

CERTIFICATION TO THE STATE SUPREME COURTS IN THE TENTH CIRCUIT

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ABSTRACT

In this piece, the authors examine the rules that apply to federal court certification of questions to state supreme courts in the six states that make up the Tenth Circuit Court of Appeals. In addition to comparing the different rules applied by these states, the Article considers the factors that influence courts' decisions whether to certify questions as well as the concerns that might motivate parties to seek or decline to seek certification. Finally, the Article discusses particular case types—tort and insurance cases—that make up the majority of certified questions and discusses why these cases are so frequently certified to state high courts.

TABLE OF CONTENTS

INTRODUCTION.....	255
I. CERTIFICATION RULES IN THE TENTH CIRCUIT STATES	257
II. RULES, STANDARDS, AND CONCERNS THAT SHAPE DECISIONS	
WHETHER TO CERTIFY IN THE TENTH CIRCUIT	258
III. THE KINDS OF CASES THAT SEEM TO MERIT CERTIFICATION	267
CONCLUSION	270

INTRODUCTION

The Supreme Court famously explained almost a century ago that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”¹ And neither the federal legislature nor the federal courts have the power to declare what state law is.² But when federal courts hear cases pursuant to their diversity jurisdiction, they are required to apply state law. If the state’s highest court has not addressed the issue presented, the federal court is called upon to determine what decision the state supreme court would make if faced with the same facts and issue.³ In addition, in certain cases where there is original non-diversity federal jurisdiction, a

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1. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

2. *Id.*

3. Farmers All. Mut. Ins. Co. v. Bakke, 619 F.2d 885, 888 (10th Cir. 1980).

federal court nevertheless may be called upon to grapple with a state law issue embedded in the underlying federal lawsuit.⁴ Moreover, federal criminal cases—especially in the sentencing context—occasionally rely upon an interpretation or application of state law or state criminal penalties.⁵ In these various cases, sometimes what the state law is will be clear, but not always. Every state except for North Carolina has now created a path for federal courts faced with an unclear question of state law to “certify” that question to the state’s highest court, asking that court to clarify the law.⁶

The benefits of the practice of certifying a question of law to a state supreme court are widely recognized.⁷ Certification promotes comity between federal and state courts. It gives state courts the chance to address and advance issues that may not otherwise come before them. It also promotes uniform approaches to state law, which diminishes the need for federal judges to try to predict developments in state law, potentially reducing forum shopping in a state with multiple federal district courts.⁸

This Article explores how the certification of questions to state supreme courts works in the Tenth Circuit, focusing primarily on cases that have been certified in the past decade. We begin with a brief explanation of the different certification rules applicable in the six states that make up the Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. We then consider the rules that authorize federal courts to certify questions, the factors that might motivate the court or the parties in a case to request certification, and some concerns that might counsel against certification. Finally, we examine the questions that the Tenth

4. For example, *Imel v. United States*, 523 F.2d 853, 853, 857 (10th Cir. 1975) was a suit brought in federal district court seeking a refund of federal taxes. The court was required to decide whether a transfer of appreciated property pursuant to a court approved divorce settlement was a non-taxable recognition of common ownership resembling a division between co-owners under Colorado law. Another example of state court issues regularly embedded in federal lawsuit is the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), which allows for claims against the United States for personal injury or death, “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” In such a case, the federal court might be called upon to predict whether a state would recognize a new cause of action. *See, e.g., Pino v. United States*, 507 F.3d 1233, 1235 (10th Cir. 2007) (explaining that case presented question under the FTCA whether the State of Oklahoma would recognize a wrongful death action for a stillborn and admittedly nonviable fetus).

5. *See, e.g., Godinez v. Williams*, No. 22-1194, 2023 WL 6970122, at *2, *4 (10th Cir. Oct. 20, 2023) (where criminal defendant’s Eighth Amendment habeas petition depended on interpretation of Colorado’s Sexual Offender Lifetime Supervision Act).

6. Hon. Kenneth F. Ripple & Kari Anne Gallagher, *Certification Comes of Age: Reflections on the Past, Present, and Future of Cooperative Judicial Federalism*, 95 NOTRE DAME L. REV. 1927, 1930 (2020) (citation omitted) (“In 1976, only fifteen states allowed certification . . . Today, every state except for North Carolina allows certifications.”).

7. *See* JASON A. CANTONE & CARLY GIFFIN, FED. JUD. CTR., *CERTIFICATION OF QUESTIONS OF STATE LAW IN THE U.S. COURTS OF APPEALS FOR THE THIRD, SIXTH, AND NINTH CIRCUITS* (2010-2018), at 1, 2 (2020).

8. *Id.* at 2.

Circuit states have answered after certification and offer some observations about patterns among these cases.

I. CERTIFICATION RULES IN THE TENTH CIRCUIT STATES

Each of the six states that make up the Tenth Circuit has a slightly different rule for what kinds of cases can be certified and from which courts it will accept certified questions.

Colorado's supreme court, for example, will accept questions certified from any federal court when there is a question that might be determinative in the federal matter and "it appears to the certifying court that there is no controlling precedent in the decisions of the [Colorado] supreme court."⁹ Utah's certification rule is nearly identical to that of Colorado.¹⁰

Other states have more expansive certification rules. In Wyoming, for example, although the rule is similar with regard to federal certification, the supreme court also permits certification from its own lower courts and state administrative agencies.¹¹ In Kansas, the supreme court is statutorily authorized to decide questions certified by federal courts or by the appellate courts of other states.¹² However, questions should only be certified where there is no controlling precedent by either the supreme court or the court of appeals.¹³

Both New Mexico and Oklahoma have laws that provide that the states' highest courts can accept certified questions from federal courts, appellate courts of other states, tribes, Canada, a Canadian province or territory, and Mexico or a Mexican State so long as there is no controlling appellate decision, constitutional provision, or state statute.¹⁴

More expansive certification rules have not translated into a significantly higher number of cases answering certified questions. In our review of cases from 2015 to 2025 in these six states, we found that Kansas accepted two cases that came through their certification process; New Mexico accepted seven; Wyoming accepted eight; Colorado accepted fourteen; Oklahoma accepted fourteen; and Utah accepted seventeen.¹⁵

9. COLO. R. APP. P. 21.1(a).

10. UTAH R. APP. P. 41(a).

11. WYO. STAT. ANN. § 1-13-106 (West 2025); WYO. R. APP. P. 11.01.

12. KAN. STAT. ANN. § 60-3201 (West 2025).

13. *Id.*

14. N.M. STAT. ANN. § 39-7-4 (West 2025); OKLA. STAT. ANN. tit. 20, § 1602 (West 2025). These statutes are modeled after the *Uniform Certification of Questions of Law Act* § 2, NAT'L CONF. OF COMM'RS ON UNIF. STATE L. (1995).

15. Of the seventeen cases that the Utah Supreme Court accepted, it revoked certification in two. See *Kiley v. Hunt*, 427 P.3d 1165, 1168 (Utah 2018); *Endow v. Utah Transit Auth.*, No. 20140024-SC, 2015 WL 4394047, at *1–2 (Utah July 17, 2015).

And with only one exception, the certified cases taken by the six states over the past decade have come from federal courts.¹⁶

II. RULES, STANDARDS, AND CONCERNS THAT SHAPE DECISIONS WHETHER TO CERTIFY IN THE TENTH CIRCUIT

Of course, before a state supreme court can consider whether to accept certification, some other court must decide that there is an unsettled question of state law that would be determinative in a matter before that court and then follow whatever relevant process within its own rules to certify.

In the Tenth Circuit, Tenth Circuit Local Rule 27.4(A) governs the certification of state law questions. It provides that, “[w]hen state law permits, this court may: (1) certify a question arising under state law to that state’s highest court according to that court’s rules; and (2) abate the case in this court to await the state court’s decision of the certified question.”¹⁷ “The court may certify on its own or on a party’s motion.”¹⁸ Any motion should be filed at the same time as, but separately from, the moving party’s brief on the merits.¹⁹ Any “response may be filed at the same time as the answer or reply brief or within [fourteen] days after the motion is served.”²⁰ Any motion to certify a question of state law to a state’s highest court “is ordinarily referred to the panel of judges assigned to decide the appeal on the merits and is considered at the same time as the arguments on the merits.”²¹

This is the sum total of the rule. There are no explicit Tenth Circuit rule-based standards for certification of a question of state law to a state supreme court. But following the United States Supreme Court’s direction in *Lehman Bros. v. Schein*,²² the Tenth Circuit has, in its written decisions, identified various criteria that it uses to decide whether to certify a question of state law to a state supreme court.

Lehman Bros. involved a complicated shareholders’ derivative lawsuit, filed on the basis of diversity jurisdiction in the United States District Court for the Southern District of New York.²³ Using New York’s choice-of-law rules, the district court concluded that Florida law would

16. The one exception is a case in which the Wyoming Supreme Court answered a question certified to it by one of the state’s district courts. See *Skoric v. Park Cnty Cir. Ct.*, 532 P.3d 667, 670–71 (Wyo. 2023).

17. 10TH CIR. R. 27.4(A).

18. *Id.* at 27.4(B).

19. *Id.* at 27.4(C).

20. *Id.* at 27.4(D).

21. *Id.* at 27.4(E).

22. 416 U.S. 386 (1974).

23. *Id.* at 387. The *Lehman Bros.* case was not the first case in which the Supreme Court had encouraged the use of certification. A brief history of certification, including some other early Supreme Court mentions of the tool is offered in the Prefatory Note to The Uniform Certification of Questions of Law Act. *Uniform Certification of Questions of Law Act*, *supra* note 14, at 1–3.

apply to the case.²⁴ But the specific question raised in the case—whether the theory that “inside” information of an officer or director of a corporation is an asset of the corporation that can be misappropriated in violation of trust—had not been previously decided by the Florida Supreme Court under Florida corporate law principles.²⁵ The trial court dismissed the case, and a divided Second Circuit Court of Appeals reversed, concluding that while Florida law controlled, there was no decisive Florida law on the subject. The appellate court therefore looked to New York law and concluded that Florida “would probably” adopt that state’s law in this circumstance.²⁶

The United States Supreme Court vacated the judgment and ordered a remand, holding that the Second Circuit should have at least considered certifying the state law question to the Florida Supreme Court.²⁷ The Supreme Court explained that it would be “particularly appropriate” to use the certification procedure in view of the “novelty of the question and the great unsettlement of Florida law, Florida being a distant State.”²⁸ The Court did caution, however, that the “mere difficulty in ascertaining local law” should not be a basis for sending the parties to state court for an answer and that it did not mean to “suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.”²⁹ The use of the certification procedure in any given case “rests in the sound discretion of the federal court.”³⁰ The Court emphasized that use of the certification procedure “in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism.”³¹ And in the *Lehman Bros.* case, the Court found certification particularly appropriate for when “federal judges in New York attempt to predict uncertain Florida law, they act . . . as ‘outsiders’ lacking the common exposure to local law which comes from sitting in the jurisdiction.”³²

Justice Rehnquist concurred, but noted that while there may be some time and energy saving involved, use of the certification procedure “entails more delay and expense [for the litigants] than would an ordinary decision of the state question on the merits by the federal court.”³³ Looking at the Florida certification procedures, which called for briefing and potentially oral argument, Justice Rehnquist cautioned that “while the certification procedure is more likely to produce the correct determi-

24. *Lehman*, 416 U.S. at 388.

25. *Id.* at 388–89.

26. *Id.*

27. *Id.* at 391–92.

28. *Id.* at 391.

29. *Id.* at 390–91.

30. *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974).

31. *Id.* at 391.

32. *Id.*

33. *Id.* at 394 (Rehnquist, J., concurring).

nation of state law, additional time and money are required to achieve such a determination.”³⁴ And so Justice Rehnquist was careful to stress that whether to certify or not should be left to the “sound judgment” of the lower court first making the choice.³⁵ “If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.”³⁶

The Tenth Circuit has made clear that to save the “time, energy, and resources” spoken of in *Lehman Bros.*, parties must ask for certification early and generally not after a party already has received an adverse decision. For example, in *Boyd Rosene & Associates, Inc. v. Kansas Municipal Gas Agency*,³⁷ a party sought certification of a novel question of Oklahoma law only after the case had already been the subject of two district court and three appellate decisions. The Tenth Circuit rejected the request, stating:

Now, however, neither this court nor the parties would reap any conservation of time, energy, or resources were this court to grant certification. Indeed, certifying this issue to the Oklahoma Supreme Court at this late hour would be inefficient and wasteful of the parties’ and the federal courts’ previously expended time, energy, and resources.³⁸

Thus, the general rule is that late requests for certification are “rarely granted” and “generally disapproved, particularly when the district court has already ruled.”³⁹ There are, of course, exceptions to this rule.⁴⁰ But a delay in seeking certification will reduce the chance that the question will be certified.

34. *Id.* at 394–95.

35. *Id.* at 395.

36. *Lehman Bros. v. Schein*, 416 U.S. 386, 395 (1974).

37. 178 F.3d 1363 (10th Cir. 1999).

38. *Id.* at 1364–65.

39. *Id.* at 1364–65 (citing as examples *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1229 n.6, 1241 (10th Cir.1996) (declining to certify in part because the requesting party “did not seek to certify the question [below], and only now (after receiving an adverse [district court] ruling) has asked us to do so”); *Massengale v. Oklahoma Bd. of Exam’rs in Optometry*, 30 F.3d 1325, 1331 (10th Cir.1994) (“We generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court.”); and *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir.1988) (denying certification in part because plaintiff “did not request certification until after the district court made a decision unfavorable to her”)); see also *Pacheco v. Shelter Mut. Ins. Co.*, 583 F.3d 735, 738 (10th Cir. 2009) (declining to certify insurance question to Colorado Supreme Court in part because she did not first request certification in the district court).

40. For example, in *Godinez v. Williams*, No. 22-1194, 2023 WL 6970122, at *1 (10th Cir. Oct. 20, 2023), where the Tenth Circuit certified a question of state sentencing law to the Colorado Supreme Court in a habeas challenge to a state criminal sentence, there is no mention of any request to certify in the trial court, and personal communication with counsel Jonathan Reppucci (for the petitioner), confirmed that there had been no request to certify before the district judge.

That said, if certification is requested and rejected in the district court, it is entirely appropriate to move again for certification from the Tenth Circuit, as the Tenth Circuit views the certification issue de novo “without regard to the district court’s assessment.”⁴¹

The Tenth Circuit has also been clear that in making an assessment whether to certify it will “seek to give meaning and respect to the federal character of [the] judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts.”⁴² This means that where a legal question may be determinative of the case, has not been addressed by a state’s courts with sufficient clarity, and is sufficiently novel that the federal court is “uncomfortable attempting to decide [the issue] without further guidance,” certifying the question may be appropriate.⁴³ Certifying a question under such circumstances is “[i]n furtherance of the interests of comity and federalism that certification protects.”⁴⁴

This guideline comes with the caveat that “[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law.”⁴⁵ Where the federal court sees “a reasonably clear and principled course,” it will feel free to follow that course and decide the state law question.⁴⁶ For example, in *Armijo v. Ex Cam, Inc.*,⁴⁷ the Tenth Circuit considered whether New Mexico law recognizes a tort action against the manufacturer of a handgun for death and personal injury under any of four theories, including liability under an “ultrahazardous activity” theory.⁴⁸ The plaintiff in that case sought to certify the question to the New Mexico Supreme Court, an invitation that the Tenth Circuit declined, explaining “the relevant New Mexico law and law from other

41. *Pino v. United States*, 507 F.3d 1233, 1235 (10th Cir. 2007).

42. *Id.* at 1236 (citing *Lehman Bros.*, 416 U.S. at 391); *see also* *Delaney v. Cade*, 986 F.2d 387, 391 (10th Cir. 1993) (certifying a question to the Kansas Supreme Court as to whether Kansas recognizes a cause of action for “loss of chance of recovery” because of the Tenth Circuit’s “judicial policy that matters of state law should first be decided by state courts”).

43. *Pino*, 507 F.3d at 1236 (noting that the court will employ the certification device where the question “(1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance”); *Delaney*, 986 F.2d at 391 (noting that where question had not been addressed by Kansas courts with “sufficient clarity,” the Tenth Circuit was “uncomfortable attempting to decide the issue without its further guidance”).

44. *Howard v. Zimmer, Inc.*, 711 F.3d 1148, 1152–53 (10th Cir. 2012) (quoting *Garza v. Burnett*, 672 F.3d 1217, 1221–22 (10th Cir. 2012)).

45. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *see also Pino*, 507 F.3d at 1236 (“[W]e will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks.”).

46. *Pino*, 507 F.3d at 1236; *see also* *Larrieu v. Best Buy Stores, L.P.*, 491 F. App’x 864, 865 (10th Cir. 2012) (noting that in handling certification requests the court “must account for two competing interests” and quoting *Pino* for the proposition that “[w]e do not want to ‘trouble our sister state courts every time an arguably unsettled question of state law comes across our desks’”).

47. 843 F.2d 406 (10th Cir. 1988).

48. *Id.* at 407.

jurisdictions indicates a clear trend against recognizing this cause of action.”⁴⁹

Compare the *Armijo* outcome with *Morris v. Giant Four Corners, Inc.*⁵⁰ Here, the Tenth Circuit confronted the novel question whether, under New Mexico law, a gasoline vendor owes a duty of care to an injured third party to refrain from selling gasoline to a visibly intoxicated driver.⁵¹ In the Tenth Circuit’s view, this question was a “prime candidate for certification.”⁵² The issue was novel, and the applicable state law was unsettled.⁵³ No controlling New Mexico statute or constitutional provision existed.⁵⁴ There was no authoritative decision by a New Mexico appellate court, and even looking outside New Mexico decisions for guidance, the authority on the issue was “scant at best.”⁵⁵ In addition, the *Morris* panel cited the “important state policy concerns surrounding drunk driving and the significant practical consequences of imposing a duty on gasoline vendors” as counseling in favor of certification.⁵⁶ Thus, because the case raised “a significant matter of state legal policy in terms of . . . the negligent entrustment doctrine,” certification was warranted.⁵⁷

Thus, the importance of the legal question for the policy of a state is a factor the federal court will consider in deciding whether to certify a question.⁵⁸ This factor arises frequently in cases involving the interpretation of state insurance law. There are few major insurance companies headquartered in the states of the Tenth Circuit, and insurance companies are frequent targets of lawsuits by individual citizens in those states.⁵⁹ Insurers regularly remove these cases to federal court on diversity of

49. *Id.*; see also *Ratcliff v. Good Times Rests., Inc.*, No. 1:19-cv-00077, 2019 WL 2774217, at *3 (D. Colo. July 2, 2019) (declining to certify question to Colorado Supreme Court whether a claim for loss of consortium exists for unmarried cohabitants under Colorado law, in part because New Mexico has recognized such a claim and “[w]hile claims for loss of consortium between unmarried cohabitants are infrequent, the movement toward allowing them to make the claim aligns with the increase of unmarried cohabitants in the United States”).

50. 791 F. App’x 735 (10th Cir. 2019).

51. *Id.* at 736.

52. *Id.* at 738.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Morris v. Giant Four Corners, Inc.*, 791 F. App’x 735, 738 (10th Cir. 2019).

57. *Id.*

58. See *Moreno v. Circle K Stores, Inc.*, No. 22-cv-02327, 2025 WL 1359277, at *7 (D. Colo. May 9, 2025) (rejecting the argument that the relative importance of the state-law question is not a factor the court should consider in its certification decision and stating, “[t]he importance or significance of the question goes directly to the issue of comity and does, in the Court’s view, belong in the certification calculus”).

59. See Nathan Reiff, *10 Biggest Insurance Companies*, INVESTOPEDIA (June 24, 2025), <https://www.investopedia.com/articles/personal-finance/010715/worlds-top-10-insurance-companies.asp> (listing the ten largest publicly traded insurance companies in the world by annual revenue and demonstrating that none are headquartered in 10th Circuit states). See generally *Tenth Circuit Contract Cases: Insurance Cases, Dockets and Filings*, JUSTIA, <https://dockets.justia.com/browse/circuit-10/noscat-1/nos-110?page=2> (last visited Oct. 23, 2025) (identifying over 17,000 results for insurance cases filed in the 10th Circuit).

citizenship grounds.⁶⁰ As a consequence, the federal courts in the Tenth Circuit find themselves confronting numerous novel state insurance law questions that the respective supreme courts of those states have not had the opportunity to address and because of the frequency of removal, may never get the opportunity to address without use of the certification process. This certification happens regularly, in part because it is more appropriate for state, rather than federal, courts to interpret and define state insurance law.⁶¹

Also important for certification is the posture of the case and the question to be certified. Both must be consistent with the state statutory language authorizing the state supreme court to accept and answer a certified question.⁶² As then-Judge Gorsuch wrote in *Larrieu v. Best Buy Stores, L.P.*,⁶³ “[C]ertification is a two -step process—requiring approval not just from the forwarding federal court but also by the receiving state court.”⁶⁴ Thus, in assessing whether to certify, the federal court is to “cast a respectful eye at the state certification standard to ensure [it is] not obviously misdirecting [its] efforts.”⁶⁵ Although a case might present an interesting state legal question, its posture might not be consistent with what the Tenth Circuit perceives to be the state certification requirements.

60. Federal courts can hear cases sitting in diversity when the amount in controversy is over \$75,000 and there is complete diversity of citizenship between the parties—meaning no one is from the same state. See 28 U.S.C. § 1332(a).

61. See, e.g., *Sinclair Wyo. Refin. Co. v. Infrassure, Ltd.*, 815 F. App’x 248, 252 (10th Cir. 2020) (certifying issue to Wyoming Supreme Court because central issue “involves interpretation of a Wyoming statute with potentially extensive effects regarding the applicability of the Wyoming insurance code”); *State Farm Mut. Auto. Ins. Co. v. Fisher*, 609 F.3d 1051, 1059 (10th Cir. 2010) (certifying question relating to Colorado’s uninsured motorist coverage statute in part because “the question of how to interpret a standard uninsured motorist insurance provision clause is a matter of exceptional importance for state insurers and insureds”); *Klabon v. Travelers Prop. Cas. Co. of Am.*, 674 F. Supp. 3d 1031, 1036–37 (D. Colo. 2023) (certifying question whether, under Colorado workers’ compensation statute, receipt of workers’ compensation benefits barred injured employee’s suit against employer’s insurer for uninsured motorist coverage, in part because it is “an important Colorado public policy question which stands to have significant impact on Colorado workers’ compensation beneficiaries”); *Skillet v. Allstate Fire & Cas. Ins. Co.*, 2022 CO 12, ¶¶ 1, 19 (accepting and answering in the negative a certified question on “[w]hether an employee of an insurance company who adjusts an insured’s claim in the course of employment may for that reason be liable personally for statutory bad faith”). But see *Sullivan v. Nationwide Affinity Ins. Co. of Am.*, 842 F. App’x 251, 260 (10th Cir. 2021) (declining to certify question of how the term “landslide” should be interpreted under a Colorado insurance contract’s “earth movement” exclusion, because decisions from other states and a decision by the District of Colorado provides a reasonably clear and principled course for the Tenth Circuit to follow in predicting what the Colorado Supreme Court would do); *Ace Am. Ins. Co. v. Dish Network, LLC*, No. 13-cv-00560, 2014 WL 811993, at *2 (D. Colo. March 3, 2014) (declining to certify insurance coverage question which required interpretation of insurance policy as applicable to particular allegations, in part because “in federal court, such exercises are routine rather than unusual,” and “there is a well-developed body of Colorado law on interpretation of contracts, including insurance policies”).

62. See *Lehman Bros. v. Schein*, 416 U.S. 386, 389–90 (citing the Florida statute and the Florida appellate rule that authorized certification of a state-law question to the Florida Supreme Court).

63. 491 F. App’x 864 (10th Cir. 2012).

64. *Id.* at 865.

65. *Id.*

For example, Colorado's rule permitting certification has two substantive requirements: "[The] question[] of law . . . may be determinative of the cause then pending in the certifying court" and it appears to the certifying court "that there is no controlling precedent in the decisions of the supreme court."⁶⁶ Thus, in *Ward v. Acuity*,⁶⁷ the Tenth Circuit was twice asked to certify a question relating to the Colorado Workers' Compensation Act to the Colorado Supreme Court but declined to do so, despite the fact that the supreme court had recently accepted certification of a similar question.⁶⁸ After explaining that the party seeking certification had failed to do so before the district court,⁶⁹ the Tenth Circuit also noted in a footnote that even if the issue were certified, "the answer might not be dispositive" because the insurer requested affirmance on other grounds, and so the Tenth Circuit might need to affirm "irrespective of the state supreme court's answer to the certified question."⁷⁰

A final indicator for when a federal court is likely to certify a question to the state supreme court is when other federal or lower state courts have grappled with the question and come to conflicting results. This is particularly true for a federal district judge being asked to choose between rulings of her colleagues, who may have predicted differently how the state supreme court would rule. *Klabon v. Travelers Property Casualty Co. of America*⁷¹ offers a good example. A federal magistrate judge (acting as the trial judge with consent of the parties), sought certification of an issue of Colorado's uninsured motorist and workers' compensation law.⁷² In that case, the judge was confronted with conflicting decisions by two colleagues on the same issue. Senior District Judge Christine Arguello had ruled one way on the question,⁷³ and District Judge Daniel Domenico had reached "exactly the opposite"⁷⁴ decision on the same Colorado insurance law question.⁷⁵ To further complicate matters, a Colorado state district judge had followed Judge Arguello's reasoning on the issue.⁷⁶ Confronted with "directly conflicting decisions from [his] respected colleagues," the magistrate judge sought guidance from the Colorado Supreme Court via certification, stating, "A definitive statement by the Colorado Supreme Court answering this challenging question would be welcome, as uninsured/underinsured motorist claims make up a sub-

66. COLO. R. APP. 21.1(a).

67. No. 1:21-CV-00765-CMA-NYW, 2023 WL 4117502 (10th Cir. June 22, 2023).

68. *Id.* at *1.

69. *Id.* at *1–2.

70. *Id.* at *3 n.1.

71. 674 F. Supp. 3d 1031 (D. Colo. 2023).

72. *Id.* at 1031–32.

73. See *Ward v. Acuity*, 591 F. Supp. 3d 1003, 1007–08 (D. Colo. 2022).

74. See *Klabon*, 674 F. Supp. 3d at 1035–36.

75. See *Laurienti v. Am. Alt. Ins. Corp.*, No. 19-cv-01725, 2020 WL 9424250, at *1, *4 (D. Colo. Jan. 3, 2020).

76. *Klabon*, 674 F. Supp. 3d at 1035 (citing *Martin v. The Travelers Indem. Co.*, No. 2022-cv-20414 (D. Colo. Dec. 28, 2022)).

stantial portion of the District of Colorado's docket, with numerous state cases being removed to federal court by out-of-state insurers based on diversity jurisdiction."⁷⁷

In this respect, a request for certification to a state supreme court is (for the states that have discretionary review jurisdiction) not unlike a petition for certiorari or review to a state supreme court.⁷⁸ Both procedures are generally discretionary for the state supreme court.⁷⁹ And conflicting lower court decisions signal to the court asking the certified question that there is no "reasonably clear and principled course" to follow.⁸⁰ The federal judges are just guessing as to what the state supreme court will do and doing so inconsistently. And, as in the context of a petition for review, conflicting federal court or lower state court decisions signal to the court being asked to certify the question that (1) it is a difficult issue that federal judges are struggling with, and (2) it is a matter that is likely to recur and, therefore, calls out for clarity from the state supreme court.⁸¹

The interest of the parties in having a question certified can also play a role, although the decision to certify is ultimately in the court's hands. The factors that might—and should—significantly impact a par-

77. *Id.* at 1032, 1036.

78. *See, e.g.*, KAN. SUP. CT. R. 8.03(b)(6)(E) (listing potential reasons for why discretionary review by the Kansas Supreme Court would be warranted, including "(i) The presence of an issue of public importance, consequence, or attention[:]; (ii) The presence of an issue of first impression[:]; (iii) The need for an update, clarification, or synthesis of caselaw[:]; (iv) The existence of a conflict between the Court of Appeals decision and Supreme Court precedent or other Court of Appeals decisions . . . [and] (vii) the presence of an issue likely to recur that is in need of immediate resolution by the court"); COLO. R. APP. P. 49 (listing among the "special and important reasons" for granting discretionary review on certiorari, including (b) lower court "has decided a question of substance in a way probably not in accord with applicable decisions of the supreme court; (c) a division of the court of appeals has rendered a decision in conflict with the decision of another division of said court . . . ; (d) the court of appeals has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of the supreme court's power of supervision"); N.M. STAT. ANN. § 34-5-14(B) (2025) (listing certiorari jurisdiction of New Mexico Supreme Court as including cases where a decision of the New Mexico Court of Appeals "(1) is in conflict with a decision of the supreme court; (2) is in conflict with a decision of the court of appeals; (3) involves a significant question of law under the constitution of New Mexico or the United States; or (4) involves an issue of substantial public interest that should be determined by the supreme court").

79. *Compare* COLO. R. APP. P. 21.1 (noting that "The supreme court *may* answer questions of law certified to it . . . when requested by the certifying court" if there are questions that would be "determinative of the cause then pending" and as to which "there is no controlling precedent in the decisions of the supreme court") (emphasis added), *with* COLO. R. APP. P. 49(a) (noting that review for grant of certiorari "is a matter of sound judicial discretion and will be granted only where there are special and important reasons").

80. *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007).

81. *See, e.g.*, *Gill v. Waltz*, No. 18-cv-00790 (D. Colo. August 12, 2019) (unpublished) (Order granting defendant's motion for issuance of certified question to Colorado Supreme Court relating to interaction between workers' compensation insurance statute and the collateral source rule where there was a conflict between decision of the Colorado Court of Appeals and a decision by federal district court judge, explaining "[r]esolution of this issue may require determination of important Colorado public policies" and "the issue is likely to arise again" noting that the conflicting opinions and the case at issue were all initiated within an eighteen-month time period). For the answer to this certified question, *see Gill v. Waltz*, 484 P.3d 691, 691 (Colo. 2021).

ty's interest in certification are the costs and the delay. Even though a motion to certify is supposed to be filed at the same time that its federal court briefing is completed,⁸² the parties cannot control how long the court will take to rule on the motion or how long the state supreme court will take if it accepts the certified question. For example, in *Godinez v. Williams*,⁸³ a motion to certify was filed in November 2022, and the Tenth Circuit certified the question to the Colorado Supreme Court in October 2023.⁸⁴ The supreme court accepted the question, reframing it slightly, and issued an opinion on March 11, 2024.⁸⁵ The Tenth Circuit ultimately issued its opinion on August 26, 2024.⁸⁶ From motion to certify to issuance of final opinion was a nearly two-year process despite each step being handled fairly efficiently.⁸⁷

One factor that can impact both timing and cost when a question has been certified is whether additional briefing or oral argument is requested in the state supreme court, which will generally push the state's decision out because of the need to find a date to set arguments. Oral argument may not be necessary if the issues have been fully briefed in the Tenth Circuit or a lower federal court and the briefs have been forwarded to the state supreme court. Another factor is whether amicus briefs are filed in addition to the parties' briefs. And because certification is generally requested on unsettled and important questions, often in higher-stakes cases, amicus briefs are not uncommon. It is worth remembering that there are trade-offs, however, to any of these strategies.

In sum, a federal court deciding whether to certify a question of law to a state supreme court will consider, among other issues: the novelty and difficulty of the question, how unsettled the state of the law is on the issue, the presence of conflicting decisions by lower courts, and whether the question implicates a matter of important state policy that is likely to otherwise evade review by the state high court. While certification may ultimately be more likely to engender the "correct" result, the court considering certification will not be blind to the time and extra expense imposed on the parties from the certification process. That said, especially at the federal district court level, if the matter is important enough that it is likely to be appealed to the Tenth Circuit in any event, then getting a definitive answer from the relevant state supreme court via a certified question while the case is still pending in the district court, might be the more efficient process.

82. 10TH CIR. R. 27.4(C).

83. No. 22-1194, 2023 WL 6970122 (10th Cir. Oct. 20, 2023) (order certifying question of law).

84. *Id.* at *7–8.

85. *Godinez v. Williams*, 544 P.3d 1233, 1242 (Colo. 2024).

86. *Godinez v. Williams*, 112 F.4th 1301 (10th Cir. 2024).

87. The Colorado Supreme Court issued its opinion just five months after accepting the certified question. The Tenth Circuit similarly issued an opinion in about five months.

III. THE KINDS OF CASES THAT SEEM TO MERIT CERTIFICATION

While there are certainly some unique cases in each of the six states, there is also one very clear pattern to the kinds of cases being certified in these states, and it is one we've already mentioned. In high stakes insurance and tort cases, plaintiffs tend to file their claims in state courts, while defendants then remove them to federal court on the basis of diversity jurisdiction when they can.⁸⁸ Often these cases turn on state statutory or common law questions, and sometimes those questions have already been settled. But as new laws are passed or lawyers develop novel theories for their cases, questions come up that have not been answered by state supreme courts.

Given that dynamic, it is not surprising that, of the fourteen cases that have been certified to the Colorado Supreme Court in the past decade, half have involved state law questions impacting the resolution of tort claims.⁸⁹ From Kansas, it was one of two.⁹⁰ Six of the seven cases certified by the New Mexico Supreme Court included at least one tort question.⁹¹ Oklahoma's supreme court has answered five tort-related

88. For example, all but one of the seven Colorado cases in which the Colorado Supreme Court answered a certified question involving insurance or tort law started in state court and were removed to federal court. *See* *Klabon v. Travelers Prop. Cas. Co. of Am.*, 556 P.3d 793 (Colo. 2024); *Skillett v. Allstate Fire and Cas. Ins. Co.*, 505 P.3d 664 (Colo. 2022); *Gill v. Waltz*, 484 P.3d 691 (Colo. 2021); *Rooftop Restoration, Inc. v. Am. Fam. Mut. Ins. Co.*, 418 P.3d 1173 (Colo. 2018); *Renfandt v. N.Y. Life Ins. Co.*, 419 P.3d 576 (Colo. 2018). The seventh was a declaratory judgment action filed directly in federal court in the first instance. *See* *Amica Life Ins. Co. v. Wertz*, 462 P.3d 51, 52 (Colo. 2020).

89. *See* *Klabon*, 556 P.3d at 798; *Skillett*, 505 P.3d at 665; *Gill v. Waltz & Swift Transp., No. 19SA174*, 2019 Colo. LEXIS 1157, at *1 (Colo. Nov. 12, 2019) (“[(1)] Does a plaintiff have standing to seek damages for personal injuries that were already paid by workers’ compensation insurance, where the insurer has settled its subrogation claim directly with the tortfeasor-defendant? [(2)] May a plaintiff present evidence of his billed amount of medical expenses, where the tortfeasor-defendant has paid the same medical expenses by settling the worker’s compensation insurer’s subrogation claim?”); *Amica Life Ins. Co.*, 462 P.3d at 52; *Rooftop Restoration, Inc.*, 418 P.3d at 1174 (“Is a claim brought pursuant to Colorado Revised Statutes § 10-3-1116 subject to the one-year statute of limitations found in Colorado Revised Statutes § 13-80-103(1)(d) and applicable to ‘[a]ll actions for any penalty or forfeiture of any penal statutes?’”); *Renfandt*, 419 P.3d at 578 (“Under Colorado law, does a life insurance policy’s exclusion for ‘suicide, sane or insane’ exclude coverage (1) for all acts of self-destruction without regard to the insured’s intent or understanding of the nature and consequences of his/her actions or (2) for only acts of self-destruction committed when the insured intends to take his/her own life or understands the nature and consequences of his/her actions?”); *Craft v. Phila. Indem. Ins. Co.*, 343 P.3d 951, 953 (Colo. (2015) (“(1) whether the notice-prejudice rule applies to claims-made liability policies in general; and (2) if so, whether the rule applies to both types of notice requirements in those policies.”)).

90. *See* *Hodges v. Walinga USA Inc.*, 532 P.3d 440, 442 (Kan. 2023) (“‘1. Under Kansas law, does an arbitration action qualify as a judicial determination of comparative fault where no other potential tortfeasors were involved in the arbitration? 2. If it does not, then under Kansas law, does the confirmation of an arbitration award by state court judgment qualify as a judicial determination of comparative fault in light of *Childs v. Williams*, 243 Kan. 441, 757 P.2d 302 (1988).’ *Hodges v. Walinga USA Inc.*, 640 F. Supp. 3d at 1093 (D. Kan. 2022).”).

91. *Smith v. Interinsurance Exch. of Auto. Club*, 563 P.3d 868, 870 (N.M. 2024) (whether *Crutcher v. Liberty Mut. Ins. Co.*, 501 P.3d 433 (N.M. 2021), applies prospectively or retroactively); *Crutcher*, 501 P.3d at 436 (“(1) [W]hether underinsurance motorist coverage on a policy that offers minimum uninsured/underinsured motorist limits is illusory for an insured person who sustains more than \$25,000 in damages caused by a minimally insured tortfeasor, and (2) if this type of coverage is illusory, whether an insurance company may charge premiums for such a policy.”); *Spurlock v.*

certified questions in the past decade,⁹² as has the court in Utah.⁹³ And in Wyoming, the supreme court has addressed three certified cases that answered tort-related questions.⁹⁴

Townes, 368 P.3d 1213, 1215 (N.M. 2016) (“When an inmate is sexually assaulted by a corrections officer, does New Mexico recognize the affirmative defense of comparative fault—permitting the comparison of the correctional facility/employer’s alleged negligence with the alleged fault of the inmate victim—for the purpose of reducing the amount of a judgment entered on the inmate’s state-law claim of negligent supervision of the tortfeasor-officer by the employer?”); *Morris v. Giant Four Corners, Inc.*, 498 P.3d 238, 241 (N.M. 2021) (“Under New Mexico law, which recognizes negligent entrustment of chattel as a viable cause of action, does a commercial gasoline vendor owe a duty of care to a third party using the roadway to refrain from selling gasoline to a driver it knows or should know to be intoxicated?”); *Hem v. Toyota Motor Corp.*, 353 P.3d 1219, 1221 (N.M. 2015) (“[W]hether the first clause of Section 32 is a limitation applicable only to acts of the Legislature, as this Court held in *State v. State Investment Company*, . . . ¶ 13, 30 N.M. 491, 239 P. 741, or if it applies to the State in general, as indicated in *Gutierrez v. Gutierrez*, . . . ¶ 8, 99 N.M. 333, 657 P.2d 1182. [W]hether Section 32 prohibits a state hospital from compromising a debt owed by a patient-debtor, where the amount of the debt owed is not disputed, but the patient-debtor’s ability to pay is doubtful and the compromise agreement is supported by consideration.”); *Vasquez v. Am. Cas. Co. of Reading*, 389 P.3d 282, 283 (N.M. 2016) (“Is a worker injured in the course of employment by a co-worker operating an employer owned motor vehicle a person ‘legally entitled to recover damages’ under his employer’s uninsured/underinsured motorist coverage?”).

92. *Hamilton v. Northfield Ins. Co.*, 473 P.3d 22, 24 (Okla. 2020) (“1. In determining which is the prevailing party under 36 O.S. § 3629(B), should a court consider settlement offers made by the insurer outside the sixty- (formerly, ninety-) day window for making such offers pursuant to the statute? 2. In determining which is the prevailing party under 36 O.S. § 3629(B), should a court add to the verdict costs and attorney fees incurred up until the offer of settlement for comparison with a settlement offer that contemplated costs and fees?”); *Anaya-Smith v. Federated Mut. Ins. Co.*, 549 P.3d 1213, 1214 (Okla. 2024) (“1. Where Mr. Smith was injured and killed as a passenger in an employer-owned vehicle that had \$7,000,000 of liability insurance and has not shown the claim would exceed \$7,000,000, but where Mr. Smith cannot recover under the policy because the worker’s compensation exclusive remedy provision of 85A O.S. § 5, bars suit against the employer, does that vehicle qualify as an uninsured motor vehicle within the meaning of 36 O.S. § 3636(C)? 2. Does 36 O.S. § 3636 permit FADCO, a corporate named insured, to purchase uninsured motorist coverage for its directors, officers, partners, owners, and their family members who qualify as insureds, but to reject uninsured motorist coverage for other persons who qualify as insureds?”); *Lane v. Progressive N. Ins. Co.*, 494 P.3d 345, 346 (Okla. 2021) (“Does Progressive’s UM Exclusion—which operates to deny uninsured motorist coverage to insureds who recover at least the statutorily mandated minimum in the form of liability coverage—contravene Oklahoma’s Uninsured Motorist Statute, codified at 36 O.S. § 3636?”); *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 392 P.3d 262, 263 (Okla. 2017) (“Does the public policy of the State of Oklahoma prohibit enforcement of the Indoor Air Exclusion, which provides that the insurance afforded by the policy does not apply to “[b]odily injury,” “property damage,” or “personal and advertising injury” arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating pathogenic or allergen qualities or characteristics of indoor air regardless of cause?”); *Morgan v. State Farm Mut. Auto. Ins. Co.*, 488 P.3d 743, 745 (Okla. 2021) (“1. Where a plaintiff is injured by entry of an adverse judgment that remains unstayed, is the injury sufficiently certain to support accrual of a tort cause of action based on that injury under 12 O.S. § 95 before all appeals of the adverse judgment are exhausted? 2. Does an action for breach of an insurance contract accrue at the moment of breach where a plaintiff is not injured until a later date?”).

93. *HealthBanc Int’l, LLC v. Synergy Worldwide, Inc.*, 435 P.3d 193, 194 (Utah 2018) (deciding “whether the ‘economic loss rule’ in Utah law extends to the tort of fraudulent inducement”); *C.R. England v. Swift Transp. Co.*, 437 P.3d 343, 345 (Utah 2019) (“First, does the tort of intentional interference with contract require proof of ‘improper means’? And second, if it is required, what constitutes ‘improper means’ in the context of tortious interference with contract?”); *Lancer Ins. Co. v. Lake Shore Motor Coach Lines, Inc.*, 391 P.3d 218, 220 (Utah 2017) (“(1) [W]hether Utah Code section 31A–22–303(1) imposes strict liability on an insured driver for damages to third parties resulting from the driver’s unforeseeable loss of consciousness while driving; and (2) if so, whether the driver’s liability is limited by the applicable insurance policy or by the applicable minimum statutory limit.”); *Smith v. United States*, 356 P.3d 1249, 1251 (Utah 2015) (“(1) Does the limitation

Given that these cases address different state laws for each of the different states, there are none that are identical, but there are some commonalities. Questions about the dynamics between underinsured/uninsured motorist insurance and workers' compensation policies have been certified in Colorado and Oklahoma.⁹⁵ In each case the question is essentially whether a plaintiff can recover on an insurance policy after receiving some amount of payment from a workers' compensation policy.⁹⁶

Whether and to what extent the notice-prejudice rule applies is a question that both Colorado and Wyoming have been asked to clarify.⁹⁷ The notice-prejudice rule provides that a claimant who gives an insurance company late notice of a claim does not lose coverage unless the insurance company can demonstrate that it was prejudiced by the late notice and thus increases the likelihood that a claimant will be successful in pursuing payment of an insurance claim.⁹⁸ These two examples demonstrate just how consequential the answer to these tort-related insurance questions can be in the resolution of suits between insurance companies and their insured and why certification might be sought and granted. They also demonstrate how cases that can be removed to federal court on diversity jurisdiction grounds still rest primarily on state law questions. That dynamic is another explanation for why these cases predominate among certified questions: these cases are fundamentally state law cases. Our federal system and the provisions of Article III permit defendants to remove them to federal courts, but that does not change the fact that state law provides the answer to the legal questions presented. In circumstances where the state law is unsettled, it is unsurprising that fed-

on a plaintiff's recovery of noneconomic damages in Utah Code Ann. § 78B-3-410 apply to claims alleging wrongful death caused by medical malpractice? (2) If the answer to Question No. 1 is in the affirmative, is Utah Code Ann. § 78B-3-410 permissible under Article XVI, Section 5 of the Utah Constitution?"); *Dircks v. The Travelers Indem. Co. of Am.*, 416 P.3d 376, 377 (Utah 2017) (discussing whether Utah Code section 31A-22-305.3 "requires that all vehicles covered under the liability provisions of an automobile insurance policy must also be covered under the underinsured motorist provisions of that policy, and with equal coverage limits").

94. *Bankers Standard Ins. Co. v. JTEC, Inc.*, 567 P.3d 1183, 1186 (Wyo. 2025) ("When does a professional's 'act, error[, or omission]' occur under Wyo. Stat. Ann. § 1-3-107 in a tort action (1) between parties not in contractual privity; (2) alleging an engineer negligently designed a component part of an engineering plan; where (3) the engineer submitted several sets of plans, each containing the allegedly defective design?"); *Sinclair Wyo. Refin. Co. v. Infrassure, Ltd.*, 486 P.3d 990, 993 (Wyo. 2021) ("Whether, under Wyo. Stat. Ann. § 26-15-101(a)(ii), an insurance policy is 'issued for delivery' or 'delivered' in Wyoming where a Wyoming corporation is a named insured, the policy covers risks in Wyoming, and the policy provides that coverage shall apply 'in the same manner and to the same extent' as if the policy had been issued to the Wyoming corporation, but no copy was ever conveyed to Wyoming and the policy only lists an out-of-state address for the insured?"); *Century Sur. Co. v. Jim Hipner, LLC*, 377 P.3d 784, 785 (Wyo. 2016) ("[W]hether, under Wyoming law, an insurer must be prejudiced before being entitled to deny coverage when the insured has failed to give notice 'as soon as practicable.'").

95. See *Anaya-Smith*, 549 P.3d at 1214; *Gill v. Waltz*, 484 P.3d 691, 693 (Colo. 2021).

96. See *Anaya-Smith*, 549 P.3d at 1214; *Gill*, 484 P.3d at 693.

97. See *Century Sur. Co.*, 377 P.3d at 785; *Craft v. Phila. Indem. Ins. Co.*, 343 P.3d 951, 952 (Colo. 2015).

98. *Craft*, 343 P.3d at 952.

eral courts, confronted with what are essentially state law cases, are reaching out to the state supreme courts for guidance on the proper interpretation of state law.

CONCLUSION

Certification of questions to state supreme courts is an essential tool for the federal courts, and examining its use in the Tenth Circuit helps to demonstrate some of the dynamics at work in the process. The reality is that federal courts still answer many more state court questions than they certify, but when unsettled questions of state law will be determinative in a federal court case, the benefits of certification are apparent. What is surprising is that, like so many things that now seem age-old in the practice of law (like three-year law school and the billable hour to name just two), the regular practice of certification to state courts was born just fifty years ago. As debates over the proper approach to tort claims continue in the states, it is almost certain that we will continue to see certified questions on state insurance and personal injury law. It also seems likely that state supreme courts—in the Tenth Circuit and elsewhere—will accept these questions because they are often central to policy determinations made by state legislatures.