

Appellate Practice Corner

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Remember Supreme Court Rule 308 Interlocutory Appeals When Faced with Potentially Dispositive Legal Questions

Interlocutory appeals should be part of every trial lawyer’s litigation arsenal and should be relied on whenever the case presents a significant and potentially dispositive legal issue. In 2011 alone, there were 22 opinions issued by the various Illinois courts stemming from Illinois Supreme Court Rule 308(a) certification questions. This article provides a quick look at the requirements of the Rule 308 interlocutory provisions and offers some insight into drafting better certified questions. A properly worded Rule 308(a) question offers counsel a vehicle to facilitate the early resolution of potentially dispositive questions of law.

Rule Refresher

Supreme Court Rule 308(a) provides that, “[w]hen the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved.” S. Ct. Rule 308(a); *In re D.J.E.*, 319 Ill. App. 3d 489, 494, 744 N.E.2d 1286 (2d Dist. 2001).

The appeal process under Rule 308(a) begins with the filing of a motion for entry of a certified question with the circuit court. The motion may be filed and the requisite “statement may be made at the time of the entry of the order or thereafter on the court’s own motion or on motion of any party.” *Id.* An appeal to the appellate court is sought by “filing an application for leave to appeal with the clerk of the appellate court within 14 days after the entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later.” S. Ct. Rule 308(b). Whether the application is allowed is discretionary.

According to Rule 308(b), an original and three copies of the application shall be filed with the appellate court. Per Rule 308(c), the application “shall contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation.” S. Ct. Rule 308(c). The application shall also be accompanied by an original supporting record assembled pursuant to Rule 328, which contains the order appealed from and other parts of the trial court record necessary for the determination of the application for permission to appeal.

“Within 14 days after the due date of the application, an adverse party may file an answer in opposition, with copies in the number required for the application, together with an original of a supplementary supporting

record containing any additional parts of the record the adverse party desires to have considered by the appellate court.” *Id.* There is no oral argument on the application unless otherwise ordered.

If leave to appeal is allowed, any party may request that an additional record on appeal be prepared (see Rule 321), or the court may order the appellant to file the record, which shall be filed within 35 days of the date on which such leave was allowed. The appellant shall file a brief in the reviewing court within the same 35 days. In all other respects, the schedule and requirements for briefs shall be as provided in Rules 341 through 344. S. Ct. Rule 308(d).

Where the motion is allowed by the circuit court and the application is accepted by the appellate court, counsel must then file a motion for stay with the circuit court. The proceedings before the circuit court are not automatically stayed. S. Ct. Rule 308(e). Also, if the circuit court denied the motion for stay, it should then be refiled with the appellate court. *Id.*

Wording the Issue

One of the most difficult aspects of using certification procedures of Rule 308(a) is the actual drafting of the proposed certified question. The importance of a properly worded question is amplified by the fact that a permissive interlocutory appeal is limited to the question that is defined by the circuit court. *Board of Trustees of the Rend Lake Conservancy Dist. v. City of Sesser*, 2011 IL App (5th) 110110, ¶ 10. While there are limited exceptions to this general rule—a court may go beyond the certified questions and consider the appropriateness of the order giving rise to the appeal where interests of judicial economy and equity require—this is applied sparingly. *Board of Managers of Wespark Condominium Ass’n v. Neumann Homes, Inc.*, 388 Ill. App. 3d 129, 131, 903 N.E.2d 39 (1st Dist. 2009); *Sperandeo v. Zavitz*, 365 Ill. App. 3d 691, 692, 850 N.E.2d 394 (2d Dist. 2006); *cf. Koch v. Spalding*, 174 Ill. App. 3d 692, 693, 529 N.E.2d 19 (5th Dist. 1988). Moreover, when a Rule 308(a) reaches the Illinois Supreme Court, interests of judicial economy and the need to reach an equitable result may oblige the court to go beyond the question of law presented and consider the propriety of the order that gave rise to the appeal. *Townsend v. Sears, Roebuck and Co.*, 227 Ill. 2d 147, 153, 879 N.E.2d 893 (2007). Absent one of these rare circumstances, however, the certified question as written will control.

Indeed, the courts have held that any attempt by the parties to rephrase the certified question is procedurally improper. *Thompson v. Walters*, 207 Ill. App. 3d 531, 533, 565 N.E.2d 1385 (4th Dist. 1991). Courts will not expand a certified question to include matters which should have been included in the question but were not. *Blackshare v. Banfield*, 367 Ill. App. 3d 1077, 1079, 857 N.E.2d 743 (5th Dist. 2006).

When drafting the proposed question, the struggle is often between including sufficient facts to make the issue applicable to the instant case while at the same time avoiding becoming bogged down with too many facts. Remember, the appellate court’s task is to answer the certified question rather than to rule on the propriety of the underlying order. *Long v. Elborno*, 397 Ill. App. 3d 982, 988, 922 N.E.2d 555 (1st Dist. 2010). In other words, the court does not determine whether the underlying summary judgment should have been allowed. Also important to keep in mind is the notion that the certified question must be a true question and not be one calling for a hypothetical answer with no practical effect. *See, e.g., Board of Trustees of Chicago State University v. Siemens Bldg. Technologies, Inc.*, 387 Ill. App. 3d 606, 611, 900 N.E.2d 414 (1st Dist. 2008). Also, to qualify for an interlocutory appeal by permission, a certified question must present an issue of law that is reviewable *de novo*. *In re Marriage of Akula*, 404 Ill. App. 3d 350, 935 N.E.2d 1070 (1st Dist. 2010).

Given these general remarks, when wording a potential Rule 308 certified question, keep in mind the following points:

- Keep the question simple, yet expansive enough to cover the full legal question involved.

- Do not become bogged down in facts; use enough to relate to your issue while retaining the legal question.
- Split the question into subparts when necessary to avoid an unwieldy question.
- Do not reference the nature of the motion underlying the issue.
- Make sure that answering the question will result in your motion being allowed; if additional steps are needed, use multiple questions.

The following are good examples of properly worded Rule 308(a) certified questions, each of which were found in recent published appellate decisions:

“Whether benefits paid pursuant to a policy of underinsurance should be disbursed pursuant to the Illinois Wrongful Death Act and not according to the policy of underinsurance.”

In re Estate of Anderson, 408 Ill. App. 3d 428, 945 N.E.2d 661 (1st Dist. 2011).

“[W]hether evaluations, communications, reports and information obtained pursuant to section *** 604(b) of the Illinois Marriage and Dissolution of Marriage [Act] [citation] are confidential under the Mental Health and Developmental Disabilities Confidentiality Act [citation] where the 604(b) professional personnel to advise the court is a psychiatrist or other mental health professional?”

Johnston v. Weil, 241 Ill. 2d 169, 946 N.E.2d 329 (2011).

“Whether fee and cost waiver certifications, filed pursuant to section 5–105.5(b) of the Code of Civil Procedure (Code) (735 ILCS 5/5–105.5(b) (West 2010)), are sufficient to waive fees for the filing of petitions for expungement?”

People v. Lewis, 2011 IL App (5th) 110279, ¶ 1.

“If the ruling in *Petersen* bars a party from contribution from a former spouse from contribution for college expenses incurred prior to the date of filing of a petition brought pursuant to 750 ILCS 5/513, does the same bar to retroactive relief for college expenses incurred prior to the filing date apply to a petition brought by a third[-]party beneficiary to enforce a provision of his parents['] marital settlement agreement to contribute to his college education[?]”

In re Marriage of Spircoff, 2011 IL App (1st) 103189, ¶ 8.

“In a bifurcated dissolution proceeding, when a grounds judgment has been entered, and when there is a lengthy delay between the date of the entry of the grounds judgment and the hearing on ancillary issues, is the appropriate date for valuation of marital property the date of dissolution or a date as close as practicable to the date of trial of the ancillary issues?”

In re Marriage of Mathis, 2011 IL App (4th) 110301, ¶ 1.

In one case, the circuit court certified three questions, which read as follows:

- “1. a. Does a trial court have the inherent authority to order a fitness evaluation of a respondent to a Sexually Violent Persons Commitment Act petition?
- b. If such inherent authority exists, did the trial court abuse its discretion in denying the above-referenced respondents’ requests for a fitness evaluation?
2. Does a respondent to a Sexually Violent Persons Commitment Act petition have a statutory right to a fitness evaluation?

3. Does a respondent to a Sexually Violent Persons Commitment Act petition have a constitutional due process right to a fitness evaluation?"

In re Commitment of Weekly, 2011 IL App (1st) 102276, ¶34.

As can be seen, these certified questions are concise and contain just enough factual matters to mesh the legal question to the case before the court. Rule 308 certification is not available for questions of fact. *In re Marriage of Spircoff*, 2011 IL App (1st) 103189, ¶ 8.

Used properly, the interlocutory provisions of Supreme Court Rule 308 can help resolve pressing legal questions early and avoid the expenses associated with drawn-out litigation. Part and parcel to using this provision in its intended manner is the recognition of when it is appropriate and how best to word the proposed certified question. Hopefully this refresher article and reference to some of the recent Rule 308 cases decided in 2011 will help you the next time such as occasion arises.

About the Author

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