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To Certify, Or Not To Certify, That Is The Question

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Certification may seem like an attractive option when in federal court and faced with a tough legal issue for which there is no controlling state law precedent. However, three recent interjurisdictional certification cases demonstrate the unique set of challenges that these cases pose to appellate lawyers.

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Interjurisdictional certification involves a court from one jurisdiction certifying a question of law to a court in another jurisdiction.[1] The statutory basis for this type of certification is generally adopted in whole or in part from the Uniform Certification of Questions of Law Act, which provides the following:

The [Supreme Court] [or an intermediate appellate court] of this State, ... may certify a question of law to the highest court of another State [or of a tribe] if:

(1) the pending cause involves a question to be decided under the law of the other State [or the tribe];

(2) the answer to the question may be determinative of an issue in the pending cause; and
(3) the question is one for which no answer is provided by either a controlling statute or appellate decision of the other State [or the tribe].[2]

A prefatory note further explains that this uniform rule contemplates a federal court's use of such procedure to avoid guessing what state law is in a case. Some states, like California, have also adopted a similar procedure by court rule.

As the uniform rule demonstrates, certification is an unusual procedure that results in one case pending in two courts at the same time. It is thus important that you are addressing the right court at the right time. It is also important to recognize the loss of control that can result. The receiving court often has the ability to reformulate the question, or even decide an issue that later becomes moot on appeal. These quirks in certified cases are worthy of careful attention.

Addressing the Right Court

Terminology and procedure matter in certification cases, and sometimes issues relating to both can be confusing, even for the court itself. In Mendoza v. Nordstrom Inc.,[3] a putative class of hourly, nonexempt Nordstrom workers brought a lawsuit against their former employer for violating California's day-of-rest law under Labor Code Section 551. The Ninth Circuit decided that no California precedent answered three questions of statutory interpretation, justifying "certification" of those issues to the California Supreme Court.

What seems to be the problem? In 2003, the Appellate Advisory Committee of the Judicial Council of California changed the California rule governing certified questions of law. Now, the Ninth Circuit and all other courts must "request" the Supreme Court to "decide a question of California law" under California Rule of Court 8.548. In its comment to change Rule 8.548, the committee referred to "certification" as "an unnecessary formalism." It further explained:

The "certification" requirement apparently served the purpose of guaranteeing that the request was authentic. But the same purpose is served equally well by the more fundamental requirement — imposed by both the former and revised rules — that the request must be presented to the Supreme Court by a formal order of the requesting court. ... Such an order is manifestly a sufficient guarantee of authenticity.[4]

Although the California Supreme Court has not yet provided an answer to the Ninth Circuit's request in Mendoza, another Ninth Circuit case demonstrates the importance of following certification rules and procedure. In Greater Los Angeles Agency on Deafness Inc. v. CNN Inc.,[5] the Ninth Circuit requested that the California Supreme Court decide a question of state law regarding the applicability of California's Disabled Persons Act to websites. There was a dispute about whether CNN was required to provide equal access for the hearing impaired by captioning videos posted on its website. The California Supreme Court agreed to take the case, but the case settled after the opening brief on the merits was filed.

In light of the settlement, CNN filed a motion to dismiss the appeal with the California Supreme Court, and it was denied. The court stated that "[t]he appeal is pending not in this court, but in the United States Court of Appeals for the Ninth Circuit" and also noted that the Ninth Circuit "has not vacated its order ... certifying a question to this court ... or otherwise requested that this court not proceed in this matter."[6] The Ninth Circuit later granted the appellant's motion to dismiss the appeal,[7] and the California Supreme Court subsequently vacated its order granting the Ninth Circuit's request to decide a question of California law.[8]

One lesson learned from Greater Los Angeles Agency on Deafness is to make sure you are filing a motion in the correct court. Certification creates a situation where you have one case pending in two different courts. And a second, less obvious lesson, is to be careful what you ask for. The California Supreme Court could conceivably have concluded that the certified question was sufficiently important to justify an exception to the usual rule that a settlement moots an appeal, and proceeded to answer the certified questions that were so troubling to the Ninth Circuit.[9]

Loss of Control

When requesting certification, appellate lawyers should be fully aware of the consequences of asking a court to answer what are very close to hypothetical questions. In some cases, this strategy can be

dangerous. Having once launched the missile, it is hard to get it back in the silo.

One such danger of certification is that a receiving court can always reformulate the question presented. For example, in Lyon Financial Services Inc. v. Illinois Paper & Copier Co.,[10] the Seventh Circuit certified four specific questions to the Minnesota Supreme Court regarding the reliance requirement in both breach of express warranty and breach of contract claims.

Under Minnesota Statute Section 480.065, however, the court had the power to reformulate certified questions of state law. Based on this power, the Minnesota Supreme Court reformulated the case into a single question that it decided tracked the fundamental issue raised. It then answered the following question in the affirmative: Is a claim for the breach of a contractual representation of future legal compliance actionable under Minnesota law without proof of reliance? In this way, the court answered a broader question that had potentially far-ranging implications, rather than limiting itself to the questions presented.

Another potential danger of certification is that a receiving court can decide an issue even in the event of settlement or some other kind of mootness issue. In general, a moot appeal or one that involves an abstract question is subject to dismissal. One such exception to this general rule, however, comes from Washington, where dismissal lies within the court's discretion if "matters of continuing and substantial public interest are involved."[11]

This exception to the mootness rule was first used in Washington in 1937, and it has been used with increasing frequency since 1965. Washington has also adopted the following four factors to determine the appropriate applicability of the public interest exception: (1) "whether the issue is of a public or private nature"; (2) "whether an authoritative determination is desirable to provide future guidance to public officers"; (3) "whether the issue is likely to recur"; and (4) "the level of genuine adverseness and the quality of advocacy of the issues."[12]

In Washington Water Power Co. v. Graybar Electric Co.,[13] the Washington Supreme Court specifically used the public interest exception to decide a certification issue from the U.S. District Court for the Eastern District of Washington. There, the issue was whether the Washington Product Liability Act excluded economic loss as a remedy and preempted common law tort claims. Even when the parties settled, the court still decided the issue because of its important and recurring nature, and because of the genuine adverseness and exceptional quality of the briefs.

While courts are often wary of issuing advisory opinions, the nature of the certification process creates a unique situation where hypothetical questions can be presented. At times, and in light of scarce judicial resources, courts may feel as though the public benefit of answering such questions outweighs any potential side effects that may occur. As a result, certification poses a unique set of challenges that can launch an appellate lawyer's case in a number of different directions. The receiving court's ability to reformulate the question can result in a broader decision than the one originally intended. Exceptions to the mootness doctrine can also limit the parties' ability to end the case without a published opinion on the issue.

Conclusion

While interjurisdictional certification may seem like a great solution for murky and debatable issues of state law, it often requires a heightened attention to detail and a sophisticated understanding of appellate rules. Once appellate lawyers initiate this process, they also risk losing control over the issues

presented and the ability to moot an issue on appeal.

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[1] J. Michael Medina, The Interjurisdictional Certification of Questions of Law Experience: Federal, State, and Oklahoma — Should Arkansas Follow?, 45 Ark. L. Rev. 99, 99 (1992).

[2] Unif. Certification of Questions of Law Act, § 2 (amended 1995), 12 U.L.A. 72.

[3] 778 F.3d 834 (9th Circ. 2015).

[4] Cal. Rules of Court, Rule 8.548 advisory committee comment (2002).

[5] No. 12-15807, 2014 U.S. App. LEXIS 2492 (9th Circ. March 11, 2013).

[6] Greater L.A. Agency on Deafness Inc. v. CNN Inc., No. S216351, 2014 Cal. LEXIS 8058, at *1 (Calif. Oct. 1, 2014).

[7] Greater L.A. Agency on Deafness Inc. v. CNN Inc., 769 F.3d 1005 (9th Circ. 2014).

[8] Greater L.A. Agency on Deafness Inc. v. CNN Inc., No. S216351, 2014 Cal. LEXIS 9984 (Calif. Oct. 22, 2014).

[9] Cal. ex rel. State Lands Comm'n v. Superior Court, 11 Cal. 4th 50, 61 (1995).

[10] 848 N.W.2d 539, 542 (Minn. 2014).

[11] Sorenson v. Bellingham, 80 Wn.2d 547, 558 (1972).

[12] Mukilteo Citizens for Simple Gov't v. City of Mukilteo, 174 Wn.2d 41, 52 n.6 (2012).

[13] 112 Wn.2d 847, 849 n.2 (1989).
