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## State Court of Appeals Aids Circuit Court to Rule in Case (NYLJ)

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## New Procedure Used First Time

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By Alan Kohn

The U.S. Court of Appeals for the Second Circuit this week decided the first case under a 1986 procedure that allows it to certify undecided questions of New York law to the State Court of Appeals for the latter's views.

In affirming a lower court's ruling in an appeal concerning New York's Social Services Law, the Circuit Court accepted the response by the state's highest court but stated it would make limited use of the procedure and outlined some conditions for its use.

### Conditions Outlined

In an opinion handed down Monday for a panel of the Circuit Court in *Kidney v. Kolmar Laboratories*, 86-7194, Judge Jon O. Newman stated the federal appeals court "recognizes that issues of state law are not to be routinely certified ... simply because a certification is available. The procedure must not be a device for shifting the burdens of this Court to those whose burdens are at least as great.

"However ... the certification procedure is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit."

Judge Newman's five-page opinion was concurred in by Judges Lawrence W. Pierce and Roger J. Miner. The Circuit Court ruling affirmed a decision last year by Judge Lee P. Gagliardi in the U.S. District Court for the Southern District of New York. He had decided the issue in the same way as the State Court of Appeals.

### Issue at Stake

The issue at stake, for which there was no controlling precedent of any New York state court, was the meaning of §104-b(2) of the State Social Services Law under the following facts, according to Judge Newman:

An insurer had advanced \$30,000 on behalf of its insured to pay for medical treatment of an infant injured in an accident involving its insured. Subsequently, the insured was held partially liable.

After the verdict, the Orange County Department of Social Services filed a lien for \$27,503.33 for funds it had advanced for the infant's medical expenses. Judge Gagliardi held the insured was responsible for paying \$22,003.33 of the amount and that the \$30,000 the insured had advanced should not be taken into account, since it did not represent the "payment of any monies" under §104-b.

Judge Gagliardi found the payment of any monies meant only payment after settlement of a claim or a judgment. The decision was appealed and the Circuit Court certified the question to the State Court of Appeals. That court agreed with Judge Gagliardi (*Kidney v. Kolmar Laboratories*, No. 407 (N.Y. Ct. App. Nov. 18, 1986).

On appeal, Jeffrey J. Ellis, of Quirk & Bakalor, represented the defendants. The plaintiff's lawyer was James G. Sweeney, Orange County Attorney.