TO CERTIFY OR NOT TO CERTIFY:

TIPS FOR FEDERAL APPEALS OF NOVEL INSURANCE COVERAGE ISSUES

AGELO L. REPPAS
BATESCAREY LLP

RACHEL G. SNIDOW
COVINGTON & BURLING LLP

J. JAMES COOPER
JESSICA E. GOPIAO
REED SMITH LLP

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J. James Cooper, Agelo L. Reppas, Rachel G. Snidow, and Jessica E. Gopiao[1]

I. INTRODUCTION

Insurance law is state law, but given the large dollar amounts frequently at stake in insurance disputes, and the often diverse state citizenship of insurers and policyholders, insurance cases often end up in federal court through diversity jurisdiction. Under the *Erie* doctrine, a federal court sitting in diversity jurisdiction must apply state law to resolve the substantive issues before it.[2] But when state law is sparse and federal appellate decisions are not on point, what are courts and advocates to do? While federal courts have both the jurisdiction and competence to decide state law issues, there is always the potential for incorrect predictions.[3] To avoid this risk, a federal court may instead opt to certify to the state high court questions of law, the answers to which will dispose of or have a meaningful impact on some aspect of the case. This article addresses the history and goals of certification, rules and procedures for certification, and current trends in certification, with a particular focus on the certification of questions of insurance law.

II. HISTORICAL DEVELOPMENT OF THE CERTIFICATION PROCEDURE

Seven years after *Erie*, in 1945, the Florida legislature had "rare foresight" when it enacted the first certification statute, authorizing its supreme court to adopt a procedure by which to accept certified questions from federal courts.[4] Yet 15 years later, the Florida Supreme Court had not accepted the legislature's invitation.[5] The Florida Supreme Court was prompted to act only after being nudged by the United States Supreme Court, which urged the Fifth Circuit to invoke Florida's then obscure certification statute to resolve a statutory construction issue.[6] The following year, in 1961, the Florida Supreme Court promulgated rules governing the certification procedure.[7]

Other states followed suit. Five years after Florida adopted a certification procedure, in 1966, Maine became the next state to do so. Maine was followed by Michigan in 1976, Kentucky in 1978, South Carolina in 1982, Illinois in 1983, Connecticut in 1985, New York in 1986, Ohio in 1988, Tennessee in 1989, and California and Minnesota in 1998.

Today, certification procedures are widespread. Forty-nine states, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands have adopted rules or enacted statutes authorizing their high courts to accept certified questions from federal courts.[8]

The notable exception is North Carolina, the only state that does not accept certified questions from federal courts. The absence of a certification procedure is not for want of trying.[9] Indeed, a few years ago, North Carolina lawmakers were poised to consider adoption of a certification procedure.[10] But the "Certifying Question Mechanism" bill died in committee and there has been no successful legislative endeavor to resurrect the issue.[11] Commentators observe that North Carolina's efforts to adopt a certification procedure have been "derailed by statutory and constitutional concerns."[12]

State certification procedures are generally based on the Uniform Certification of Questions of Law Act ("UCQLA").[13] The UCQLA was adopted in 1967 and revised in 1995 to be more expansive. The original version restricted certifying courts to certain federal and state courts, whereas the revised version allows all federal and state courts, Indian tribal courts, Canadian courts, and Mexican courts to certify questions.[14] Likewise, the original version contemplated certification of only questions that were potentially determinative of the entire case (to ensure that the answers were not merely advisory opinions), whereas the revised version relaxes the standard to questions that are potentially determinative of a single issue.[15]

While the scope of the revised UCQLA is broad, there is a vast divergence in certification procedures from state to state.[16] Some states have adopted the revised UCQLA wholesale; others have borrowed only key operative language. An overview of each state's certification procedures may be found in the appendix.

III. CERTIFICATION'S LAUDATORY GOALS

A. Certification has its benefits.

Proponents put forth a number of advantages that make availment of the certification procedure an attractive option in diversity cases. Certification eliminates *Erie* guesses and, consequently, mistaken predictions of state law.[17] Certification gives state high courts the opportunity to declare their state's law in the first instance or to update it, in response to changed societal circumstances.[18] Certification discourages forum shopping and promotes a uniform, consistent, and predictable body of state jurisprudence, in that answers to certified questions are binding in both federal and state courts.[19] And, certification promotes judicial efficiency and saves time and money.[20]

Relatedly, certification fosters "cooperative judicial federalism."[21] It opens space for states to chart unique courses for matters in which they have the final say. As the Fifth Circuit put it, "[s]tate judiciaries, after all, are partners in our shared duty 'to say what the law is'—equal partners, not junior partners."[22] Thus, certification respects the states' sovereign status. The Supreme Court of Tennessee has remarked that "[r]ather than requiring a federal court to make the law of this state[,] . . . answering certified questions from federal courts . . . protects this state's sovereignty."[23] Indeed, only state high courts can provide guidance on state law issues in a way that meaningfully guides all future parties, as those courts' interpretations control in both state and federal cases moving forward.[24]

This is not to say that certification, in practice, is without its detractors. One commentator observes that federal courts have applied certification standards haphazardly, adding to the

uncertainty surrounding unsettled questions of state law.[25] Another commentator, after examining 55 certified question cases sent to the Ohio Supreme Court between July 15, 1988 (inception of Ohio's certification procedure) and December 31, 2001, concluded that the procedure had yielded largely advisory opinions and opinions "devoid of analysis," as well as promoted forum shopping and undercutting the appellate process.[26]

On balance, however, certification has enjoyed widespread praise and acceptance. With the United States Supreme Court's endorsement, use of the certification procedure will likely only increase.[27]

B. Illustrations of how certification might have prevented federal appellate courts from inadvertently charting the wrong course.

The reality is that federal courts' pronouncements of state law can be errant. There are numerous instances where federal courts, operating without a clear indication of how state high courts would rule, incorrectly predicted state law—only for state high courts eventually to rebuff those predictions.[28] Insurance law is especially rife with such examples.[29]

By way of illustration, the Seventh Circuit has made incorrect *Erie* guesses concerning trigger-of-coverage. The Seventh Circuit misjudged the contours of Illinois insurance law when it adopted the incorporation doctrine.[30] The Seventh Circuit did so again when it predicted that the Illinois Supreme Court would hold that coverage for malicious prosecution claims is triggered when the underlying tort claim accrues—for example, when the wrongfully convicted claimant is exonerated.[31] When confronted with the issue, Illinois trial and intermediate appellate courts parted company with the Seventh Circuit and held that the trigger-of-coverage is the misconduct giving rise to the injury caused by malicious prosecution.[32] The Illinois Supreme Court ultimately agreed with the lower courts, rejecting the Seventh Circuit's approach.[33]

Other federal appellate courts are equally susceptible to incorrect *Erie* guesses. The Fifth and Eleventh Circuits erred in forecasting Mississippi and Georgia law, respectively, regarding whether faulty workmanship is an "occurrence."[34] The Fourth and Eighth Circuits similarly erred in forecasting Maryland and Missouri law, respectively, regarding whether the policy term "damages" encompasses environmental response costs.[35] And the Sixth Circuit went astray in predicting that the Ohio Supreme Court would find that the absolute pollution exclusion unambiguously extends to nontraditional pollution risks.[36]

Certification could have helped these federal courts avoid inadvertently charting the wrong course. Incorrect *Erie* guesses not only impact the litigants to the particular cases in which they arise, but set precedent for future cases—especially in the insurance context, where policies are typically written on standardized forms.[37] A federal appellate court's prediction of state law technically is not binding on federal district courts applying that law. Nevertheless, federal district courts tend to follow such predictions, absent a clear indication that the state high court would decide the issue otherwise. As a result, federal appellate courts' mistaken *Erie* guesses can be perpetuated for years to come. Consider, for example, that the Illinois Supreme Court did not have an opportunity to rectify the Seventh Circuit's

erroneous adoption of the incorporation doctrine until nearly a decade later. In hindsight, certification might have prevented this anomaly and preserved uniformity of state law.

IV. PROCEDURE AND STANDARDS FOR CERTIFICATION

A. Courts apply a multi-factor analysis in deciding whether to certify state law questions.

To be certified, a case or issue must meet the requirements for certification of both the certifying court and the relevant state's certification statute or local court rule. As such, litigants should carefully review the requirements of both venues when evaluating whether a question is a good candidate for certification. Likewise, motions or requests for certification should address the requirements of both the certifying court and the state court to which the question is to be certified.

So long as an issue or case meets the relevant requirements for certification, federal courts have broad and essentially unreviewable discretion to decide whether to grant certification.[38] Some federal appellate courts have established local rules addressing certification, providing more or less guidance, depending on the court. For instance, the Third and Seventh Circuits require that a question "control the outcome of a case pending in the federal court," whereas the Second Circuit permits certification so long as "state law permits."[39] Similarly, some federal district courts have established local rules for certification, which may impose substantive requirements on the question to be certified.[40] Further insight into the key factors supporting certification can be gleaned from certification orders, where federal courts are typically guided by the requirements of the state to which the question is to be certified. Although there is some variation in the factors considered from court to court, the following factors tend to be central to the decision to certify in many jurisdictions.

Genuine uncertainty about how the state court would resolve the question

The most critical factor in the certification decision is the absence of controlling state authority. Even where there is an absence of completely on-point authority from the highest court in the state, however, that may not be sufficient in and of itself to justify certification. Federal courts sitting in diversity jurisdiction must predict how the state court would resolve the question of state law—the so-called "*Erie* guess."[41] In making an *Erie* guess, federal courts look first to the decisions of the highest court in the state that might provide guiding principles, and then to the decisions of the lower appellate courts in the state. If such decisions provide a reasonable basis for predicting how the state high court would likely resolve the issue, certification is likely not warranted.[42] At other times, however, federal courts will face a true lack of relevant state court decisions or conflicting state authority.[43] A split on the issue among other jurisdictions can create further uncertainty.[44] When conflicting or lacking state authority makes it genuinely difficult to predict how the state would resolve the issue, the issue might be a good candidate for certification.

Question dispositive of an issue or the case

State certification statutes generally require that the question be potentially determinative of either a single issue or the entire case.[45] Similarly, the rules in some federal circuit courts require certified questions to be potentially determinative of the entire case.[46]

Significance of the question, including likelihood of recurrence

The significance of the question is also an important factor in certification decisions. Questions that implicate public policy value judgments, or that have broad applicability to important or regulated industries in the state, make good candidates for certification. Courts also tend to certify questions that are likely to recur, and thus have broader significance, as opposed to questions that relate narrowly to only the case at hand.

In this regard, insurance law questions often make good candidates for certification. A number of federal courts have recognized that insurance law questions often implicate important state economic concerns and public policy judgments, which state courts are better equipped to assess.[47] For instance, the Second Circuit determined that certification was warranted for a question involving the interpretation of a fire policy's service-of-suit clause because the question implicated "important" matters of state law, including "identifying the contours of property insurance policies and the state's strong interest in supervising highly regulated industries."[48] The Second Circuit further observed that the New York state legislature's "codification of a standard fire insurance policy—creating a floor for fire insurance coverage throughout New York State—underscores its concern for coverage in this field."[49] In addition, given the use of standardized forms with common language throughout the insurance industry, questions of insurance policy interpretation will often present issues that are likely to recur.[50]

B. Which courts may certify?

All states (other than North Carolina) allow certification from the United States Supreme Court and the federal Courts of Appeals. A number of states also permit certification from other federal courts, including federal district courts (which may or may not be limited to courts in the state's region) and bankruptcy courts. In addition, although this article focuses on certification by federal courts, it is important to note that many states also accept certified questions from other state courts (which may or may not be limited to the highest court of another state), Indian tribal courts, Canadian courts, and Mexican courts. In the insurance field, for instance, the important *Viking Pump* decision from the New York Court of Appeals on the issue of all-sums allocation came before the New York Court of Appeals on certification from the Supreme Court of Delaware.[51]

C. Timing of certification request

There is no Federal Rule of Appellate Procedure that addresses certification, so a party can request certification at any time, absent a contrary local rule. By local rule, the Second, Third,

Seventh, and Tenth Circuits require that requests for certification be made when the moving party files its principal brief on the merits. Courts may also decide to certify *sua sponte* at any time, including after a decision or on rehearing *en banc*.

Even absent a local rule restricting the timing of a certification request, it is still generally wise to request certification sooner rather than later. This is true even if the court might hold off making a decision on certification until after the record or briefing is complete. In particular, parties should avoid delays in seeking certification that could give the appearance of gamesmanship—for instance, asking for certification only after oral argument goes poorly or after receiving an adverse decision. For the same reason, where the relevant state statute or rule permits certification from district courts, parties should give careful thought to seeking certification in the district court. Some federal Courts of Appeal have signaled that a party's failure to timely seek certification before the district court is a factor weighing against certification by the Court of Appeals.[52]

On the other hand, cases where the relevant factual record is not yet fully developed are generally not considered ripe for certification. One strategy to address this problem is for the parties to stipulate to the facts relevant to resolution of the proposed question. Insurance cases, which often present either pure questions of law or questions that turn on a small number of material facts, can be good candidates for this approach.

D. Other practical and strategic considerations

It is never too early in the proceedings to begin thinking about whether a case presents a question that would be better decided by a state court. This consideration should inform the decision about whether to seek a federal venue in the first place, as most federal courts disfavor requests for certification from parties who invoked the federal court's jurisdiction, whether by filing suit in or removing to federal court.[53]

Another factor to consider when deciding whether to seek certification is the unavoidable and significant delay involved in certification procedures. Federal Courts of Appeal often take about the same time to decide whether to certify as they do to issue a merits decision. Then the state court must review the request and decide whether to accept the question. Then there is briefing and argument in the state court, followed by the time the state court requires to issue an opinion. After that, the case returns to the federal court, where the federal court decides any remaining issues, decides whether to remand, and issues a judgment. The entire process can add one to two years to the proceedings.

V. DATA ANALYTICS

A. Certification is inconsistent across federal courts.

Although the United States Supreme Court endorses and encourages certification as a means to answer unsettled questions of state law, the high court has never set a common certification standard. Given that federal courts are free to adopt their own standards, it is

perhaps no surprise that certification rates diverge considerably.[54] As a general trend, however, use of the certification procedure is on the rise.[55]

B. Comparison of certification rates among federal appellate courts.

Among the federal appellate courts, the Ninth Circuit is one of the most frequent certifiers of state law questions. From 2010 to 2018, of 97 certified-question events, the Ninth Circuit certified 92% of the proposed questions.[56] The vast majority of certified questions were ordered *sua sponte* (85%), while the rest (15%) originated on a party's motion.[57] Certification was most often granted in insurance cases (26%), followed by civil rights cases (11%), labor cases (10%), and personal injury/product liability cases (10%).[58] Most certified questions were directed to the California Supreme Court (47%), followed by the Washington Supreme Court (14%).[59] The state courts collectively accepted 80% and declined 10% of the certified questions.[60]

The Fifth Circuit likewise certifies a significant number of state-law questions to the supreme courts in Texas, Louisiana, and Mississippi. Since 2016, the Fifth Circuit has certified state-law questions in 20 different cases.[61] Of those cases, ten have been accepted and answered, five have been accepted and are pending, two have settled before the state court resolved the issue, two await responses from the state supreme court, and only one has been declined. In addition, of those 20 cases, 15 were raised *sua sponte* by the panel, while 5 were on motion of either party.

The Second Circuit is also a frequent certifier of state law questions, especially to the New York Court of Appeals.[62] For example, between January and August 2013, the Second Circuit issued six certified questions (two of which were insurance law questions) to New York's high court.[63]

In comparison, the Third Circuit has a moderate certification rate. From 2010 to 2018, of 63 certified-question events, the Third Circuit certified 49% of the proposed questions.[64] The vast majority of certified questions were ordered *sua sponte* (90%), while the rest (10%) originated on a party's motion.[65] Certification was granted in 24 different types of cases, including insurance cases (19%) and personal injury/product liability cases (19%).[66] Most certified questions were directed to the Pennsylvania Supreme Court (42%), followed by the New Jersey Supreme Court (35%), as well as the high courts of states outside the Third Circuit.[67] The state courts collectively accepted 87% and declined 10% of the certified questions.[68]

Certification is rarely invoked in the Sixth Circuit. From 2010 to 2018, of 60 certified-question events, the Sixth Circuit certified just 17% of the proposed questions.[69] Most certified questions were ordered *sua sponte* (60%), while the rest (40%) originated on a party's motion.[70] Certification was granted in bankruptcy cases (40%), personal injury cases (20%), contract cases (10%), habeas corpus cases (10%), franchise cases (10%), and personal property cases (10%).[71] All certified questions were directed to the Ohio Supreme Court

(50%), Kentucky Supreme Court (30%), and Tennessee Supreme Court (20%).[72] These three courts collectively accepted 60% and declined 30% of the certified questions.[73]

C. Comparison of certification acceptance rates among state high courts.

The New York Court of Appeals has a high certification acceptance rate.[74] In the nearly thirty-year period between 1986 (inception of New York's certification procedure) and 2015, the New York Court of Appeals accepted 95% of all certification requests—131 of 138, 133 of which were issued by the Second Circuit.[75] From 2011 to 2015, New York's high court accepted an average of five certified questions annually.[76] The number of accepted certified questions has ranged from a low of 1 in 1986 to a high of ten in 1998 and 2014.[77]

The Connecticut Supreme Court also rarely declines certified questions.[78] From 2001 to 2011, of 25 certification requests from federal courts, the Connecticut Supreme Court accepted 22 and the remaining three were withdrawn.[79]

The Ohio Supreme Court has a comparatively lower acceptance rate, though still well above 50%. From July 1988 (inception of Ohio's certification procedure) through November 30, 2021, of 130 certified question cases, the Ohio Supreme Court accepted 89 (68%), declined 32 (25%)—in eight instances, after full briefing and oral argument on the merits—and dismissed the remainder before a certification decision.[80]

This is just a small sampling of those state high courts with publicly accessible data concerning disposition of certified-question events. Many other courts not discussed here receive an average of only a few certified question cases each year, making it difficult to extrapolate general trends.

VI. TYPES OF INSURANCE LAW ISSUES THAT HAVE BEEN AND WILL BE DECIDED BY CERTIFICATION

A. State courts have answered insurance law questions touching on a number of topics.

State high courts have answered certified questions of insurance law involving a variety of issues.[81] Such issues include: 1) whether there is an "occurrence" under an employer's commercial general liability policy when a third party sues the employer for negligent hiring, retention, and supervision of the employee who intentionally injured the third party;[82] 2) whether an intentional acts exclusion bars coverage for claims that one insured negligently failed to prevent another insured's intentional acts;[83] 3) whether an insurer owes a duty to defend a claim that the insured violated the Telephone Consumer Protection Act by sending unsolicited text message advertisements that did not reveal any private information;[84] 4) the requisite causal nexus for determining when an injury arises from "use" of a vehicle, for purposes of coverage under an automobile policy;[85] 5) whether an expired policy remains effective until the insurer cancels the corresponding certificate of insurance;[86] 6) whether a pollution exclusion bars coverage for liability arising from environmental contamination

caused by the long-term discharge of pollutants from a landfill;[87] 7) trigger of an excess insurer's duty to defend;[88] and 8) determination of actual cash value and replacement costs under a homeowners' policy.[89] State high courts have also been receptive to insurance law questions that implicate a state's equitable principles.[90]

B. Certification of COVID-19 coverage disputes

Over the past two years, there has been an eruption of insurance claims for COVID-19-related business interruption losses.[91] Coverage for such losses under commercial property policies typically requires direct physical loss of or damage to the insured property, which then causes a necessary suspension of the insured's business operations.[92] A key point of contention in these cases is the scope and meaning of "direct physical loss or damage," including what is required to trigger coverage under this language and the distinction between physical "loss of" and "damage to" property.[93]

Thus far, the Second,[94] Fourth,[95] Ninth,[96] and Tenth[97] Circuits, as well as some federal district courts,[98] have declined to certify questions arising in COVID-19 coverage disputes. At least two federal courts, however, have certified COVID-19 coverage issues. In January 2021, the Northern District of Ohio certified to the Ohio Supreme Court the question whether the general presence of the coronavirus in the community or on surfaces at a premises, or the presence of an infected person on a premises, constitutes direct physical loss of or damage to property.[99] The Ohio Supreme Court accepted certification[100] and is poised to be among the first state high courts to resolve such an issue, with oral argument set to take place in February 2022.

More recently, in October 2021, the District of South Carolina *sua sponte* certified to the South Carolina Supreme Court five questions—including whether the presence of COVID-19 in or near the policyholder's premises and/or related governmental orders constitute "direct physical loss or damage."[101] The South Carolina Supreme Court accepted all five certified questions and briefing is currently underway.[102]

Undoubtedly, policyholder and insurer counsel alike will be closely following the certification proceedings pending before the Ohio and South Carolina Supreme Courts. Other state high courts may follow suit and accept similar or related certified questions. Other COVID-19 cases pending in state court systems are making their way to state supreme courts through direct appeals. But given that a larger share of COVID-19 coverage litigation has thus far been brought in or removed to federal court, state high courts have thus far had fewer opportunities than federal courts to opine on these issues.[103] As such, certification offers a procedural mechanism whereby state high courts can have the final say.

VII. CONCLUSION

The process of certifying questions of law is particularly important for policyholders and insurers, as the diverse state citizenship of these parties often leads them to federal court through diversity jurisdiction. Of course, some jurisdictions are more prone to accept certification than others; many disfavor requests for certification from parties who invoked the federal court's jurisdiction; and there is an unavoidable delay involved with certification

procedures. Parties should also evaluate which individual judges are more likely to favor the desired result—state or federal. These are just a few strategic factors to consider when deciding whether to seek certification.

[1] J. James Cooper is a partner in the Houston, Texas, office of Reed Smith LLP. Agelo L. Reppas is partner in the Chicago, Illinois, office of BatesCarey LLP. Rachel G. Snidow is an associate in the Washington, DC, office of Covington & Burling LLP. Jessica E. Gopiao is an associate in the Miami, Florida, office of Reed Smith LLP. The views expressed in this article are the authors' own and do not necessarily reflect the views of the authors' co-panelists, law firms, or law firms' clients.

[2] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

[3] Erick Sandler & John Cerreta, Connecticut Lawyer, *Certifying State Law Questions to the Connecticut Supreme Court*, at 21 (Oct. 2013), https://www.daypitney.com/~/media/files/insights/publications/2013/10/erick-sandler-and-john-cerreta-coauthor-ct-lawye__/files/dp501pdf/fileattachment/dp_501.pdf.

[4] *Clay v. Sun Ins. Off. Ltd.*, 363 U.S. 207, 212 (1960) (citing FLA. STAT. ANN. § 25.031)).

[5] *Clay*, 363 U.S. at 212 n.3.

[6] *Id.* at 212 (noting that Florida's facilitating statute could be used to certify a question to the Florida Supreme Court, even though that court had not promulgated any rules governing the certification procedure and had never accepted a certified question under the facilitating statute).

[7] Bennett Evan Cooper, Reuters, *Certification of Questions of Law to State Supreme Courts*, https://www.reuters.com/legal/legalindustry/certification-questions-law-state-supreme-courts-2021-06-22 (last visited Dec. 11, 2021).

[8] *See generally* Jason A. Cantone & Carly Giffin, Federal Judicial Center, *Certified Questions of State Law: An Examination of State and Territorial Authorizing Statutes*, at 1 (June 2020), https://www.fjc.gov/sites/default/files/materials/04/Certified%20Questions%20of%20State%20Law-Statutes.pdf; *but see Jiang v. Porter*, No. 4:15-CV-1008, 2016 WL 193388, at *2 (E.D. Mo. Jan. 15, 2016) (explaining that, although Missouri has enacted a certification statute, the Missouri Supreme Court has held that the state constitution does not grant it original jurisdiction to answer certified questions and, as such, routinely declines certified questions).

[9] *E.g.*, Beth Scherer, North Carolina Appellate Practice Blog, *Fourth Circuit Pleads With North Carolina to Create Federal Certification Mechanism*, https://ncapb.foxrothschild.com/2016/03/08/fourth-circuit-pleads-with-north-carolina-to-create-federal-certification-mechanism (last visited Dec. 10, 2021) ("Both the NCBA's Appellate Practice Section and the Appellate Rules Committee are exploring if and how a certification procedure could be adopted in North Carolina.").

[10] H.B. 157, 152nd Gen. Assemb., Reg. Sess. (N.C. 2017).

[11] N.C. Gen. Assemb., H.B. 157, Certifying Question Mechanism, 2017–2018 Session, https://www.ncleg.gov/BillLookup/2017/h157 (last visited Dec. 10, 2021).

[12] Scherer, *supra*, note 9 ("In the past, North Carolina's efforts to adopt a certification procedure were derailed by statutory and constitutional concerns."); *see also* Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 69 (2008) ("Previous calls for certification's adoption in this state have been unsuccessful, perhaps because the North Carolina Supreme Court's jurisdictional precedent seems to undercut certification's constitutionality.").

[13] Unif. Certification of Questions of Law Act (1967 Act) § 1, 12 U.L.A. 86 (1996) (amended 1995).

[14] Uniform Law Commission, *Certification of Questions of Law Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=494b84ff-bd1f-465b-89a0-ffaddf84d7b3 (last visited Dec. 10, 2021).

[15] 12 U.L.A. 86; *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 n.2 (Nev. 2006).

[16] Cantone & Giffin, *supra*, note 8 at 1.

[17] *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 76 (1997) (certification increases "the assurance of gaining an authoritative response"); *Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. 2000) (lauding the New York Court of Appeals' certification procedure as conferring the ability to provide requesting courts with "authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation"); Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 168 (2003) (advocates urge that certification "avoids the dual dangers of federal court speculation and federal court imposition of uniquely federal perspectives that lead to misinterpretation of state law issues").

[18] *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 209–10 (1956) (Frankfurter, J., concurring) ("Law does change with times and circumstances, and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports, or otherwise written.").

[19] *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification "helps build a cooperative judicial federalism"); Cochran, *supra*, note 17 at 168 (certification "promotes federalism because it serves to allocate and share judicial power between the state and federal court systems").

[20] *Arizonans for Off. Eng.*, 520 U.S. at 76 (certification reduces delay and cuts costs); *Lehman Bros.*, 416 U.S. at 391 (in the long run, certification saves time, energy, and resources); Cochran, *supra*, note 17 at 168 (certification promotes judicial efficiency).

[21] *Lehman Bros.*, 416 U.S. at 391*; Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 18 F.4th 802, 805 (5th Cir. 2021).

[22] *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 202 (5th Cir. 2020).

[23] *Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cnty.*, 382 S.W.3d 318, 320 (Tenn. 2012).

[24] *McMillan*, 983 F.3d at 202 (explaining that certification from federal court to state court solicits guidance from "the only court that can issue a precedential ruling that will benefit all

future litigants, whether in state or federal court" (quoting *JCB, Inc. v. Horsburgh & Scott Co.,* 912 F.3d 238, 239 (5th Cir. 2018))).

[25] John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. 455, 458, 481 (2015) ("Although some use of certification is better than none, the reality is that the availability of certification is dependent upon the court in which the case is pending, and, in many cases, seems to turn on nothing more than how the judicial winds are blowing on a particular day.").

[26] Cochran, *supra*, note 17 at 161. Professor Cochran concluded as follows:

> A rule that contradicts the appellate review process should be used more carefully and applied more explicitly. Ohio and other jurisdictions have presumed that only benefits can flow from the process; yet, in practice, certification in Ohio has resulted in advisory opinions, permitted a range of forum shopping, encouraged efforts to avoid the appellate process, and produced opinions so devoid of analysis that for years afterward, courts work to fill in the potholes of missing doctrine.

Id.

[27] *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court."); The Juris Lab, *Ninth Circuit Certification Trends*, https://thejurislab.com/ninth-circuit-certification (last visited Dec. 14, 2021) ("The Supreme Court's endorsement of the certification procedure in cases where novel issues of state law (particularly those involving cutting edge moral or policy issues) are at stake further underscores the importance of certification procedures in the federal courts of appeal.").

[28] Watkins, *supra*, note 25 at 459 (observing that "incorrect *Erie* guesses have plagued the federal judiciary for years in many different substantive areas of the law").

[29] *Id.* at 460–68.

[30] *Compare Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992) (a divided panel predicted that Illinois law would hold that "physical injury to tangible property" occurred the moment an allegedly defective plumbing system was incorporated into a larger structure, rather than when the system failed and physically damaged the structure), *with Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, 502 (Ill. 2001) (Illinois Supreme Court rejected incorporation doctrine, holding that coverage was not triggered until the plumbing system actually malfunctioned).

[31] *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1131 (7th Cir. 2012); *Am. Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 481 (7th Cir. 2012); *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335, 344–45 (7th Cir. 2010).

[32] *First Mercury Ins. Co. v. Ciolino*, 107 N.E.3d 240, 249–50 (Ill. App. Ct. 2018); *Indian Harbor Ins. Co. v. City of Waukegan*, 33 N.E.3d 613, 621 (Ill. App. Ct. 2015); *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 18 N.E.3d 193, 201–02 (Ill. App. Ct. 2014).

[33] *Sanders v. Ill. Union Ins. Co.*, 157 N.E.3d 463, 469 (Ill. 2019).

[34] *Compare Hathaway Dev. Co. v. Ill. Union Ins. Co.*, 274 F. App'x 787, 791 (11th Cir. 2008) (predicting that faulty workmanship is not an "occurrence" under Georgia law), *and ACS Constr. Co. of Miss. v. CGU*, 332 F.3d 885, 891–92 (5th Cir. 2003) (predicting same under Mississippi law), *with Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) (faulty workmanship can constitute an "occurrence" where it causes unexpected damage to other property, rejecting "out of hand" the Eleventh Circuit's reasoning), *and Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1162 (Miss. 2010) (characterizing the Fifth Circuit's contrary prediction that a subcontractor's faulty workmanship is not an "occurrence" as "inconsistent with Mississippi law").

[35] *Compare Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977, 987 (8th Cir. 1988) (predicting that Missouri law would hold that "damages" does not encompass environmental response costs), *and Md. Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987) (predicting same under Maryland law), *with Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 510, 512 (Mo. 1997) (holding that environmental response costs are "damages," finding that the Eighth Circuit had misconstrued and circumvented Missouri law), *and Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1032–33 (Md. 1993) (holding same and rejecting *Armco*'s interpretation as overly narrow and technical).

[36] *Compare Longaberger Co. v. U.S. Fid. & Guar. Co.*, 201 F.3d 441, 441 (6th Cir. 1999) (predicting that Ohio law would hold that the absolute pollution exclusion unambiguously bars coverage for "bodily injury" claims arising from the discharge of carbon monoxide) *with Andersen v. Highland House Co.*, 757 N.E.2d 329, 331 (Ohio 2001) (finding the absolute pollution exclusion ambiguous as applied to carbon monoxide exposure).

[37] Watkins, *supra*, note 25 at 457 ("[T]he consequences of an incorrect *Erie* guess in coverage cases can have profound practical implications beyond the immediate case because insurance policies are typically written on common forms. A mistaken determination in one case may thus be repeated many times over in being applied as persuasive precedent to other claims.").

[38] *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974) (use of certification procedure "rests in the sound discretion of the federal court").

[39] 2d CIR. L.R. 27.2; 3d CIR. L.A.R. 110.1; 7th CIR. R. 52.

[40] *See, e.g.*, E.D. MICH. L.R. 83.40(a) (certified issue must be an unsettled issue of state law and likely to control the outcome of the federal suit).

[41] *See, e.g.*, *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 637 (7th Cir. 2002).

[42] *See, e.g.*, *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015) ("The federal courts generally will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks. When we see a reasonably clear and principled course, we will seek to follow it ourselves. The state court need not have addressed the exact question, so long as well-established principles exist to govern a decision." (cleaned up)).

[43] *See, e.g.*, *Executive Plaza, LLC v. Peerless Ins. Co.*, 717 F.3d 114, 117 (2d Cir. 2013) (certifying property policy interpretation question to New York Court of Appeals where "the few [intermediate appellate] courts to have read the provisions together … reached different conclusions"); *Menards*, 285 F.3d at 639 ("[I]n determining whether an intrusion on the time of our colleagues on the state court is justifiable, we shall be more inclined to certify the

question when the intermediate courts of the state are in disagreement on the issue or the issue is one of first impression for the court of last resort.").

[44] *See, e.g.*, *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001) ("[W]hile the scope of the pollution exclusion clause has been the subject of extensive litigation in other jurisdictions, we can find no common ground of opinion among the courts that have construed the clause.").

[45] 12 U.L.A. 86, *supra*, note 13.

[46] *See, e.g.*, *supra*, note 35.

[47] *See, e.g.*, *Arrowood Indem. Co. v. King*, 605 F.3d 62, 79–80 (2d Cir. 2010) ("The case for certification to the Connecticut Supreme Court is especially compelling when the uncertainty pertains to an insurance dispute, given the 'established preeminence' of that court in the field of insurance law." (quoting *Israel v. State Farm Mut. Auto. Ins. Co.*, 239 F.3d 127, 135 (2d Cir. 2000)).

[48] *Executive Plaza*, 717 F.3d at 117 (cleaned up).

[49] *Id.*

[50] *See, e.g.*, *Nationwide Mutual*, 270 F.3d at 950 ("[T]he question is one of significant import to the public. Because the pollution exclusion clause appears in the standard commercial comprehensive general liability policy, it potentially affects the insurance coverage of most businesses in the District of Columbia.").

[51] *In re Viking Pump, Inc.*, 52 N.E.3d 1144 (N.Y. 2016).

[52] *See, e.g.*, *City of Columbus, Ohio v. Hotels.com, L.P.*, 693 F.3d 642, 654 (6th Cir. 2012) ("Certification is disfavored where a plaintiff files in federal court and then, after an unfavorable judgment, seeks refuge in a state forum." (cleaned up)); *Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000) ("[T]he City did not seek certification until after it received an adverse decision from the district court. That fact alone persuades us that certification is inappropriate.").

[53] *Boyd Cty. ex rel. Hedrick v. MERSCORP, Inc.*, 614 F. App'x 818, 823–24 (6th Cir. 2015) ("To the extent that [plaintiffs] did, in fact, believe that state courts provided a better forum to consider their novel legal argument, they should have filed in state court or at least sought certification before the district court ruled on the merits of the claim."); *Am. Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 481 (7th Cir. 2012) ("The reason *this* case is in federal court is that American Safety filed here. If it genuinely wanted the views of the state judiciary, it should have brought this declaratory-judgment action in state court."); *Shaheen v. Yonts*, 394 F. App'x 224, 233 (6th Cir. 2010) ("One who … chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification." (cleaned up)).

[54] Watkins, *supra*, note 25 at 458 ("The Supreme Court has never established standards for certification, and, left to their own devices, the federal appellate courts have espoused a crazy quilt of certification standards, ranging from liberally granting certification to using it sparingly.").

[55] Cooper, *supra*, note 7 ("Its use has grown considerably in recent years, whether because there is a greater appreciation of principles of federal-state comity embodied in certification, or whether increased use of the process itself has legitimized and encouraged requests or sua

sponte decisions to certify."); *see also* Mary-Christine Sungaila, Joshua Ostrer & Lauren Jacobs, Law360, *When Your 9th Circ. Case Needs California High Court Input*, https://www.law360.com/articles/1390811/when-your-9th-circ-case-needs-california-high-court-input (last visited Dec. 14, 2021) (observing that, within the last six years, the Ninth Circuit has increasingly certified questions to state supreme courts).

[56] Jason A. Cantone & Carly Giffin, Federal Judicial Center, *Certification of Questions of State Law in the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits*, at 5 (June 2020), https://www.fjc.gov/sites/default/files/materials/52/Certification%20of%20Questions%20of%20State%20Law_Third-Sixth-Ninth%20Circuits.pdf.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See Whole Woman's Health v. Jackson*, No. 21-50792, 2022 WL 142193, at *1 (5th Cir. Jan. 17, 2022), *certified question accepted* (Jan. 21, 2022); *Seguin v. Remington Arms Co., L.L.C.*, 22 F.4th 492 (5th Cir. 2022) (certified question pending); *Fire Prot. Serv., Inc. v. Survitec Survival Prod., Inc.*, 18 F.4th 802 (5th Cir. 2021), *certified question accepted* (Dec. 20, 2021); *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467 (5th Cir. 2021), *certified question accepted* (Sept. 10, 2021), *certified question dismissed after settlement* (Dec. 3, 2021); *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 11 F.4th 345 (5th Cir. 2021), *certified question accepted* (Sept. 3, 2021); *Goodrich v. United States*, 3 F.4th 776 (5th Cir. 2021), *certified question denied*, 327 So. 3d 492 (La. 2021); *Doe v. Mckesson*, 2 F.4th 502 (5th Cir. 2021), *certified question accepted* (July 8, 2021); *Dillon Gage, Inc. of Dallas v. Certain Underwriters at Lloyds Subscribing to Pol'y No EE1701590*, 992 F.3d 401 (5th Cir. 2021), *certified question answered sub nom. Dillon Gage Inc. of Dallas v. Certain Underwriters at Lloyds*, No. 21-0312, 2021 WL 5750553 (Tex. Dec. 3, 2021); *Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, 846 F. App'x 248 (5th Cir. 2021), *certified question accepted* (Mar. 19, 2021); *McMillan v. Amazon.com, Inc.*, 983 F.3d 194 (5th Cir. 2020), *certified question answered*, 625 S.W.3d 101 (Tex. 2021); *Zepeda v. Fed. Home Loan Mortg. Corp.*, 935 F.3d 296 (5th Cir. 2019), certified question answered, 601 S.W.3d 763 (Tex. 2020); *Liberty Mut. Fire Ins. Co. v. Fowlkes Plumbing, L.L.C.*, 934 F.3d 424 (5th Cir. 2019), *certified question answered*, 290 So. 3d 1257 (Miss. 2020); *Janvey v. GMAG, L.L.C.*, 925 F.3d 229 (5th Cir. 2019), *certified question answered*, 592 S.W.3d 125 (Tex. 2019); *Degan v. Bd. of Trustees of Dallas Police & Fire Pension Sys.*, 766 F. App'x 16 (5th Cir. 2019), *certified question answered*, 594 S.W.3d 309 (Tex. 2020); *JCB, Inc. v. Horsburgh & Scott Co.*, 912 F.3d 238 (5th Cir. 2018), *certified question answered*, 597 S.W.3d 481 (Tex. 2019); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018), *certified question answered*, 579 S.W.3d 53 (Tex. 2019); *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 740 F. App'x 70 (5th Cir. 2018), *certified question answered*, 283 So. 3d 1014 (La. 2019); *Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, 745 F. App'x 535 (5th Cir. 2018), *certified question accepted* (Aug. 24, 2018) (dismissed after settlement); *Colony Ins. Co. v. First Specialty Ins. Corp.*, 726 F. App'x 992 (5th Cir. 2018), *certified question answered*, 262 So. 3d 1128 (Miss. 2019); *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Rentfro*, 853 F.3d 750 (5th Cir. 2017), *certified question answered sub nom. Lefoldt v. Rentfro*, 241 So. 3d 565 (Miss. 2017).

[62] Sandler & Cerreta, *supra*, note 3 at 21.

[63] *Id.* at n.17.

[64] Cantone & Giffin, *supra*, note 56 at 7.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 9.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. 2000) (observing that the New York Court of Appeals has accepted "all but a very few of the questions that have been certified to us").

[75] Advisory Group to the New York State & Federal Judicial Council, PRACTICE HANDBOOK ON CERTIFICATION OF STATE LAW QUESTIONS BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO THE NEW YORK STATE COURT OF APPEALS 2 (3d ed. 2016), https://nycourts.gov/ctappS/forms/certhandbk.pdf.

[76] *Id.*

[77] *Id.*

[78] Sandler & Cerreta, *supra*, note 3 at 23 ("As a practical matter, the Court has rejected certification requests only on very rare occasions, and it appears that no certification request has been rejected for over a decade.").

[79] *Id.* at n.73 (citing Wesley W. Horton & Kenneth J. Bartschi, Conn. Prac., Rules of Appellate Procedure § 82-1 (2012-2013 ed.)).

[80] Ohio Supreme Court, https://www.supremecourt.ohio.gov/Clerk/ecms/#/search (follow "Show Advanced Case Search Options" hyperlink) (last visited Dec. 14, 2021) (the 89 accepted certified question cases encompass: a) multiple certified questions that were answered within the same case; b) some certified questions that were declined within the same case; and c) cases that were dismissed before the certified questions were answered).

[81] *See, e.g.*, *Morgan v. State Farm Mut. Auto Ins. Co.*, 819 F. App'x 614, 617 (10th Cir. 2020) (recognizing "the importance of allowing state courts to decide questions of state law and policy, and thus define state law" (cleaned up)), *certified question answered*, 488 P.3d 743, 745 (Okla. 2021).

[82] *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 834 F.3d 998, 1000 (9th Cir. 2016), *certified question answered*, 418 P.3d 400, 402 (Cal. 2018), *as modified* (July 25, 2018).

[83] *Minkler v. Safeco Ins. Co.*, 561 F.3d 1033, 1035 (9th Cir. 2009), *certified question answered sub nom. Minkler v. Safeco Ins. Co. of Am.*, 232 P.3d 612, 615 (Cal. 2010), *opinion after certified question answered sub nom. Minkler v. Safeco Ins. Co.*, 399 F. App'x 230 (9th Cir. 2010).

[84] *Yahoo! Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 913 F.3d 923, 926 (9th Cir. 2019).

[85] *Gradillas v. Lincoln Gen. Ins. Co.*, 792 F.3d 1050, 1052 (9th Cir. 2015).

[86] *Allied Premier Ins. v. United Fin. Cas. Co.*, 991 F.3d 1070, 1071 (9th Cir. 2021).

[87] *Claussen v. Aetna Cas. & Sur. Co.*, 865 F.2d 1217, 1219–20 (11th Cir. 1989), *certified question answered*, 380 S.E.2d 686, 690 (Ga. 1989).

[88] *Old Republic Ins. Co. v. Stratford Ins. Co.*, 777 F.3d 74, 86 (1st Cir. 2015), *certified question answered*, 132 A.3d 1198, 1199 (N.H. 2016).

[89] *Branch v. Farmers Ins. Co.*, No. 00–6385, 2001 WL 1028385, at *1 (10th Cir. Sept. 4, 2001), *certified question answered*, 55 P.3d 1023, 1029 (Okla. 2002).

[90] *City of Asbury Park v. Star Ins. Co.*, No. 18-3261, 2019 WL 9105722, at *5 (3d Cir. Aug. 12, 2019) (certifying question concerning whether, under equitable principles of New Jersey law, the made-whole doctrine applies to first-dollar risk that is allocated to an insured by way of a self-insured retention or deductible), *certified question answered*, 233 A.3d 400, 401 (N.J. 2020) (answering in the negative); *Vu v. Prudential Prop. & Cas. Ins. Co.*, 172 F.3d 725, 727 (9th Cir. 1999) (certifying question concerning whether statute of limitations was equitably tolled in an insured's lawsuit against a homeowners' insurer where the insured provided timely notice of covered damage and the insurer investigated the claim, but failed to discover the full extent of the damage), *certified question answered*, 33 P.3d 487, 488-89 (Cal. 2001) (finding insurer would be estopped from raising statute of limitations defense, if the insured proves reasonable reliance on the insurer's representations).

[91] *See* Covid Coverage Litigation Tracker, University of Pennsylvania Law School, https://cclt.law.upenn.edu (last visited Jan. 29, 2022); John Koch, Law360, *COVID Insurance Cases Highlight Federal-State Court Tension*, https://www.law360.com/california/articles/1441185/covid-insurance-cases-highlight-federal-state-court-tension (last visited Jan. 6, 2022) (over 2000 COVID-19 coverage cases have been filed nationwide, with the majority being filed in federal court).

[92] Erin M. Turner & Nicole C. Wixted, Faegre Drinker Biddle & Reath LLP, *Business Interruption Claims Continue to Erupt Across the Legal Scene* (May 25, 2021), https://www.faegredrinker.com/en/insights/publications/2021/5/business-interruption-claims-continue-to-erupt-across-the-legal-scene (last visited Jan. 6, 2022).

[93] *Id.*

[94] *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, No. 21-80-CV, 2021 WL 6109961, at *4 (2d Cir. Dec. 27, 2021).

[95] Order, *Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, No. 21-2055 (4th Cir. Oct. 20, 2021), ECF No. 16 (summary denial).

[96] *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 891 n.3 (9th Cir. 2021).

[97] *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. 21-6045, 2021 WL 6048858, at *7 (10th Cir. Dec. 21, 2021) (summary denial).

[98] *See, e.g.*, *Marler v. Aspen Am. Ins. Co.*, No. 2:20-CV-00597-BJR, 2021 WL 1599193, at *5 (W.D. Wash. Apr. 23, 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2021 WL 966886, at *3 (S.D.W. Va. Mar. 15, 2021).

[99] *Neuro-Comm'n Servs., Inc. v. Cincinnati Ins. Co.*, No. 4:20-CV-1275, 2021 WL 274318, at *1 (N.D. Ohio Jan. 19, 2021), *certified question accepted*, 2021-Ohio-1202, 166 N.E.3d 29.

[100] *Id.*

[101] Order Certifying Questions to the Supreme Court, 8, *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, No. 3:20-cv-02275 (D.S.C. Oct. 19, 2021), ECF No. 76.

[102] Joint Status Report, *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, No. 3:20-cv-02275 (D.S.C. Dec. 22, 2021), ECF No. 79.

[103] Koch, *supra*, note 91.