Federal courts are often faced with questions of state law. First, federal law may implicate state law. Second, state law claims are often brought along with federal claims pursuant to the federal courts’ supplemental jurisdiction. Third, and perhaps most prominent, many state law claims are heard in federal court by virtue of the federal courts’ diversity jurisdiction. And, recent legislation—such as the Class Action Fairness Act of 20051—may further augment the frequency with which federal courts confront state law issues by expanding the reach of federal court jurisdiction to include certain cases in which the parties are only minimally diverse—i.e., cases in which some plaintiffs and some defendants hail from the same state.

How should federal courts resolve issues of state law with which they are faced? Erie Railroad v. Tompkins2 and its progeny dictate that, to avoid the “twin evils” of forum shopping and inequitable administration of the laws, federal courts should endeavor to resolve questions of state law as would the high court of the state whose law is at issue. If the state high court has recently decided a case that resolves the issue, the federal court’s chore is easy (relatively at least). To the extent, however, that the issues of state law are novel, the task is more difficult. The federal court necessarily will have to engage in “divination” or “guesswork.” Among the factors that the federal court may take into account in undertaking such an analysis are signals from state high court cases, rulings from lower state courts, state court dicta, opinions of the state attorney general, and silence of the state legislature. At bottom, the federal courts must predict, as best they can, how the state high court would rule on the issues.

Thus, even where the contours of state law are relatively clear, the federal court can at best offer an “Erie guess” as to proper outcome under state law. The only way to be sure that the outcome is in fact correct is to afford the state courts the opportunity to resolve the pending issue. There are two procedural devices that make that possible—abstention and certification.

Abstention involves the federal court not proceeding with the case before it in order to allow the courts of the state to
hear a case, the resolution of which will resolve the state law question pending before the federal court. There might be a state court case already pending, or the federal court might abstain in order to allow the parties to bring and argue a new suit in state court. The Supreme Court has recognized different forms of abstention that may be applicable in cases in which state law questions arise. Foremost among these is Pullman abstention doctrine, under which a federal court may abstain in favor of a round of litigation in the state court system if resolution of the state law claims might obviate the need for the federal court to confront novel issues of federal law. Pullman abstention is not available, however, in cases in which no issue of federal law lurks; in other words, the mere presence of a novel question of state law is insufficient to justify Pullman abstention.

The Supreme Court has recognized other forms of abstention that may apply in federal cases in which there are only questions of state law and where the state law questions at issue go to the heart of state sovereignty. But these forms of so-called “Erie-based abstention” are of quite limited applicability.

As a threshold matter, certification of a question of state law will be an available option to a federal court only if the state whose law is at issue offers a certification procedure for the federal court to exercise. A federal court will not ask a state high court to respond to any questions of state law if there is no procedure under state law that authorizes certification. Most states, as well as the District of Columbia and Puerto Rico, offer federal courts the option to certify questions of state law to the state high court. Many states also allow lower federal courts and courts of other states to submit certified questions to their highest courts. Not every state that has a certification procedure allows every federal court to certify questions to its state high court, however.

Assuming certification is an available option, one or more of the parties to the federal case may move the federal court to invoke certification, or the federal court may choose that option sua sponte. Either way, the federal court has final discretion over whether or not to employ certification.

A federal court will consider numerous factors in deciding whether to exercise its discretion and certify questions of state law to a state high court. Perhaps the most important factor is the degree to which state law on the issue in question is unclear and difficult to predict: A federal court likely will not certify a question of state law if the answer to it is clear or easy to anticipate. A federal court also might choose not to certify a question of state law that it feels either is unlikely to recur, or does not raise significant issues of public policy. Further, the posture of the parties might affect a federal court’s willingness to certify questions of state law: Courts may be less likely to honor requests from parties who chose to invoke federal jurisdiction. Thus, for example, some courts have indicated that they will be less receptive to certification requests from a plaintiff who opted to bring a diversity case in federal court, from a defendant who, after receiving an adverse ruling from a state trial judge, removed the case to federal court, or from an appellant who received an adverse ruling below and for the first time seeks certification on appeal.
In determining whether to invoke certification procedure, federal courts also will balance the benefits certification would bring against the delay inherent in using the procedure. In particular, while certification in theory can be invoked at any stage of a case, a court likely will consider less favorably a tardy request for certification than a request made early in a proceeding.

It is the federal court—and not the parties—that invokes the procedure by promulgating and sending to the state high court a certificate that sets forth the questions of state law for which answers are sought. The certifying court normally includes a statement of the background facts necessary to give the certified questions context.

A state high court has discretion to accept or reject the certifying court’s questions. Assuming it chooses to accept the certification, the state high court proceeds in accordance with any governing statutes or rules. State courts dealing with certified questions engage in no fact-finding. Certification applies only to questions of law, and state courts have treated the notion that the certifying federal court will have made all necessary ancillary factual findings as a prerequisite to proper certification.

If the state court determines that it can resolve the controversy by responding to only a portion of the certified questions, thereby obviating the need to address the remaining questions, the state court may so inform the certifying court and declined to proceed further. Along similar lines, the state court has discretion to rephrase the questions if it feels that that would be appropriate.

The state high court’s involvement ends when it returns to the certifying court answers to the question or questions certified. Federal courts were initially uncertain as to whether a state court’s response to a certified question bound the certifying court with respect to the question certified. Thus, the Fifth Circuit, in a 1963 case, allowed for the possibility that answers given by state high courts in response to certified questions could be either “merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent, or . . . credited under Erie-Tompkins doctrine and the rule of stare decisis as though it were the ratio decidendi of a decision made in adversary litigation before the court.”

Today, although statements to the contrary are not extinct, the federal courts are generally in agreement that they are bound to follow state court responses to certified questions. The predominant view shared by federal courts is that Erie and its progeny mandate that they follow the answers rendered by state high courts in response to certified questions. At the same time, a few opinions reach the same result, but based on the notion that such state high court opinions are to be followed under the “law of the case” doctrine.