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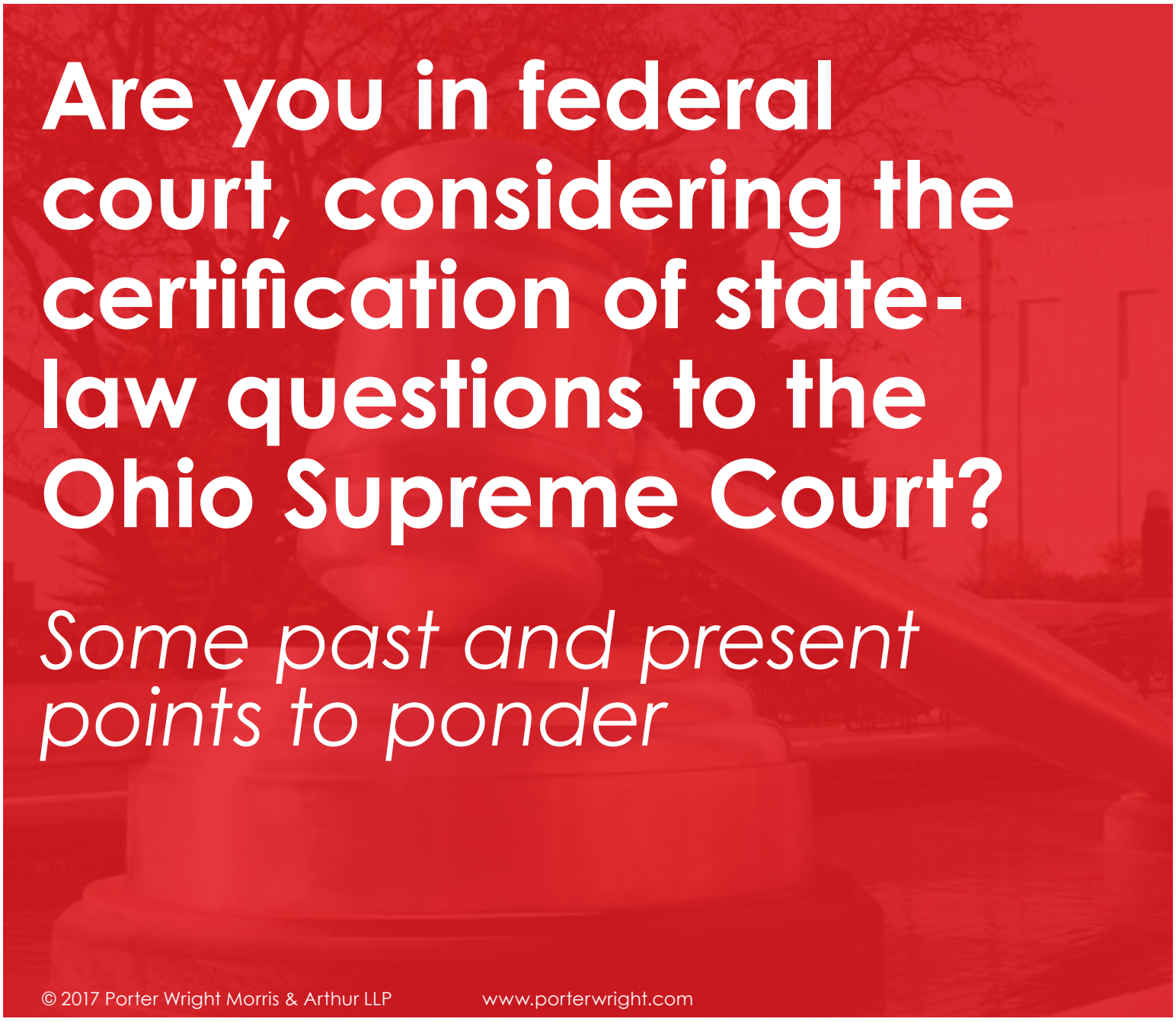

Are you in federal court, considering the certification of state-law questions to the Ohio Supreme Court?

Some past and present points to ponder

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Porter Wright Appellate & Supreme Court Practice Group

Brad Hughes	**Chair, Partner**	**614.227.2053**	**bhughes@porterwright.com**
Brodie Butland	Partner	216.443.2571	bbutland@porterwright.com
Phil Calabrese	Partner	216.443.2504	pcalabrese@porterwright.com
Eric Gallon	Of Counsel	614.227.2190	egallon@porterwright.com
Caroline Gentry	Partner	937.449.6748	cgentry@porterwright.com
Darcy Jalandoni	Senior Associate	614.227.2024	djalandoni@porterwright.com
Jared Klaus	Senior Associate	614.227.2076	jklaus@porterwright.com
Tony McClure	Partner	239.593.2952	amcclure@porterwright.com
Javier Pacheco	Partner	239.593.2968	jpacheco@porterwright.com
Candi Taggart	Partner	513.369.4231	ctaggart@porterwright.com
Kathleen Trafford	Partner	614.227.1915	ktrafford@porterwright.com

Are you in federal court, considering the certification of state-law questions to the Ohio Supreme Court? Some past and present points to ponder

BY: BRAD HUGHES | SEPTEMBER 2017

In October 2014, District Judge Watson of the U.S. District Court for the Southern District of Ohio certified a question of state law to the Ohio Supreme Court in a significant breach-of-contract dispute between American Municipal Power, Inc. and Bechtel Power Corporation. The dispute before him in federal court concerned Bechtel's alleged breach of an engineering, procurement and construction contract for a coal-fired power plant. Judge Watson wanted to know whether, under Ohio law, reckless conduct by a contracting party—as distinct from willful or wanton conduct—may preclude that party from enforcing a limitation-of-liability clause in the agreement. In his order certifying this question, Judge Watson noted that "resolution of the issue implicates the difference between $97 million and $500,000 in potential damages" in the dispute between AMP and Bechtel. Out-of-state counsel were admitted *pro hac vice* in the Supreme Court to litigate the certified question, 200 pages of preliminary and merits briefing were submitted by the parties, and the Ohio Council of Retail Merchants joined the fray as an *amicus curiae*. A year after Judge Watson certified the question—almost five years into the underlying lawsuit between AMP and Bechtel— 45 minutes of pitched oral argument on the certified question took place before the Supreme Court in Columbus. Last summer, though, by a vote of 5-2, the court issued a one-sentence entry declining to answer Judge Watson's question, with no reason given. *Am. Mun. Power, Inc. v. Bechtel Power Corp.*, 146 Ohio St. 3d 251, 2016-Ohio-3431. So the parties returned to federal court, where they continued to litigate their dispute until a stipulated dismissal, without the benefit of an answer to the question that Judge Watson certified. The certified question interlude in *Bechtel Power*, which took 18 months, calls to mind Macbeth's tale "full of sound and fury, signifying nothing."

Another recent certified-question case was dismissed after a similarly lengthy and pitched battle. In *Lutz v. Appalachia, L.L.C.*, U.S. District Judge Lioi from the Northern District of Ohio certified a question in an oil and gas contract dispute, asking whether Ohio followed the so-called "at-the-well rule" for calculating royalties, or some version of the so-called "marketable product rule." The former rule permits the deduction of post-production costs from royalties paid to lessors, while the latter limits the deduction of post-production costs under certain circumstances. As in *Bechtel Power*, lengthy merit briefs were submitted, out-of-state counsel admitted *pro hac vice*, and *amici curiae* chimed in to make their voices heard (including an esteemed professor of oil and gas law, Bruce Kramer). And again, as in *Bechtel Power*, a majority of the Ohio Supreme Court decided to dismiss *Lutz* after oral argument, without answering the question certified—no less than 576 days after the question was first certified to the Court. Slip Opinion No. 2016-Ohio-7549. Notably, the two justices who dissented from this dismissal would have answered Judge Lioi's question, but in two different ways. (Pfeifer, J., dissenting, stating that he would adopt the marketable product rule); (O'Neill, J., dissenting, stating that Ohio follows the at-the-well rule). As of this writing, a renewed motion for summary judgement was filed in the underlying federal case since the Supreme

Court's dismissal of the certified question case, and the case will proceed before Judge Lioi without the benefit of an answer to the question she certified.

Another recent certified question in the oil and gas context led to a far more definitive and influential response. In *Corban v. Chesapeake Exploration, L.L.C.,* 2016-Ohio-5796, U.S. District Judge Watson—the same judge whose question was left unanswered in *Bechtel Power*—asked the Ohio Supreme Court to determine whether the 1989 or 2006 version of Ohio's Dormant Minerals Act applied to claims asserted after 2006, alleging that rights to oil, gas or other minerals had been abandoned and thereby automatically vested in the surface. After more than 850 days, the Ohio Supreme Court provided its answer, in an opinion that has already been cited by no less than 40 other courts to resolve many other disputes that had arisen in this important context.

Reading the Ohio Supreme Court's brusque dismissals in *Bechtel Power* and *Lutz*, as well as its opinion in *Corban*, reminded me of work that I was grateful to have more than a decade ago, supporting University of Dayton Professor of Law (now Professor Emeritus) Rebecca Cochran with her comprehensive analysis of states' procedures for resolving questions certified by federal courts. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157 (2003). Professor Cochran's exhaustive examination of the certified-question process is worth close review by anyone interested in the relationship between federal and state courts. It is also worth analysis by companies and their counsel who are litigating in federal court, and considering whether or not to ask their district judge to certify a potentially case-dispositive issue of state law to the Ohio Supreme Court for its determination, as permitted by the Ohio Supreme Court's Rules of Practice. In this white paper, I first summarize some of the key findings that Professor Cochran made in her 2003 study of the certified-question process. Next, I examine more recent data about that process, and assess Professor Cochran's earlier findings against that dataset. In doing so, I hope to provide information that will be helpful to those considering whether or not to invoke Section 9 of the Ohio Supreme Court's Rules of Practice to certify potentially case-dispositive questions for resolution.

A look back

Professor Cochran began her study of the certified-question process with some history: how the *Erie* doctrine compelled federal judges to develop methods to predict state law; how Florida's legislature, in 1945, started the trend of states authorizing formal procedures for federal courts to certify state law questions; how the momentum increased with the Uniform Certification of Questions of Law Acts of 1967 and 1995; and how the various states have addressed certification in their distinct statutes and rules.

Professor Cochran then conducted a rigorous empirical examination of the certification process here in Ohio as a "case study of the strengths and weaknesses of the process." To do so, she analyzed the procedural history, substance and resolution of the 55 questions certified to the Ohio Supreme Court from federal courts from the very beginning of Ohio's certification rules (July 1988) through the end of 2001. What she found did not always reassure her:

> The article concludes, after detailed analysis of Ohio's certification experiences, that federal certifying courts and the Ohio Supreme Court have largely

> accepted certification as a process to be encouraged and embraced with little analysis of its actual practice. *** 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.

By the numbers, Professor Cochran's analysis of the Ohio Supreme Court's first 55 certified question cases resulted in the following empirical observations:

> To summarize briefly these results: of the 55 questions addressed by the Ohio Supreme Court, it resolved nine by dismissal, declined to answer 10 and issued an order or opinion in answer to 36. Fourteen Ohio district court judges, three non-Ohio district court judges and 10 Sixth Circuit Court of Appeals panels sent certified questions. The law of torts, in the form of products liability, dominated the questions asked. In additional tort cases, several wrongful death cases raised questions of under-insured and uninsured motorist insurance. The average time from certification to resolution was 11.96 months, with five weeks being the shortest wait and 25 months the longest wait.

Professor Cochran also identified District Judge Carr, of the U.S. District Court for the Northern District of Ohio, as the most prolific source of certified questions during her study period.

Professor Cochran then went beyond the numbers to make some observations about the substance of Ohio's certified-question process. She cautioned that the process can at times lead to the Ohio Supreme Court resolving complex and fact dependent questions without the benefit of a fully developed record—a potentially troubling departure from the appellate norm. She bemoaned the Supreme Court's failure, at times, to provide reasons for declining to answer questions certified—a practice that leaves litigants and federal judges alike in the dark. She encouraged the Supreme Court to determine more carefully if the certified questions are properly framed, highlighting stark inconsistencies among the many questions she studied. And she assessed the merits of the answers to certified questions that the Supreme Court provided from 1988-2001, identifying some positive and negative examples.

More recently, Kathleen Trafford, one of my professional mentors at Porter Wright, and former chair of the firm's Appellate Practice Group, also published an article on the Ohio Supreme Court's certified-question jurisprudence. In *The less traveled road to the Supreme Court of Ohio*, published in the Winter 2011 edition of the Ohio Bar Association's *Ohio Lawyer* magazine, Trafford explained how Ohio's tort-reform legislation, as well as the Class Action Fairness Act of 2005, provided opportunities for counsel to utilize the certified-question process to settle important questions of state law that are likely to recur in federal suits, allowing parties to avoid lengthy or duplicative litigation and potentially sparing them from "the delay, expense and uncertainty of litigating cases seriatim in the courts of common pleas and through the intermediate appellate courts." I have been fortunate to litigate some certified-question cases alongside Trafford and

other colleagues in my time at Porter Wright and these experiences have often made me reflect back on Professor Cochran's 2003 study.

New data, but persistent themes

Compared to the 1988-2001 data that Professor Cochran analyzed, we now have 15 more years of data to examine with respect to Ohio's certified-question process. So what does that more recent sample of data show? The Supreme Court's recent, unexplained dismissal of Judge Watson's certified question in *Bechtel Power* brings some of Professor Cochran's concerns back to the fore, while the court's response to Judge Watson's certified question in *Corban* reflects the potential for the certified-question process to definitively resolve long-simmering uncertainties in state law. Are Professor Cochran's other concerns still relevant now? These are some of the questions that this white paper will address briefly below. The answers, I hope, may be of practical use for parties and counsel who, while litigating in federal court, are thinking about having potentially determinative state-law questions certified to the Ohio Supreme Court for resolution.

1. How many state-law questions have been certified to the Ohio Supreme Court since Professor Cochran's study, and how has the Court resolved those cases?

Professor Cochran analyzed the 55 certified question cases addressed by the Ohio Supreme Court from 1988-2001—an average of just over four cases per year. From Jan. 1, 2002, through March 14, 2017, the Supreme Court resolved 53 certified question cases.[1] The frequency of certified question cases thus appears to have declined slightly since Professor Cochran's study, to between three and four cases per year. Forty-one of the questions certified in the more recent sample period were certified by federal district courts. The Sixth Circuit has been the only federal circuit court to certify questions in the more recent sample period, with that circuit's bankruptcy panel the origin of three certified question cases. Although three non-Ohio District Courts certified questions in Professor Cochran's sample period, the U.S. District Court for the Middle District of Alabama was the only out-of-state District Court to have certified a question to the Supreme Court since 2002, but the Supreme Court declined (without opinion) to answer the question certified from Alabama. From 2002 through 2016, District Judge Carr of Ohio's Northern District was once again the most common source of certified questions (10 questions certified), with District Judge Dlott from the Southern District occupying second place (four questions certified).

2. Does the law of torts still dominate the questions certified by federal courts, as Professor Cochran found?

As noted above, Professor Cochran identified products liability issues and underinsured/uninsured motorists' issues as most prevalent among the questions certified in the early sample period. That trend has persisted in the more recent sample period, with certified questions concerning Ohio insurance law, torts and products liability implicating about 20 of the certified-question cases addressed since 2002. The shale oil boom in Ohio also accounted for a recent cluster of certified question cases concerning Ohio's Dormant Minerals Act and the calculation of oil and gas royalties under state law.[2] The Supreme Court received a wide range of other certified questions in the more recent sample period as well, including constitutional

challenges to Ohio's tort-reform measures, state securities law, property interests, the Ohio Public Records Act, mortgage law, statutes of limitation, the Ohio Corrupt Practices Act and the Ohio Consumer Sales Practices Act, to name a few.

3. How has the average time from certification to resolution changed since Professor Cochran's study?

Professor Cochran noted that the average time from certification to resolution was 11.96 months for the first 55 questions certified to the Supreme Court. The average number of days from certification to resolution in the more recent sample period has also been just under a year, at 355 days.[3] If we remove from the recent data set those cases in which the Supreme Court declined to answer the question certified, and we then calculate the average number of days from certification to an actual answer on the merits, the average time-to-resolution increased to 458 days in the recent sample period. This compares to a median of 545 days for the Supreme Court to dispose of merit cases accepted on discretionary review, according to recently published statistics in the court's Annual Report. As such, those attorneys and judges certifying questions of state law from federal court should reasonably expect to wait a year or more for an answer on the merits. On average, however, they will wait a bit less time for that answer than the parties in the typical discretionary appeal.

Because Ohio's rules only permit certification of questions that "may be determinative of the proceeding" before the federal court, one might expect that federal proceedings proceed expeditiously to final judgment upon receipt of the Ohio Supreme Court's answer to the questions certified. That is not always the case, however, and counsel should be aware of procedural developments that can delay resolution of underlying federal cases even after the Supreme Court answers the questions certified. An examination of the federal docket in *Pilkington N. Am., Inc. v. Travelers Cas. & Surety Co.*, N.D. Ohio Case No. 3:01 cv 7617, for example, reveals that the case was litigated in federal court for more than three years after the Ohio Supreme Court answered the insurance-related questions certified by District Judge Carr. After the Ohio Supreme Court turned away facial challenges to Ohio's workers' compensation subrogation statutes in *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, the underlying federal case (N.D. Ohio Case No. 06cv1604) was litigated for an additional five years before settlement and dismissal. And after the Ohio Supreme Court declined to recognize a cause of action for tortious acts in concert in *DeVries Dairy, L.L.C. v. White Eagle Coop. Assoc.*, Inc., 132 Ohio St.3d 516, 2012-Ohio-3828, the parties to the underlying federal case did not achieve settlement or dismissal for another two years (N.D. Ohio Case No. 09cv207). As such, clients should be warned that certifying apparently "determinative" questions of state law to the Ohio Supreme Court does not necessarily result in a speedy "determination" of their claims in federal court. Sometimes, of course, delay of any federal judgment inures to a client's benefit, so the prospect of a lengthy pause or extension of federal proceedings resulting from the certification of a question to the Ohio Supreme Court becomes a strategic asset to be deployed, not avoided.

4. Do Professor Cochran's substantive concerns about the certified-question process still hold water?

As described above, Professor Cochran's survey of Ohio's first 55 certified question cases identified a few troubling pitfalls associated with the certification process. She cautioned that parties could, at times, use the procedure to effectively "leapfrog over the appellate process;" that the Ohio Supreme Court had often failed to provide any reasons for declining to answer questions certified; that the court sometimes (but not always) accepted broadly worded questions that invited free-ranging inquiries into difficult constitutional issues on a sparse record; and that the court's opinions on the merits of some certified question cases left pressing questions unanswered or engendered confusion among subsequent courts looking for binding precedent on the issue at hand. As the following bullet points reveal, these concerns arguably remain valid today, with 15 years of additional certified-question cases having been resolved (or dismissed without answer or explanation, as the case may be).

- **The Supreme Court continues to decline to answer some certified questions without explanation.** Since 2002, the Ohio Supreme Court has declined to answer over a dozen questions certified to it by federal judges. This is a sizeable percentage of the entire pool of questions certified in that period. In three instances, the Supreme Court's unexplained rejection of the certified questions has come only after full briefing and oral argument on the merits—hundreds of days after the questions were certified. *See, e.g.*, Ohio Supreme Court Case No. 2010-0951, *Mentor Exempted Village School Dist. Bd. of Edn. v. Mohat* (pending 308 days); Ohio Supreme Court Case No. 2014-1847, *Am. Mun. Power, Inc. v. Bechtel Power Corp.* (pending 602 days); and Ohio Supreme Court Case No. 2015-1252, *Wells Fargo Bank, N.A., v. Allstate Ins. Co.* (pending 294 days). The rejection of a certified question can, of course, be entirely appropriate—just as the court is surely wise to dismiss certain discretionary appeals as improvidently granted. On the other hand, the unexplained rejection of certified questions may be frustrating not only for the parties in the underlying federal proceedings, but also to the federal judicial officer who agreed that the questions should be certified and who followed (in his or her mind, at least) the Supreme Court's Rules of Practice for doing so.

- **The certified-question process continues to provide litigants with a potential opportunity to forum shop and/or sidestep the routine appellate process.** It is not hard to imagine scenarios in which a party to an action in federal court might seek to certify a case-determinative issue to the Ohio Supreme Court as a means of forum-shopping—hoping for a better outcome from the Supreme Court on the merits of the certified issue than the party felt that he or she was likely to obtain from the assigned federal judge, or even from the federal circuit court on appeal. Both a federal appellate judge (Judge McKeague, of the Sixth Circuit) and an Ohio Supreme Court Justice (Senior Justice Pfeifer) have noted related concerns in the time since Professor Cochran identified this issue in her analysis. In *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, Ohio Supreme Court Case No. 2011-1486, for example, a party to the underlying federal proceeding asked the federal district court to certify questions of Ohio insurance law to the Ohio Supreme Court. The district court declined to do so, and under federal law that determination is subject to an abuse-of-discretion standard of review on appeal. To avoid

that onerous standard of review, though, instead of appealing the denial of the motion to certify, the insurer renewed its request to certify the questions in the Sixth Circuit—a request that a majority of the Sixth Circuit panel granted, over Judge McKeague's strenuous dissent. When the Ohio Supreme Court addressed the merits of the certified questions, Senior Justice Pfeifer agreed with Judge McKeague that "Westfield's revival of the motion to certify at the appellate level was an end run to evade abuse-of-discretion review of the district court's denial of the motion for certification."

- **The Ohio Supreme Court's answers to certified questions can still make for confusing (or, at least, case specific) precedent.** When the Ohio Supreme Court grants a federal judge's request to answer a "determinative" question of Ohio state law, one might expect the Supreme Court's answer to that question to have some significance as precedent in other cases—definitively establishing the law of the state of Ohio to be applied in future lawsuits, be they venued in state court or a federal court sitting in diversity. And make no mistake, that can indeed be the case. Recent examples of answers to certified questions having significant precedential value include the Supreme Court's answers to questions certified about Ohio's Dormant Minerals Act (DMA) in *Chesapeake Exploration, L.L.C. v. Buell*, Ohio Supreme Court Case No. 2014-0067, and *Corban, supra*, Ohio Supreme Court Case No. 2014-0804. The Supreme Court's answers to the questions certified in these cases resolved several other pending Ohio Supreme Court cases—and numerous other cases pending in Ohio trial and appellate courts—presenting the same previously unsettled questions about the DMA. On the other side of the coin, though, are less definitive answers to certified questions where the precedential value of the Supreme Court's opinion is much less apparent. *E.g., Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270 (answering a certified question concerning municipal home-rule authority with a "qualified yes" in light of limitations in the record transmitted by the certifying court); and *DeVries Dairy, L.L.C. v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828 (in a brief, *per curiam* opinion, after being asked whether Ohio recognizes a cause of action for tortious acts in concert, a majority of the Ohio Supreme Court declined to do so "under the circumstances of this case.")

- **The Ohio Supreme Court continues to resolve significant and pressing issues of statewide concern in cases lacking a complete record.** As Professor Cochran explained in her analysis of the Ohio Supreme Court's first 55 certified question cases, the court has on occasion recognized new tort claims in response to certified-questions by "issuing opinions nearly devoid of all fact, law or legal analysis." Cochran, *supra*, at 190, citing *Smith v. Howard Johnson*, 67 Ohio St.3d 28, 1993-Ohio-229. In *Smith*, as Professor Cochran noted, the Supreme Court recognized a tort claim for "interference with or destruction of evidence" in a single, brief paragraph of text, after setting forth the district court's certified questions. Some certified question decisions in the more recent sample period reflect similar concerns. In *DeVries Dairy*, 2012-Ohio-3828, ¶ 2, for example, the Supreme Court declined to recognize a cause of action for tortious acts in concert "under the circumstances of this case," yet the Supreme Court's docket nowhere reflects transmission of all or any part of the underlying district court record, as permitted by the Court's Rules of Practice.[4] And in *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, the Supreme Court (in a split, 4-3 decision) opined on what constitutes a "record"

under the Ohio Public Records Act, R.C. 149.351, even while acknowledging in a footnote that "the record is not before us and the appendix does not contain an exemplar" of the precise type of record at issue in the underlying federal case. More recently, in *Foley v. Univ. of Dayton*, Slip Op. No. 2016-Ohio-7591, the court avoided answering three certified questions concerning the tort of negligent misidentification by opining—again, without the benefit of a complete appellate record—that no such tort exists in Ohio.

As the foregoing discussion shows, Ohio's process for resolving questions certified by federal courts continues to reveal both the promise and pitfalls identified by Professor Cochran in her comprehensive 2003 study of the Ohio Supreme Court's first 55 certified-question cases. Professor Cochran may have retired from active instruction at the University of Dayton School of Law, but her scholarship on the certification process remains keenly relevant today as attorneys and judges continue to seek (and sometimes find) meaningful answers to pressing state-law questions that may (or may not) be determinative of proceedings in federal courts. Any lawyer considering whether to propose that his or her federal judge certify a state-law question to the Ohio Supreme Court, or any lawyer mounting a challenge to such a proposal, would be well served by reviewing Professor Cochran's 2003 analysis of certified-question jurisdiction in the *Journal of Legislation*, Trafford's 2011 publication in *Ohio Lawyer,* as well as some of the more recent certified question data and case law summarized above.

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1. The Ohio Supreme Court's website now makes an analysis of certified-question cases much easier than it was as a practical matter when Professor Cochran conducted her 2003 analysis. The "Advanced Search Options" tab on the online docket now makes it possible to immediately generate a date-sortable list of various case types, including all certified question cases—many of which include .pdf files of most or all docket entries. And oral argument videos in certified-question cases are also now publicly available online, going back to the *Morgan v. Eads* case filed in 2004 (Ohio Supreme Court Case No. 2004-0141).

2. *Chesapeake Exploration, L.L.C. v. Buell*, Ohio Supreme Court Case No. 2014-0067; *Corban v. Chesapeake Exploration, L.L.C.*, Case No. 2014-0804; and *Lutz v. Chesapeake Appalachia, L.L.C.*, Case No. 2015-0545.

3. This average was calculated after eliminating one outlier from the data set -- a certified-question case concerning the Ohio Consumer Sales Practices Act. See *State ex rel. DeWine v. GMAC Mtge., L.L.C.*, 146 Ohio St.3d 393, 2016-Ohio-985. Due to the bankruptcy of a party, and the resulting stay issued by the bankruptcy court, this certified-question case languished on the Ohio Supreme Court's docket for five years before being dismissed as improvidently accepted. The average time-to-resolution was also calculated without accounting for a small number of certified-question cases that were filed within the sample period, but not yet resolved as of this writing.

4. S.Ct.Prac.R. 9.06 provides that the Supreme Court, "sua sponte or on motion of a party may request that copies of all or any portion of the record before the certifying court be transmitted to the Clerk of the Supreme Court."

Additional Resources

***City of Norwood v. Horney* – Much more than Eminent Domain: A forceful affirmation of the independent authority of the Ohio Constitution and the court's power to enforce**

Kathleen Trafford, a partner in Porter Wright's Litigation Department and former chair of its Appellate and Supreme Court Practice Group, wrote the article "*City of Norwood v. Horney* – Much more than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce," published in the *Akron Law Review*. The article is one of several articles in a symposium recognizing Ohio Supreme Court Justice Maureen O'Connor. Read full article

Law reviews: An undervalued resource

Jared Klaus, an attorney in Porter Wright's Litigation Department, authored the article "Law reviews: An undervalued resource," published in the May/June 2012 issue of *Ohio Lawyer*. Read full article

Can you 'DIG' it? The dismissal of appeals as improvidently granted

Brad Hughes, a partner in Porter Wright's Litigation Department and chair of its Appellate and Supreme Court Practice Group, published the article "Can you 'DIG' it? The dismissal of appeals as improvidently granted" in the September/October 2013 issue of *Ohio Lawyer*, the magazine of the Ohio State Bar Association. Read full article

The importance of legislative history in Supreme Court decisions

Kathleen Trafford published the article "The importance of legislative history in Supreme Court decisions" in the September/October 2013 issue of *Ohio Lawyer*, the magazine of the Ohio State Bar Association. Read full article

Strategies for overturning precedent

Tony McClure, a partner in the firm's Naples, Florida office and member of the Appellate and Supreme Court Practice Group, published the article "Strategies for overturning precedent" in the September/October 2012 issue of *Ohio Lawyer* magazine. Read full article