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Using Rule 2:12A to Certify Questions of Law

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A decade has passed since a rule permitting the Court of Appeals for the Third Circuit to certify questions of law to the New Jersey Supreme Court was first considered. "The 1998 Report of the Civil Practice Committee to the Supreme Court," 151 *N.J.L.J.* 689, 703. In light of the 10-year anniversary of that in-depth analysis and the coming 10-year anniversary of the provisional adoption of New Jersey Court Rule 2:12A (1999), it is worth examining how the courts have employed this seldom-used, yet valuable resource, during its first decade.

Rule 2:12A enables the New Jersey Supreme Court to render opinions on issues of state law on certification of the issue by the Court of Appeals for the Third Circuit. It was designed with intent to foster greater stability in a system of dual sovereigns, thereby avoiding inconsistent interpretation of state law between state and federal courts. The rule accommodates federal appellate courts that have been called on either to divine or decide state policy in a manner that could affect fundamental princi-

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ples of federalism. It can also avoid interpretational distortions that might result when federal judges apply federal jurisprudential assumptions to unsettled state law issues. The following thoughts may assist the practitioner who confronts Rule 2:12A.

A review of the case law using this mechanism reveals that fears of the overburdening of the New Jersey Supreme Court or abuse by members of the bar were unfounded. In fact, the Third Circuit has sought certification in only six cases since 1999. Of the six cases in which the Third Circuit has sought certification, the Supreme Court has declined to review three without indicating its rationale for declination. The practitioner and the federal judiciary might thus wonder not only when the Supreme Court will consider a question, but also exactly what factors influence that decision. Rule 2:12A states:

The Supreme Court may answer a question of law certified to it by the United States Court of Appeals for the Third Circuit, if the answer may be determinative of an issue in litigation pending in the Third Circuit, and there is no controlling appellate decision, constitutional provision or statute in this State.

The rule states further that the "Supreme Court, acting as the receiving court, shall notify the Third Circuit of its acceptance or rejection of the question and shall respond to an accepted certified question as soon as practicable." However, the rule does not explain how or why the Supreme Court would determine whether to accept a particular question. In fact, Judge Pressler's comment indicates "[t]he State Supreme Court's obligation to respond to a certification request from another court is purely voluntary." Pressler, "N.J. Court Rules" (2009 Ed.), Comment R. 2:12A, (Gann). The plain language of the rule indicates that the drafters intended to vest the Supreme Court with unfettered discretion to accept or reject a Third Circuit request. This is supported by the report of the subcommittee that originally considered the adoption of Rule 2:12A in 1998.

The Subcommittee deliberately refrained from endorsing any specific procedure to be followed in the Supreme Court upon its receipt of a certified question. The consensus was that the Court itself would know best (1) what sorts of papers, briefs, appendices, record materials and legal arguments that it would want in order to decide whether to accept a certified question and (2) if the question is accepted, on how to go about answering it.

An examination of the rule, its history, and the Supreme Court decisions granting or denying certification pursuant to Rule 2:12A similarly do not explain in any detail which certified questions the Supreme Court will choose to answer. The first case raising a question certified pursuant to the rule, *Musikoff v. Jay Parrino's The Mint, L.L.C.*, 172 N.J. 133 (2002), states merely:

We are called on to answer a question of law certified and submitted by the United States Court of Appeals for the Third Circuit. This is the first time that this Court will answer such a question pursuant to the procedures set forth under Rule 2:12A.

Neither that opinion nor any other opinion wherein the Rule is discussed provides a standard for which questions will be considered. *See Delta Funding Corp. v. Harris*, 185 N.J. 255 (N.J. 2006) (accepting certification of inquiry but reformulating question with respect to unconscionability of arbitration agreement under New Jersey law); *Knoepfler v. Guardian Life Ins. Co. of Am.*, 185 N.J. 612 (N.J. 2005) (denying, without explanation, petition by Third Circuit to certify question); *Brennan v. Norton*, 174 NJ 185 (2002) (denying, without explanation, petition by Third Circuit to certify question); *In re Prof'l Ins. Mgmt. v. Ohio Cas. Group of Ins. Cos.*, 169 N.J. 470 (N.J. 2001) (denying certification without indicating nature of question of law sought to be certified by Third Circuit); *Pittston Co. v. Sedgwick James of N.Y., Inc.*, 165 N.J. 129 (N.J. 2000) (accepting question of law from Third Circuit).

There are some polestars for the practitioner. A review of the literature leading to the adoption of Rule 2:12A suggests its intent. The history of inter-jurisdictional certification in the United States demonstrates that there was and remains broad support for certification

mechanisms such as Rule 2:12A. William G. Bassler, U.S.D.J., & Michael Potenza, "Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure," 29 *Seton Hall L. Rev.* 491 (1998). Judge Bassler cited four important policies supporting certification: (1) comity and cooperative federalism; (2) the avoidance of judicial guesswork; (3) furtherance of the underlying principal of *Erie Railroad v. Tompkins* — reduction of forum shopping; and (4) realization of the goals of the Pullman abstention — deference to state interpretation of state law. Judge Becker, then Chief Judge of the Third Circuit, called for a certification rule on these grounds in *Hakimoglu v. Trump Taj Majal Assoc.*, 70 F.3d 291, 302 (3d Cir. 1995). The majority report of the 1998 subcommittee itself noted:

such a process would be useful...as an avenue for clarifying unsettled questions of New Jersey law and reducing the instances of erroneous predictions about the status or meaning of our state law by other jurisdictions. Such a rule would also help promote comity between our own state courts and the other courts in our federal system.

Additionally, rules governing the Supreme Court's practice of certifying questions to the Appellate Division provide guidance in discerning what questions it will seek to answer on a certification from the Third Circuit. When a party files a petition for certification asking the Supreme Court to exercise its discretion to hear a matter on its merits, Rule 2:12-4 sets forth specific grounds for a grant of relief. Not only is this a logical reference point as a matter of common sense, but also Rule 2:12A-1, which applies to Third Circuit certifications, states that when the Supreme Court has accepted a certified question, "the matter shall proceed in the

same manner as an appeal as of right." Although that does not denote that the implied grounds of Rule 2:12A-1 is the same as the express grounds in Rule 2:12-4, the language does suggest parallel approaches taken by those two rules.

The first ground for certification in Rule 2:12-4 is when the appeal involves "a question of general public importance...." Another basis is when "the decision under review is in conflict with any other decision of the same or a higher court...." Further, "if the interest of justice requires," the Supreme Court may take the matter. Finally, and apart from these considerations, the policy of comity suggests that if the Third Circuit requests that the Supreme Court examine and determine an issue of state law — if the Third Circuit needs help — the Supreme Court may accommodate a request in appropriate cases. Put colloquially, it can be a win-win situation because acceptance of the question allows the Supreme Court to tell the Third Circuit what the law is, rather than compelling the federal court to guess. However, comity does not guarantee acceptance of the question. As noted, during the brief history of this rule the Supreme Court has declined to answer certified questions half of the time. Furthermore, even when a certified question is accepted, the Supreme Court has the ability to "reformulate a question of law certified to it." R. 2:12A-2. This process was used in *Delta Funding*.

At the end of the day, the practitioner and the federal courts, when asking if the Supreme Court will decide to consider a question referred by the Third Circuit, should examine the underlying principles of Rule 2:12A, as presented in the reports of the Civil Practice Committee, as well as the four factors set forth in Judge Bassler's article. A review of Judge Becker's decision in *Hakimoglu*, as well as the certification rules of other jurisdictions, may also provide assistance. ■