District of Utah through the electronic filing system CM/ECF using the events Order UT Supreme Court [cv, misc] and Order on Motion for Certification of Issue to State Supreme Court [cv, order]. We also searched written opinions for the word “certification” which yielded some cases and many false positives, because many things are *certified* in the district court. A CM/ECF search excludes many older cases because CM/ECF was not implemented in Utah until May 1 2005. However, some dockets and orders before that date were imported into CM/ECF.⁵⁰⁸

⁵⁰⁸ The District of Utah provides electronic access to case information on civil cases filed with the Court since July 1989, and criminal cases filed with the court since November 1992. Exceptions include cases that have been sealed by order of a judge and social security cases. This system permits users to search for a case by entering a party name or case number. Documents began to be scanned to TIF format, and available electronically on a limited basis in November 1998. By the year 2000, most documents were being either scanned to PDF or converted electronically to PDF text format, and available through WebPACER. <http://www.utd.uscourts.gov/cmecf-general-information> (last

We also searched CM/ECF docket text only (not case filed documents) for the phrase “Utah Supreme Court” which also yielded many false positives, but gathered more cases. (This reveals that the correct CM/ECF events are not always used for certification orders.) Because this was not a search for CM/ECF filing events, which only began to be used May 1, 2005, but a search for docket entries, many of which were imported into CM/ECF, this method of search in CM/ECF went back much further in time, finding cases as early as 1989.

Similar searches were made in the Utah Bankruptcy Court. However, the method used did not locate cases in which motions to certify were denied.

Utah Supreme Court:

To locate cases from the Utah Supreme Court, we searched in Westlaw for cases with the Key Number 170B-3105-3108. There are 37 Utah Cases under this Key Number.

Tenth Circuit Court of Appeals:

To locate cases from the Tenth Circuit, we searched in Westlaw for cases with the Key Number 170B-3105-3108. We culled the cases from Utah from that group.

visited June 15, 2017). The District went live on CM/ECF with full electronic filing May 1, 2005. “District of Utah is Live on CM/ECF, May 1, 2005. <http://utd-cmecf.blogspot.com/2005/05/> (last visited June 15, 2017).