BRIEFLY

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'Let's certify it!'

Lots of trial lawyers and lots of trial judges don't mind kicking the can down the road

By Eric Magnuson and Lisa Lodin Peralta

So you have a really tough legal issue in your case. Neither the lawyers nor the judge quite know what to do with it. Someone comes up with the brilliant idea: "Let's certify that for appeal." Oh, if it were only that easy. While the appellate rules of many courts provide some mechanism for certification, an interlocutory appeal of any kind is an exception to the general rule of only one appeal per case, which comes at the end of all proceedings. As such, parties seeking to avail themselves of an early appeal may find the path more challenging than it would appear.

The starting point in any quest for certification is to identify the rule of procedure or statute that authorizes certification. Generally, these fall into two camps — what might be called vertical certification, that is certification from the trial court to an appellate court in the same jurisdiction and justice system, and what might be called horizontal certification, that is certification from one court system to another. The latter often involves certification from a federal court to a state court for guidance on an undecided point of state law. The former, which is more common, involves certification of an important legal issue from the trial court to the appellate court, on the theory that the issue is going to result in an appeal anyway, and the parties are probably better off knowing the answer early in the case than at the end.

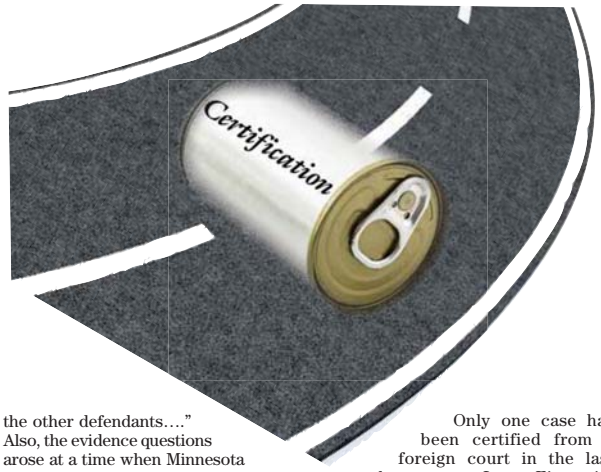
In Minnesota state trial courts, parties in civil cases can appeal to the Court of Appeals in limited circumstances if the trial court "certifies that the question presented is important and doubtful." Minn. R. Civ. App. P. 103.03(i). Under the rule, certification is limited to circumstances where the trial court has denied a motion to dismiss for failure to state a claim, or when the court denies summary judgment. Criminal cases have a separate procedural rule, Minn. R. Crim. P. 28.03, governing certification under the same standard. But there, the criminal defendant must specifically consent to the certification.

The question certified to the appellate court under Rule 103.01(i) cannot be unanswered or vague — it must actually be ruled on by the district court. *See Jane Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 41 (Minn. App. 2014) (dismissing appeal where, after denial of summary judgment, defendant sought and received district court's certification of questions on newly raised issues upon which district court did not rule). Appellate courts review decisions already made. The district court rules on the law, and if the answer to the legal question is important and doubtful (the court might be wrong), then better to find out sooner rather than later. For example, the court may deny a motion for summary judgment because it is unclear as to the controlling law, even if the facts are not disputed. Certification is not, however, appropriate when summary judgment is denied because there are unresolved fact issues. The certified question must be one of law, and not fact. *See State v. Knoch*, 781 N.W.2d 170, 176 (Minn. App. 2010) (stating purpose of certification procedure is to obtain answer on question of law, and mixed question of fact and law is not appropriate).

Like beauty, importance and doubt are in the mind of the beholder. What may seem important and doubtful to you, especially because it would be a lot more convenient to have that answer to that burning question now rather than later, is not necessarily going to be seen as "important and doubtful" by the appellate courts. It is a two-part test, and both parts must be met.

Minnesota appellate courts are not always receptive to certified questions. In *Emme v. C.O.M.B., Inc*, 418 N.W.2d 176 (Minn. 1988), the Supreme Court reviewed the history of certification and then declined to accept a certification, saying in no uncertain terms that there are limits on the rule. "[N]ot every vexing question is important and doubtful. We have recently noted that trial courts appear to be focusing more on the 'doubtful' aspects of the question than on the 'important' aspects. . . . A question is "doubtful" only if there is no controlling precedent. . . . In addition to being 'doubtful,' the question must be 'important.' Importance depends in large measure on a weighing of probabilities. Importance increases with the probability that resolution of the question will have statewide impact and the probability of reversal." The Court of Appeals has been similarly strict in its application of the rule. *See also Jane Doe 175*, 842 N.W.2d at 42-47 (refusing to accept certified questions for a variety of reasons.)

But certification is important and useful in the right case. *State v. Jacobson* is an example of an "important and doubtful" criminal case on which the trial lawyers obtained certification and won reversal, which was then affirmed by the Supreme Court. 681 N.W.2d 398 (Minn. App. 2004), *aff'd by* 697 N.W.2d 610 (Minn. 2005). Jacobson was the owner of a controversial strip club in Coates. When the county received 93 voter change-of-address cards listing the strip club as the voters' place of residence, Jacobson and several others were charged with conspiracy to commit voter fraud. A number of cases were stayed pending Jacobson's trial, where he sought to present evidence that his personal attorney had advised him that the scheme to vote out some local officials was legal. The district court excluded the evidence but certified two questions. The appellate court agreed that the ruling would have "an immediate and substantial effect on the other defendants…." Also, the evidence questions arose at a time when Minnesota had not expressly recognized the defense of reliance on the advice of counsel. You can see: important, and doubtful.



In federal court, a judge can only certify an order that involves (1) a controlling issue of law; (2) where there is a substantial ground for difference of opinion on the issue; and (3) the appeal will materially advance termination of the litigation. 28 U.S.C. § 1292(b). But as in state court, certification by the trial court is no guarantee that the appellate court will see the case in the same light. Upon application, the Court of Appeals having jurisdiction may, "in its discretion," permit an appeal to be taken from an order. *Id.* Which means it may deny leave to appeal for any reason – such as docket congestion or the policy against piecemeal appeals. The result is the federal appellate courts routinely reject certification appeals. *See, e.g., EEOC v. Old Dominion Freight Line, Inc.*, No. 13-8016, Order (8th Cir. July 8, 2013) (denying order certified by district court in 2013 U.S. Dist. LEXIS 88352, 28 Am. Disabilities Cas. (BNA) 161 (W.D. Ark. June 24, 2013)).

The Minnesota Supreme Court can of course answer a question of law certified to it by a foreign court. Minn. Stat. § 480.065, subd. 3. Most commonly the questions come from a federal court. These certified questions are sent to Minnesota's highest court if the answer may be determinative of an issue in pending litigation in the certifying court, and there is no controlling appellate decision, constitutional provision, or statute of this state. *Id.*

While there are many courts from which questions could come, certified questions to the Minnesota Supreme Court are not frequent. Since 2000, there have been only 16 filings, according to Cynthia Lehr, Chief Attorney at the Minnesota Court of Appeals. Although the Minnesota Supreme Court could decline to answer a certified question, it issued opinions in 15 of the 16 filed cases – and the exception was a case where the certified question became moot because the case settled.

Only one case has been certified from a foreign court in the last three years: *Lyon Financial Svcs. Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539 (Minn. 2014). *Lyon Financial is* a case that highlights another twist in presenting a certified question to an appellate court – the receiving court is not stuck with the question presented, but may reformulate the question. In *Lyon Financial*, the 7th Circuit had certified four questions to the Minnesota Supreme Court. The Supreme Court chose to "deviate from the 7th Circuit's articulation of the certified questions so that our analysis more closely tracks the fundamental issue raised in the case." *Id.* at 542. Or, in other words, it more closely tracked the *one issue* that the Minnesota Supreme Court believed was the fundamental issue – regardless of what the parties thought in the trial court, or what the certifying court thought was important. The Rolling Stones were right – you can't always get what you want, but sometimes, you get what you need.

Lots of trial lawyers and lots of trial judges don't mind kicking the can down the road when it comes to a tough legal issue. "Let's certify it (and let somebody else decide the tough question)" is sometimes an attractive alternative to a long trial with a very real prospect of having to do everything over because of a legal ruling gone bad. However, while certification is significantly more probable than buying the winning lottery ticket, it never has been, and never will be, a sure bet.

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