

## STATE VS. FEDERAL LAW

## Federal Courts Using 'Certification' to Punt On Controversial State Tort Law Issues

By Mark A. Behrens and Donald J. Kochan

Federal courts sitting in diversity are increasingly becoming a forum for the resolution of controversial cases that often seek to extend state liability law beyond its historical moorings. Rather than interpret state law themselves, however, some federal courts are choosing another option: certifying the question to the highest court in the state and thereby avoiding having to decide a difficult or controversial question.

Throughout its life, certification has been invoked sparingly. And, although the number of federal cases in which issues are certified to state courts remains low today, observations from recent federal court litigation raise concerns that the use of this certification power may be on the rise, to the detriment of both politically neutral resolution of disputes and fundamental principles of judicial responsibility.

For example, the 1998 Annual Report of the Clerk of the New York Court of Appeals stated that "the number of certifications remained low for several years" after the procedure became available in New York in 1986, "and gradually rose to between two and four per year." But in 1998, the New York Court of Appeals, the state's highest court, received 10 certifications. Although that court received only one certification in 1999, the number rose again in 2000. On Sept. 5, the Court of Appeals agreed to decide its sixth certified question of the year.

Over the past two years, and particularly in 2000, federal courts and state supreme courts have been faced with a comparatively large

number of certifications. For example, in August, the U.S. Court of Appeals for the Second Circuit sent two certified questions to the New York Court of Appeals emanating from the first jury verdict in the country to hold a gun maker liable for injuries caused by properly functioning weapons. The first question raised in this controversial firearms case, *Hamilton v. Accu-tek*, 222 F.3d 36 (2d Cir. 2000), asked whether plaintiffs may maintain suit based on a novel new tort called negligent distribution. The theory asserts that manufacturers flooded Southern states with allegedly weak gun control laws with firearms, and that it was foreseeable that guns sold in the allegedly "oversupplied" Southern market would make their way up to New York for sale in the "black market" and would be misused by remote purchasers—i.e., criminals. The theory failed to acknowledge that tort law has long realized that duties are not defined based on the general "foreseeability" of a risk.

The practical consequences of this new theory demonstrate its folly. A beer manufacturer in Wisconsin could be held liable if a convenience store in New York sold someone a six-pack without first becoming satisfied that the purchaser did not plan to drink it at one sitting and get behind the wheel of a car. Pharmaceutical manufacturers could be held liable if a drug store sold sleeping pills to an individual with suicidal tendencies. Gasoline manufacturers and matchmakers could be held liable for damage caused by arsonists.

The Second Circuit also asked the New York Court of Appeals to decide whether a market-share liability theory could be used to apportion fault, even though that theory has been rejected repeatedly in contexts such as the *Hamilton* case,

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## Certification

where the products involved were not fungible (identical) and the manufacturer could be identified.

In another recent case, the U.S. District Court for the District of North Dakota certified a question to the North Dakota Supreme Court regarding the constitutionality of North Dakota's product liability statute of repose. In that case, *Dickie v. Farmers Union Oil Co.*, 611 N.W.2d 168 (N.D. 2000), the North Dakota Supreme Court concluded in May that the statute violated equal protection under the North Dakota Constitution.

Perhaps the most extreme example of what can happen when a federal court shuns its responsibility to decide a case occurred in West Virginia in 1999. When *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999), came to the West Virginia Supreme Court of Appeals in the form of a certified question from the U.S. District Court for the Northern District of West Virginia, a majority of the West Virginia high court actually reformulated the certified question in order to allow recovery of future medical monitoring costs in the absence of a present physical injury. The majority's decision drew a strong dissent from Justice Elliott E. Maynard, who challenged the majority's aggressive retooling of the district court's "clear, concise, and limited question" in order to satisfy its "grand designs" with respect to allowing recovery of future medical monitoring costs. Justice Maynard also argued that the majority lacked the authority to create such a "speculative and amorphous" new cause of action.

Another medical monitoring case that is pending before the Nevada Supreme Court, *Badillo v. American Tobacco Co.*, No. 34300 (Nev.), came to that court in the form of a certified question from the U.S. District Court for the District of Nevada. The case involves casino workers who are seeking medical monitoring for tobacco-related illnesses as a result of working in an

allegedly smoke-filled environment.

The apparent trend of federal courts certifying liability issues to state courts should not be ignored. Serious further study regarding whether, and to what extent, a certification trend is emerging is needed, because the use of certification can have serious practical effects for businesses and for the integrity of the federal court system.

### Differences Between Federal and State Courts

Some state courts have shown an increasing penchant to expand liability law radically and create new tort causes of action, such as medical monitoring. This can occur at the federal level, too, as in the *Hamilton* case in federal district court in New York. As a general matter, however, the federal courts have been less accepting of novel legal theories and less likely to push the envelope of tort law than the state courts have.

In addition, some state courts, such as the North Dakota Supreme Court, have effectively blocked legislatures from responding to this trend to expand tort law by nullifying the considered judgments of state legislators regarding liability law. Their federal counterparts, on the other hand, have been more accepting of state tort reform efforts.

The distinction may be based, in part, on institutional differences between federal and state courts. Many state judicial systems, especially those that are electorally based, are more susceptible to capture by interest groups than are life-tenured federal jurists who do not have to run for reelection. Consequently, state judges may have a political incentive to expand tort law, especially in many certified situations where the court is in the plaintiff's home state and the defendants reside elsewhere.

Moreover, state judges answering certified questions have a level of autonomy to create new legal theories unavailable to a federal court attempting to answer the same questions. A federal court applying state law must interpret that law—or, more precisely, predict the inter-

pretation of the state's highest court—based on existing state law. As such, federal courts are not free to craft brand new legal theories.

If, however, the federal court punts the issue and certifies the question to the state court, the limitation based on interpretation through preexisting rules disappears. The West Virginia Supreme Court's resolution of *Bower v. Westinghouse Electric Corp.*, in which a majority of the court reformulated the certified question and used its opinion as an opportunity to adopt an entirely new tort cause of action, provides an excellent example of this danger.

It is likely that the burdens of greater use of certification will fall disproportionately on those that become targets of novel and expansive tort theories—corporate defendants. Indeed, the burden is most likely to fall disproportionately on out-of-state corporate defendants given that the state to which an issue is certified is often the plaintiff's home state. That is where a danger lies.

### Undermining the Legitimacy Of the Legal System

The use of certification to avoid resolving a controversial issue also undermines the legitimacy of the legal system itself. Article III of the U.S. Constitution gives the federal courts diversity jurisdiction between citizens of different states, and specifically contemplates the resolution of questions of state law as a result. The purpose of federal diversity-of-citizenship jurisdiction is to provide a fair neutral forum—premised on the basis that a state court is more likely to favor the interests of its own citizens over that of a foreign entity, particularly when that entity is an out-of-state corporation. When a federal court chooses not to apply the law neutrally, but instead certifies the issue to the state court, it runs the risk of eviscerating the very reason the Constitution provides for federal court jurisdiction. Although the U.S. Supreme Court has accepted the certification con-

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cept and itself certifies some issues to state courts, it has also expressly cautioned that courts may not decline to decide an issue merely because it involves state law or because the law is uncertain or difficult to determine.

Federal judges should exercise leadership and their constitutional authority to decide the state issues in those cases in which jurisdiction is proper in their court. They should not punt the tough questions to a state court before which the parties have not appeared. Part of the reason the Constitution created a politically insulated federal judiciary was to eliminate any fear of deciding controversial issues in a fair and neutral manner.

Importantly, restricting certification does nothing to limit the power of the states. When a federal court makes an interpretation of state law, state courts are not bound by that interpretation. When a case is properly brought within the jurisdiction of the state court, the state court remains free to independently interpret its state's law. Moreover, the state legislature equally remains free to "correct" the federal court and craft a rule that will be applied in similar future situations.

### A Disturbing Trend

It may be too early to tell its full extent, but indications of a trend toward more frequent certifications of tort law issues are emerging. If the federal courts are unwilling to face the tougher issues of state law interpretation and instead rely on certification, state courts increasingly will have more opportunities to expand liability theories and strike down state tort reform laws without ever having a live case or controversy before them. The state courts are essentially permitted to legislate through their certification answers. Our observed activity to date indicates that this does not bode well for businesses or the legitimacy of the federal court system.



## DECISION OF NOTE

### Class Actions in the Free World: Nonmonetary Relief and Punitive Damages

By Justin S. Kudler

The Supreme Court's recent decision in *Free v. Abbott Laboratories*, 120 S.Ct. 1578 (2000), has emphasized the battle over federal subject matter jurisdiction. Last month's article discussed the issues of jurisdictional piggybacking and attorney fees; this month's will look at nonmonetary relief and punitive damages, and give a brief peek at what the future holds.

#### Problems of Perspective: Nonmonetary Relief

Claims for equitable relief present particular problems for courts considering the value in controversy requirement for diversity jurisdiction. Unlike monetary relief, the value of nonmonetary relief is highly subjective. For example, individual plaintiffs in product liability class actions may stand to gain very little from enjoining a manufacturer of defective toasters from selling toasters. The company making the toasters, however, could stand to lose millions of dollars in sunk costs and potential profits. Thus, jurisdiction in product liability class actions where plaintiffs seek an injunction often boils down to a question of perspective: From whose viewpoint is the amount in controversy to be determined? Once again, ambiguous Supreme Court precedent has left the circuit courts split over the question.<sup>1</sup>

Some courts look only to the value of the potential relief to the plaintiff, while others employ the "either viewpoint rule." In *Ericsson GE Mobile Communications v.*

*Motorola Communications & Electronics Inc.*, 120 F.3d 216, 219 (11th Cir. 1997), the U.S. Court of Appeals for the Eleventh Circuit reviewed its previous decisions and concluded that it had "purposefully and conspicuously adopted the plaintiff-viewpoint rule." The Seventh Circuit falls among those courts applying the "either viewpoint" rule. According to the court in *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 393 (10th Cir. 1979), "the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." (quoting *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940)).

There is some support, though not at the appellate level, for a third alternative: Some district courts assess the amount in controversy from the perspective of the party seeking access to federal court. See, e.g., *McLaughlin, Piven, Vogel Inc. v. National Ass'n of Sec. Dealers Inc.*, 733 F. Supp. 694, 697 (S.D.N.Y. 1990).

Some courts modify the "either viewpoint" rule in suits involving multiple plaintiffs. In a class action where the plaintiffs seek an injunction, "[t]he test...is the cost to each defendant of an injunction running in favor of one plaintiff." In *re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 610 (7th Cir. 1997). The court explained that if it did not divide the defendant's "value" by the number of plaintiffs, parties could easily circumvent the Supreme Court's rule that the value of claims cannot be aggregated unless the plaintiffs seek to vindicate a collective and undivided interest.

Similarly, the Tenth Circuit seems to follow the "either viewpoint" rule in injunction cases—see *Justice v. Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503 (10th Cir. 1991)—but in

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