# The less traveled road to the Supreme Court of Ohio

by Kathleen Trafford

Twenty-three years ago, the Supreme Court of Ohio adopted a rule that allows federal courts to certify to the Court for resolution questions of state law that may be determinative of the federal proceeding but for which there is no controlling precedent.[1] Since 1988, federal district courts and the Sixth Circuit Court of Appeals have invoked the certification rule on average four times a year for a total of 105 cases as of September 2011.[2] The Supreme Court has discretion to accept a certified question for resolution or to decline the case. The Court has accepted three-fourths of the cases presented to it. The most common reasons for declining a case are that the question presented is too fact-specific, that there is controlling precedent, or that the question will not be determinative of the action. The Court, however, does not always say why a case is declined.

The questions of law certified to the Supreme Court have been diverse, but a few cases stand out. A significant number of cases to reach the high court through certification involve insurance coverage disputes.[3] Even though such disputes are frequently litigated in federal courts under federal diversity jurisdiction, the outcomes of the cases often depend on questions of state contract law or the applicability of state insurance law, which makes such cases good candidates for the certification process. Several cases involving tort or product liability claims have traveled to the Supreme Court by the certification route.[4] The most common reason why a federal court might certify any case, however, is that an Ohio statute central to the case is unclear or might be unconstitutional. For example, federal courts have used the certification process to obtain definitive rulings on the applicable statute of limitations for certain state causes of action, on the reach of Ohio's anti-discrimination laws, and on the constitutionality of tort reform legislation in Ohio.[5]

Ohio trial lawyers on both the plaintiff side and the defense side should be mindful of the certification process in preparing their case strategy because it offers a unique opportunity to get an issue before the Supreme Court of Ohio early, and it possibly helps to avoid lengthy or duplicative litigation. The tort reform litigation provides a good example. The Ohio General Assembly enacted numerous tort reform laws during the past two decades.[6] Each effort spawned multiple cases in courts throughout Ohio in which plaintiffs suing for personal injuries were met with new defenses that they in turn challenged as violating due process or other constitutional guarantees.[7] Invoking the certification option in *Arbino v. Johnson & Johnson*, for example, meant that the constitutionality of the most recent tort reform legislation was decided in a timely manner by the Supreme Court. Parties across the state were spared the delay, expense and uncertainty of litigating cases seriatim in the courts of common pleas and through the intermediate appellate courts.[8]

While the dust appears settled in the tort reform arena, counsel should consider the certification option in other areas of litigation where it is common to see multiple or repetitive cases sharing unsettled questions of state law. Consumer class actions are an example of the type of litigation in which counsel should evaluate the use of the certification process. The passage of the Class Action Fairness Act of 2005 has resulted in the pursuit of more consumer class actions in federal court even when the claims for relief are based on state common law or statutory law.[9] Consumer class actions often involve unsettled questions relating to the elements of the claim, standing to bring the claim, the applicable statute of limitations, or the available remedies. The certification alternative is a valuable tool in this arena because it means that federal judges can refer such questions to the Supreme Court of Ohio for a timely and definitive resolution that will benefit all courts in Ohio—state as well as federal—and all litigants, be they plaintiffs or defendants. Certification brings closure to unsettled questions of state law and avoids the inconsistent results that can occur when there is no controlling state precedent.[10] ■

## Author bio

Kathleen Trafford chairs Porter Wright's appellate and Supreme Court practice group. She represents private parties in disputes with governmental agencies and also serves as special counsel to a number of state and local governmental agencies. Trafford is a past president of the Columbus Bar Association and chair of the Ohio State Committee of the American College of Trial Lawyers.

## Endnotes

1 The current rule is S.Ct. Prac. R. 18.

2 www.sconet.state.oh.us/Clerk/ecms/resultsbycaseinfo.asp.

3 Id. Fifteen percent of the certified cases accepted for review involved an insurance dispute. See e.g. *Garlikov v.Continental Cas. Co.*, 68 Ohio St.3d 91, 1993-Ohio-106; 79 Ohio St.3d 414, 1997-Ohio-373; *Linko v. Indemn. Ins. Co. of N. Am.*, 90 Ohio St.3d 445, 2000-Ohio-92.

4 See, e.g., *Grover v. Eli Lilly & Co.*, 63 Ohio St.3d 756, 1992-Ohio-45;

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*Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 1998-Ohio-16; *Rolf v. Tri State Motor Transit Co.*, 91 Ohio St.3d 380, 2001-Ohio-44.

5 See, e.g., *Sun Refining and Marketing Company v. Crosby Valve and Gage Co.*, 68 Ohio St.3d 397, 1994-Ohio-369; *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 1999-Ohio-361; *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948.

6 Id. at ¶10-18.

7 *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 514, 1999-Ohio-123 (Pfeifer, J., concurring).

8 Am. Sub. S.B. 80, 125th Gen. A., the tort reform law at issue in *Arbino*, became law on April 7, 2005. Arbino filed suit in federal court in August 2005. The case was certified to the Supreme Court of Ohio on June 23, 2006, and the Court issued its decision upholding the law on Dec. 27, 2007.

9 Class Action Fairness Act of 2005, Public Law 109-2, 119 Stat. 4, 109th Congress (Feb. 18, 2005); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts, Federal Judicial Center*, April 2008.

10 See, e.g. *McKinney v. Bayer Corp.* (N.D. Ohio, 2010), 744 F. Supp.2d 733, 749-752 (noting that split between Southern District and Northern District of Ohio on issue of whether a consumer may bring a claim under the Ohio Deceptive Trade Practices Act warranted certification of the question to the Supreme Court of Ohio).


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