

DELAWARE INVITES CERTIFIED QUESTIONS FROM  
BANKRUPTCY COURTS

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ABSTRACT

*When a thorny new question of Delaware corporate law arises in bankruptcy proceedings, bankruptcy courts must either decide the question or find some way to ask for Delaware's expertise. Recent amendments to the Delaware constitution and court rules provide a mechanism for asking and answering such questions. The Delaware Supreme Court can now respond to state-law questions from bankruptcy courts throughout the United States. This article puts this innovation in the context of bankruptcy certification nationwide and the state's experience with certification. It identifies significant obstacles to wide use of this procedure and proposes ways to make certification an effective tool for resolving questions that arise at the intersection of state corporate law and federal bankruptcy proceedings.*

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I. INTRODUCTION

Think of a cutting-edge legal question of Delaware corporate law. Now imagine that the Delaware Supreme Court has never resolved that question, and it comes up in bankruptcy proceedings.<sup>1</sup> The bankruptcy

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<sup>1</sup>See, e.g., Francis G.X. Pileggi & Jeffrey M. Schlerf, *Duties of Directors and Managers of Distressed Companies: A Review of Cases from Delaware's Supreme Court, Court of Chancery and Bankruptcy Court*, DEL. LAW., Fall 2010, at 17 (identifying issues of

court must either decide the open issue or find some way to ask the state court. Certification is one way to ask.

In October 2013, the Delaware legislature and rule-makers took the final step necessary to allow the Delaware Supreme Court to answer questions certified to it by United States bankruptcy courts throughout the country.<sup>2</sup> Courts and litigants can now ask the Delaware Supreme Court questions of Delaware law that arise in any bankruptcy court proceeding. By broadening the availability of certification, Delaware signaled its willingness to hear questions of Delaware law—especially corporate law—from a wide range of courts and entities.

This article analyzes this innovation, putting it into the context of bankruptcy certification nationwide and the Delaware experience with certification. It identifies two significant obstacles: courts' reluctance to send questions to courts in other states, and the potential for delay. Finally, it proposes ways that courts and legislatures can overcome these obstacles to make certification an effective tool for resolving Delaware corporate law questions that arise in complex bankruptcy proceedings.

## II. HOW CERTIFICATION WORKS

Certification is a formal way for courts from one legal system to send open legal questions to a court in a different system. In the U.S., its most established use is by federal appellate courts, which can send state-law questions to the relevant state's highest court.<sup>3</sup> For example, a federal appellate court in New York might ask New York State's highest court a question of New York law.<sup>4</sup>

To determine whether a particular question may be certified, litigants and courts must consult the relevant state's statutes, rules, or constitutional provisions that define the jurisdiction of the highest state court.<sup>5</sup> These provisions often specify both the court's power to answer and its power to certify to other courts.<sup>6</sup>

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Delaware corporate law that arise in bankruptcy proceedings).

<sup>2</sup>S.B. 10, 147th Gen. Assemb. (Del. 2013).

<sup>3</sup>See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 158-59 (2003) (discussing federal court judges' certification of state-law questions to avoid difficult and time-consuming research and prediction of unresolved state law).

<sup>4</sup>See, e.g., *Penguin Group (USA) Inc. v. American Buddha*, 16 N.Y.3d 295 (N.Y. 2011) (answering a question certified to it by the U.S. Court of Appeals for the Second Circuit about a New York jurisdictional statute).

<sup>5</sup>See, e.g., DEL. CONST. art. IV, § 11, para. 8 (amended 2013); see also DEL. SUPR. CT. R. 41; 17A FED. PRAC. & PROC. JURIS. § 4248 (3d ed.) (discussing how many states have adopted the Uniform Certification of Questions of Law Act while emphasizing that it is

Where authorized by state law, parties can move for certification of an unsettled legal question, as can courts on their own motion.<sup>7</sup> The process is voluntary for both asking and answering courts; courts have discretion whether to certify a question at all and, once certified, courts have discretion not to respond.<sup>8</sup> If the court decides to accept the certified question, the court issues an opinion, which the certifying court then applies in the particular matter and which serves as binding state law on the issue going forward.<sup>9</sup>

### III. DELAWARE EXPANDS CERTIFICATION

In Delaware, Article IV, Section 11(8) of the state constitution and Delaware Supreme Court Rule 41 enable certification.<sup>10</sup> As most recently amended, the Delaware state constitutional provision allows the Delaware Supreme Court to do the following:

To hear and determine questions of law certified to it by other Delaware courts, the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a United States Bankruptcy Court, the United States Securities and Exchange Commission, or the highest appellate court of any other state, where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it.<sup>11</sup>

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necessary to consult individual state statutory schemes before certifying questions of law).

<sup>6</sup>See 17A FED. PRAC. & PROC. JURIS. § 4248 (3d ed.); see also DEL. SUPR. CT. R. 41 (listing who may certify questions of law).

<sup>7</sup>See, e.g., UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] § 2 (1995) ("[A court] of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law . . .").

<sup>8</sup>See, e.g., *Williams v. McGreevey* (*In re Touch Am. Holdings, Inc.*), 401 B.R. 107 (Bankr. D. Del. 2009) (denying party's motion to certify a question to the state court); *Rufino v. U.S.*, 506 N.E.2d 910 (N.Y. 1987) (declining to accept two certified questions from the U.S. Court of Appeals for the Second Circuit); Jona Goldschmidt, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE tbl.4 (1995) (finding that every state's enabling language included an "explicit right of refusal").

<sup>9</sup>See, e.g., *Lewis v. Waletzky*, 31 A.3d 123, 126 (Md. 2011) (discussing the effect that a certified question from the Fourth Circuit will have on an unresolved question of Maryland law).

<sup>10</sup>See DEL. CONST. art. IV, § 11, para. 8 (amended 2013); DEL. SUPR. CT. R. 41.

<sup>11</sup>See DEL. CONST. art. IV, § 11, para. 8 (amended 2013).

The constitutional provision also permits the Delaware Supreme Court to make rules defining "the conditions under which questions may be certified to it" and prescribing "methods of certification," which it has done in Rule 41.<sup>12</sup>

In some ways, Delaware's certification procedure is more expansive than in other states. Because many states model their enabling language on the Uniform Certification of Questions of Law Act ("Uniform Act"), states have several common requirements.<sup>13</sup> For instance, the question must be "dispositive" or "determinative" of the matter and unsettled in state law.<sup>14</sup> State-by-state variation persists, however, and Delaware in particular has adopted a more flexible approach.<sup>15</sup> Delaware's highest court may hear certified questions any time "it appears to the [Delaware] Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it."<sup>16</sup> Moreover, the court rule governing certification does not require that the question be open but, instead, the fact that a legal question is unsettled in state law is listed as one possible reason among many.<sup>17</sup>

Amendments to Delaware's Constitution and Supreme Court Rules have gradually expanded the entities allowed to certify questions to Delaware courts.<sup>18</sup> Until 1993, only Delaware state courts and the U.S. District Court for the District of Delaware could certify questions.<sup>19</sup> In 1993, certification was broadened to reach all Article III federal courts

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<sup>12</sup>See DEL. CONST. art. IV, § 11, para. 8 (amended 2013); DEL. SUPR. CT. R. 41 (detailing the procedure for certification of questions of law).

<sup>13</sup>UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3 (1995), 12 U.L.A. 53, 54 (1995) (showing few variations from the official text in six adopting jurisdictions); UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1 (1995) (showing common language among fourteen adopting jurisdictions); see also GOLDSCHMIDT, *supra* note 8 at 18-20.

<sup>14</sup>Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 189 (2010).

<sup>15</sup>See *id.* at 195.

<sup>16</sup>DEL. CONST. art. IV, § 11, para. 8 (amended 2013).

<sup>17</sup>See DEL. SUPR. CT. R. 41(b):

Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification: (i) Original question of law. The question of law is of first instance in this State; (ii) Conflicting decisions. The decisions of the trial courts are conflicting upon the question of law; (iii) Unsettled question. The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.

<sup>18</sup>See *id.* (Committee Comment to DEL. SUPR. CT. R. 41).

<sup>19</sup>See *Rales v. Blasband*, 634 A.2d 927, 931 n.5 (Del. 1993) (noting recent amendment of the Delaware Constitution).

and other states' highest courts, bringing this aspect of Delaware practice into line with the Uniform Act and other states.<sup>20</sup>

In 2007, the Delaware legislature began to expand the state's certification procedure in innovative ways.<sup>21</sup> Delaware became the first and only state to allow its highest court to hear questions from the Securities and Exchange Commission.<sup>22</sup> The amendment's legislative history was brief, but focused on the effects on corporate law and the fact that more than half of U.S. public companies are incorporated in Delaware.<sup>23</sup>

The expansion continued in 2013, when certification from bankruptcy courts was first explicitly permitted. In July 2013, the Delaware legislature finished amending the state constitution to permit certification from U.S. bankruptcy courts, and, in October 2013, Delaware Supreme Court Rule 41 was revised to accord with this change.<sup>24</sup> The amendments add bankruptcy courts to the list of entities authorized to certify questions but do not limit the type of state-law question that they can certify.<sup>25</sup> In other words, they permit a bankruptcy court to certify *any* state-law question that arises in a bankruptcy proceeding (*e.g.*, homestead exemptions or security interests) and that comports with the rule's broad parameters.

Although the legislative committee reported only that it supported the bill because "it allows for the state of Delaware to interpret its own laws,"<sup>26</sup> the amendment appears to be aimed at corporate law in particular, as with the earlier expansion to the SEC. The addition of bankruptcy courts seems to be designed as an innovative procedure to resolve jurisdictional conflicts arising at the intersection of corporate law

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<sup>20</sup>See S.B. 3, 137th Gen. Assemb. (Del. 1993).

<sup>21</sup>See S.B. 333, 143d Gen. Assemb. (Del. 2006); Winship, *supra* note 14, at 196 (analyzing the Delaware-SEC experience and arguing that federal agencies should be permitted to certify questions to state courts).

<sup>22</sup>See *id.*

<sup>23</sup>See S.B. 333, 143d Gen. Assemb. (Del. 2006) (noting that the SEC was added to the list of entities that can certify questions to the Delaware Supreme Court because Delaware is home to over half of U.S. publicly traded companies).

<sup>24</sup>In Delaware, constitutional amendment requires passage by two thirds of the General Assembly in two consecutive, separately elected sessions. See DEL. CONST. art. XVI, § 1. This two-step process was completed in July 2013. See 78 DEL. LAWS 316 (formerly S.B. 221, 146th Gen. Assem.) (2012); S.B. 10, 147th Gen. Assem. (Del. 2013) (readopting the bill); DEL. S. CT. R. 41(a)(ii); *Order Amending Rule 41 of the Rules of the Delaware Supreme Court* (Oct. 15, 2013), archived at <http://perma.cc/552G-HYA9>.

<sup>25</sup>See *id.*

<sup>26</sup>Del. H.R. Judiciary Comm. Rep., S.B. 221, 146th Gen. Assem. (Del. 2012).

and bankruptcy.<sup>27</sup> Former Justice Jack B. Jacobs of the Delaware Supreme Court (retired on June 24, 2014) has been quoted as supporting such a move, suggesting "[I]t's wonderful that we could develop useful protocol today—like certifying questions (on Delaware corporate law issues) from the bankruptcy courts directly to the Delaware Supreme Court."<sup>28</sup>

#### IV. BANKRUPTCY CERTIFICATION NATIONWIDE

Nationwide, states rarely include bankruptcy courts expressly on the list of courts allowed to certify questions to the highest state court.<sup>29</sup> In making this amendment, Delaware joins only four other states: Alaska, Missouri, and Nevada allow certification directly from bankruptcy courts, and Tennessee allows it but restricts it to bankruptcy courts in Tennessee.<sup>30</sup> Missouri and Alaska state courts have never acted on this authorization, but Nevada and Tennessee state courts have accepted certified questions from bankruptcy courts.<sup>31</sup>

Whether a state has explicit enabling language does not tell the full story of bankruptcy certification, however.<sup>32</sup> Most bankruptcy certification has occurred without language expressly authorizing bankruptcy courts to certify.<sup>33</sup> Courts that have responded to questions from bankruptcy courts have done so based on language that enables certification from district courts or from "any U.S. court" or similar language.<sup>34</sup> Even when certification from the bankruptcy court is not

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<sup>27</sup>See, e.g., *Delaware Bench, Bar Try to Clear Jams at Intersection of State, Federal Law*, 27 NO. 22 WESTLAW J. CORP. OFFICERS & DIR. LIAB. 2, at \*1 (2012) [hereinafter *Delaware Bench*]; see also Lawrence Hamermesh, *Certifying Questions of Law From Bankruptcy Courts to the Delaware Supreme Court*, INST. OF DEL. CORP. & BUS. L. (June 5, 2012), archived at <http://perma.cc/AC8L-DVNR> (noting that state court and bankruptcy court judges discussed this idea at a conference at Widener University School of Law in April 2012).

<sup>28</sup>*Delaware Bench*, *supra* note 27, at \*1.

<sup>29</sup>See Verity Winship, *Certification of State-Law Questions by Bankruptcy Courts*, 87 AM. BANKR. L.J. 483, 497 (2013) (identifying state enabling language and analyzing state-court responses to questions certified during bankruptcy proceedings from the first identified—filed in 1968—to December 31, 2012).

<sup>30</sup>ALASKA R. APP. P. 407(a); MO. ANN. STAT. § 477.004 (1989); NEV. R. APP. P. 5; TENN. SUP. CT. R. 23, § 1; see also *Order Amending the Nev. Rules of Appellate Procedure* (Dec. 31, 2009) (noting that Nevada made this amendment effective July 1, 2009).

<sup>31</sup>See Winship, *supra* note 29, at 497.

<sup>32</sup>See *id.* at 495-97, 516-24 tbl. 2.

<sup>33</sup>See *id.*

<sup>34</sup>See, e.g., *In re W. Side Prop. Assocs.*, 13 P.3d 168, 170 (Utah 2000) (accepting a question from a bankruptcy court based on its power to answer questions from any federal court); see also Winship, *supra* note 29, at 513-15 tbl.1 (listing all of the enabling language

permitted under state law, issues that initially arose in bankruptcy proceedings may be certified by federal appellate courts during a bankruptcy appeal.<sup>35</sup>

#### V. MAKING BANKRUPTCY CERTIFICATION WORK IN DELAWARE

Certification is not a magic bullet. Delaware can open its court but cannot control whether other courts or entities certify any questions. Certification is voluntary, even in the face of a question that would qualify for certification under the various state rules.<sup>36</sup> To make bankruptcy certification work in Delaware, courts and legislators have to address two significant hurdles to establishing a widely used certification procedure—the traditional reluctance to certify questions across state borders and the concern that certification merely causes delay. Publicity to courts and to litigants, and a commitment to speedy resolution play key roles.

Courts have historically been reluctant to certify questions to courts in other states or, in the context of federal appellate courts, to courts in states outside the federal judicial circuit.<sup>37</sup> Early supporters of certification hoped that it could help courts that had to apply non-domestic law, but those early ambitions have not been fulfilled.<sup>38</sup> Although no one has undertaken a systematic study of all uses of certification, studies focused on particular states, court systems, or regions indicate that certification is infrequently used to ask questions across state lines.<sup>39</sup> For instance, despite a jurisdictional grant that allows it to consider certified questions from "any United States Court of Appeals,"<sup>40</sup> of the 45 questions certified to New York's highest state court

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with a focus on the language used to support bankruptcy certification).

<sup>35</sup>See, e.g., *Reiber v. GMAC, LLC (In re Peaslee)*, 913 N.E.3d 387, 388-89 (N.Y. 2009) (answering a question that arose during initial bankruptcy proceedings and that was certified when on appeal); see also *Winship*, *supra* note 29, at 516-24 tbl.2 (providing a comprehensive list of cases answering questions certified during bankruptcy proceedings).

<sup>36</sup>See *Winship*, *supra* note 14, at 187.

<sup>37</sup>See John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 414 (1988) (analyzing cross-jurisdictional certification and identifying no state-to-state certifications from 1978 to 1987).

<sup>38</sup>See *id.* at 431 & n.94; see also UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 48 (1995) ("[State-to-state certification] is not utilized as frequently as it could and should be.").

<sup>39</sup>See Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 397 (2000) (analyzing certifications to New York's highest state court from 1986 to Oct. 13, 2000).

<sup>40</sup>N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27 (2008).

from 1986 to 2000, all but one were from the U.S. Court of Appeals for the Second Circuit.<sup>41</sup> Suggestively, the description of certification in the New York judiciary's annual report focuses on its in-state uses, describing it as "an additional aid to comity and judicial economy" that may be used "to address issues of mutual concern" within the state.<sup>42</sup> Other regional studies reflect similar patterns.<sup>43</sup> In the context of questions certified during bankruptcy proceedings nationwide, only 3% of state-court opinions responding to questions certified in initial bankruptcy proceedings crossed state borders.<sup>44</sup>

Nonetheless, Delaware's track record with cross-border certifications suggests that it has a good chance of attracting incoming certified questions from courts in other states.<sup>45</sup> From 1985 to the end of 2013, the Delaware Supreme Court answered approximately twenty-six certified questions.<sup>46</sup> Of these, 38% were from outside of Delaware or, in the case of federal appeals courts, outside of the Third Circuit. The majority of certifications were from federal district courts, predominately the U.S. District of Delaware, but questions also came from the Southern District of Florida, Southern District of New York, and Eastern District of Pennsylvania.<sup>47</sup> The courts of appeals were similarly distributed in the

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<sup>41</sup>See Kaye & Weissman, *supra* note 39, at 373, 397 & n.143.

<sup>42</sup>STUART M. COHEN, 2009 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 9 (2010), *archived at* <http://perma.cc/QN9A-XU2F>.

<sup>43</sup>See Cochran, *supra* note 3, at 170 (noting that, of the fifty-five questions sent to the Ohio Supreme Court from 1988 to 2001, all but three were from Ohio district court judges or the Sixth Circuit); *see also* Courts Which May Certify Question to an Oklahoma Appellate Court, 6 OKLA. PRAC., APPELLATE PRACTICE § 23:6 (2013) (suggesting most certifications to the Oklahoma Supreme Court came from in-state federal courts or the Tenth Circuit Court of Appeals, with only occasional certifications from federal courts in other jurisdictions).

<sup>44</sup>See Winship, *supra* note 29, at 503-04. The percentage of out-of-state or out-of-circuit certifications was higher (7%) when courts responded to bankruptcy appellate panels or federal courts of appeal. *Id.*

<sup>45</sup>See *infra* Figure 1.

<sup>46</sup>To identify the responses to certified questions, a search was conducted in the Delaware Supreme Court cases database on WestlawNext using the search terms: "certif! of question" "certif! question," limiting the search to cases filed before December 31, 2013. *See infra* Exhibit A. The search was modeled on the search I conducted for *Certification of State-Law Questions by Bankruptcy Courts* and one used by the American Judicature Society to identify responses to certified questions. *See* Goldschmidt, *supra* note 8, at n.101. The search identified 191 opinions. After eliminating the questions certified by other Delaware state courts (not the type of certification at issue here) and outgoing certifications by the Delaware court, twenty-five opinions were left. An additional case was identified through other sources. *See* Lawyers Title Ins. Corp. v. Wolhar & Gill, 575 A.2d 1148 (Del. 1990).

<sup>47</sup>See *infra* Exhibit A. Overall, 17 of 26 were from federal district courts. When only considering decisions since the certification enabling language was broadened, effective April



sense that the most were from the Third Circuit, and the rest were scattered among other appeals courts (Second, Seventh, Ninth, and Eleventh Circuits.)<sup>48</sup>

Figure 1: Delaware Cross-Border Certifications

<b>Geography</b>	<b>Certifying Court or Agency</b>	<b>% of Total (26) cases</b>
In-State or In-Circuit		62%
	U.S. District Court for the District of Delaware	50%
	U.S. Court of Appeals for the Third Circuit	12%
Out-of-State or Out-of-Circuit		38%
	U.S. District Courts (non-Delaware)	15%
	U.S. Courts of Appeals (non-3d Circuit)	15%
	SEC	4%
	Other States' (& D.C.) Highest Courts	4%
<b>Grand Total</b>		<b>100%</b>

The percentage of cross-border certifications may relate to Delaware's corporate law expertise and the fact that the internal affairs doctrine obliges out-of-state courts to apply Delaware corporate law to corporate governance issues concerning Delaware corporations.<sup>49</sup> Approximately 35% (nine of twenty-six) of these state-court opinions responded to corporate law questions. Of these, 89% answered questions from courts in other states or other federal judicial circuits, although the raw numbers obviously are quite low. In contrast, in non-corporate subject areas, only 12% of certifications were from courts in other states or federal judicial circuits.

One response to the problem of attracting certification is simply publicity. This cannot force unwilling courts to certify, but it eliminates

12, 1993, 12 of 21 responded-to-questions were certified by federal district courts.

<sup>48</sup> See *infra* Figure 1 & Exhibit A.

<sup>49</sup> *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971).

uncertainty or lack of awareness of the process. Delaware has already taken the first step by amending the state constitutional provision and rules. Delaware's express inclusion of bankruptcy courts strongly signals its interest in deciding state-law issues that arise in bankruptcy.<sup>50</sup> Although the Delaware Supreme Court does not seem to have done so, the court could likely have accepted certified questions from bankruptcy courts before the amendments, even absent express authorization. Although the prior language did not mention bankruptcy courts explicitly, it might reasonably have been understood to include them because, by statute, the bankruptcy court is a "unit of the U.S. district court."<sup>51</sup> Indeed, other state courts with similar language in their jurisdictional statutes have answered questions from bankruptcy courts on that basis.<sup>52</sup> As noted above, litigants and judges who want to certify a question must first look to the state enabling language to see whether the particular state court accepts that kind of question from that kind of court.<sup>53</sup> The enabling language thus serves an important gatekeeping function. Delaware's express inclusion of bankruptcy courts eliminates any doubt about whether bankruptcy courts fit within the language of the relevant constitutional provision and rule. Moreover, by specifically enabling certification by bankruptcy courts, the state invites certification, overcoming more general objections that certification is a one-sided imposition on state courts, often of the most tedious questions.<sup>54</sup>

Encouraging attorneys to make motions asking the judge to certify questions may be another way to support the use of certification, as Justice Henry duPont Ridgely of the Delaware Supreme Court has suggested.<sup>55</sup> Delaware courts may urge counsel to move to certify

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<sup>50</sup>*Delaware Bench*, *supra* note 27, at \*1.

<sup>51</sup>*See* 28 U.S.C. § 151 (2012) (calling bankruptcy courts a "unit of the district court" and bankruptcy judges "judicial officer(s) of the district court").

<sup>52</sup>*See, e.g., In re Price Waterhouse Ltd.*, 46 P.3d 408, 409 (Ariz. 2002) (basing the power to accept a bankruptcy court's question on its relationship to the district court); *Winship*, *supra* note 29, at 503-04.

<sup>53</sup>*See supra* note 6 and accompanying text.

<sup>54</sup>*See, e.g., Wendy L. Watson et al., Federal Court Certification of State-Law Questions: Active Judicial Federalism*, 28 JUST. SYS. J. 98, 103 (2007) ("[F]ederal courts may use certification as a means to impress state courts into service on the more tedious legal issues that come before them."); *see also* Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 128-31 (2009) (asserting that federal judges push these questions to the state courts because of "boredom, not comity").

<sup>55</sup>Hon. Henry duPont Ridgely, *Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law*, 63 SMU L. REV. 1127, 1133 (2010) ("[I]f another jurisdiction is faced with a significant and unanswered question of Delaware corporation law, it makes sense for counsel to suggest consideration of a

questions of Delaware law that arise in other jurisdictions.<sup>56</sup> This approach may be most effective when defense counsel are repeat Delaware players or represent defendants in multijurisdictional litigation.<sup>57</sup>

It is worth noting that one approach to encouraging certification across state lines is not available in the bankruptcy context. The Delaware Supreme Court has sometimes certified questions to other states' highest courts, especially to New York.<sup>58</sup> This outbound certification may signal an interest in reciprocity. State courts, however, have no ability to certify to any federal court, whether bankruptcy or not, under the enabling state statutes and rules.<sup>59</sup> Moreover, in the bankruptcy context in particular, it is difficult to imagine a certifiable question that would arise in state court.

Besides a reluctance to certify across borders, the other significant barrier to certification is the concern that it causes delay.<sup>60</sup> Based on limited available information, the amount of time other state courts have taken to respond to questions certified in initial bankruptcy proceedings has varied widely, with a mean amount of time of about a year between the date of certification and the issuance of a state-court opinion.<sup>61</sup> The response time (days between the date of certification and the issuance of a state-court answer) was identified for 19 of the 26 Delaware opinions. Response times ranged from 20 to 427 days, with a median of 195 and an average of 215. Before it issued an opinion, the Delaware Supreme Court often notified the certifying court that it had accepted the

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certification of the question to the Delaware Supreme Court. Otherwise, it is a missed opportunity.").

<sup>56</sup>See *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at \*4 n.12 (Del. Ch. Mar. 29, 2011).

<sup>57</sup>See *id.* ("[Regarding multiforum litigation,] [m]y personal preferred approach . . . is for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward.").

<sup>58</sup>See *Quadrant Structured Products Co., Ltd. v. Vertin*, 2013 WL 5962813, at \*1 (Del. Nov. 7, 2013) ("We have concluded that a resolution of the appeal before us depends on dispositive and unsettled questions of New York law that, in our view, are properly answered in the first instance by the New York Court of Appeals."); see also *Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers, LLP*, 998 A.2d 280, 280 (Del. 2010).

<sup>59</sup>This asymmetry is the basis of some criticisms of certification. See Hon. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 683 (1995) ("[Certification] apes federalism, but does not advance it.").

<sup>60</sup>See Goldschmidt, *supra* note 8, at 54 (noting that delay was the problem most frequently identified by federal judges who responded to a questionnaire about certification); *Old Cutters, Inc. v. City of Hailey (In re Old Cutters, Inc.)*, 488 B.R. 130, 143 n.14 (Bankr. D. Idaho 2012) (declining to certify a question because the case required "prompt resolution").

<sup>61</sup>See *Winship*, *supra* note 29, at 505.

question.<sup>62</sup> The days between the date of certification and the date the court gave notice of acceptance was identified for 8 of the 26 opinions. The range was from 4 to 83 days, with a median of 12 and an average of 21. It is worth noting that this does not reflect the time to rejection, which was not captured in this body of cases.

Commitment to speed may be an important factor in making Delaware's innovations in certification work. There is precedent for this: the Delaware court acted quickly in response to a prior expansion of certification. As mentioned above, Delaware is unusual in allowing the SEC to certify questions.<sup>63</sup> In the one case in which the SEC certified a question, the Delaware Supreme Court issued its opinion approximately twenty days after the question was certified.<sup>64</sup>

## VI. CONCLUSION

Strong language from the U.S. Supreme Court that certification promotes "cooperative judicial federalism" pushed states to adopt procedures and establish the legal infrastructure that still supports certification.<sup>65</sup> In Delaware, the state judiciary and legislature have signaled their willingness to open the state's courts to questions of Delaware law and, in particular, Delaware corporate law, wherever they arise. Certification has its limitations. Not only is it voluntary for both asking and answering courts, but also low raw numbers characterize certification's history, and it is hard to evaluate how well it works because of the difficulties of determining the optimal level. Nonetheless, certification is another way to access Delaware courts to resolve issues of Delaware corporate law, and provides an approach to resolving complex disputes that span different court systems. Delaware's recent enabling of bankruptcy certification makes the mechanism an increasingly available and flexible tool for counsel and for courts.

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<sup>62</sup>See, e.g., *CA, Inc. v. AFSCME Emp. Pension Plan*, 953 A.2d 227, 229 (Del. 2008); see also *Winship*, *supra* note 29, at 505 n.108 (mentioning that Connecticut has a statute requiring its Supreme Court to notify the certifying court whether it will accept or reject a question).

<sup>63</sup>See *supra* notes 22-24 & accompanying text.

<sup>64</sup>See *CA, Inc.*, 953 A.2d at 230-31 (Del. 2008) (explaining that the corporation's short time-frame for filing proxy materials necessitated the urgent acceptance and decision of the certified questions needed for those proxy materials).

<sup>65</sup>*Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) ("[Certification] save[s] time, energy, and resources and helps build a cooperative judicial federalism.").

Exhibit A: Delaware Supreme Court Responses  
to Certified Questions (to Dec. 31, 2013)

<b>Certifying Court or Agency</b>	<b>Answering Opinion (Delaware Supreme Court)</b>	<b>Corporate</b>	<b>Out-of-state or circuit</b>
9th Cir.	<i>Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.</i> , 75 A.3d 888 (Del. 2013)	X	X
D. Del.	<i>PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank and Trust Co.</i> , 28 A.3d 1059 (Del. 2011)		
D. Del.	<i>Lincoln Nat. Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust</i> , 28 A.3d 436 (Del. 2011)		
S.D.N.Y.	<i>Lambrecht v. O'Neal</i> , 3 A.3d 277 (Del. 2010)	X	X
S.D.N.Y.	<i>A.W. Fin. Serv.s, S.A. v. Empire Res.s, Inc.</i> , 981 A.2d 1114 (Del. 2009)	X	X
SEC	<i>CA, Inc. v. AFSCME Emp.s Pension Plan</i> , 953 A.2d 227 (Del. 2008)	X	X
D. Del.	<i>Waters v. United States</i> , 787 A.2d 71 (Del. 2001)		
11th Cir.	<i>Duncan v. Theratx, Inc.</i> , 775 A.2d 1019 (Del. 2001)	X	X
S.D. Fla.	<i>E.I. DuPont de Nemours and Co. v. Florida Evergreen Foliage</i> , 744 A.2d 457 (Del. 1999)		X

3d Cir.	<i>Kerns v. Dukes</i> , 707 A.2d 363 (Del. 1998)		
D. Del.	<i>Continental Ins. Co. v. Burr</i> , 706 A.2d 499 (Del. 1998)		
D. Del.	<i>Potter v. Peirce</i> , 688 A.2d 894 (Del. 1997)		
3d Cir.	<i>Penn Mut. Life Ins. Co. v. Oglesby</i> , 695 A.2d 1146 (Del. 1997)		
3d Cir.	<i>Konstantopoulos v. Westvaco Corp.</i> , 690 A.2d 936 (Del. 1996)		
7th Cir.	<i>Riblet Products Corp. v. Nagy</i> , 683 A.2d 37 (Del. 1996)	X	X
E.D. Pa.	<i>Hoesch v. Nat'l R.R. Passenger Corp. (Amtrak)</i> , 677 A.2d 29 (Del. 1996)		X
D. Del.	<i>United States v. Anderson</i> , 669 A.2d 73 (Del. 1995)		
2d. Cir.	<i>Shaw v. Agri-Mark, Inc.</i> , 663 A.2d 464 (Del. 1995)	X	X
D. Del.	<i>United States v. Cumberbatch</i> , 647 A.2d 1098 (Del. 1994)		
D.C.	<i>Farahpour v. DCX, Inc.</i> , 635 A.2d 894 (Del. 1994)	X	X
D. Del.	<i>Rales v. Blasband</i> , 634 A.2d 927 (Del. 1993)	X	
D. Del.	<i>Wallace v. Archambo</i> , 619 A.2d 911 (Del. 1992)		

D. Del.	<i>Miller v. Spicer</i> , 602 A.2d 65 (Del. 1991)		
D. Del.	<i>Lawyers Title Ins. Corp. v. Wolhar &amp; Gill, P.A.</i> , 575 A.2d 1148 (Del. 1990)		
D. Del.	<i>Richardson v. Wile</i> , 535 A.2d 1346 (Del. 1988)		
D. Del.	<i>Fiat Motors of N. Am., Inc., v. Mayor &amp; Council of City of Wilmington</i> , 498 A.2d 1062 (Del. 1985)		

