CARRINGTON COLEMAN

INTERLOCUTORY APPEALS IN FEDERAL COURT:

Gosh, I miss § 51.014

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Dallas Bar Association – Appellate Section

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State vs. Federal – the Numbers

Texas State Courts of Appeals SYE 8/31/16

New Appeals – 9,333 total; 4,879 civil

Dallas Court of Appeals SYE 8/31/16

New Appeals – 1,836 total; 966 civil

U.S. Fifth Circuit SYE 6/30/16

New Appeals – 8,675

Minus criminal, prisoner, habeas – 2,356

From Texas – about 1,500 non-criminal

BASICS

Appeal from Final Judgment

- *The norm*
- *Avoid "piecemeal" review*

Interlocutory Appeal

- *Authorized by statute, rule, or common law*
- *By right or by permission*

Mandamus

- *Equitable remedy … for another day*

APPEAL BY RIGHT – STATUTORY AUTHORITY

TEX. CIV. PRAC. & REM. CODE § 51.014(a)

receiver or trustee**class certification**temporary injunction**official immunity**denial of media member's MSJ based on free speech**special appearance**plea to jurisdiction by governmental unit**denial of MTD involving Healthcare and Asbestos claims**denial of MSJ by electric utility**denial of MTD under anti-SLAPP law

28 U.S.C. § 1292(a)

injunctions, receiverships, admiralty …. ???

APPEAL BY RIGHT – COLLATERAL ORDER

Federal Collateral Order Doctrine

- ***Cohen v. Beneficial Industrial Loan Corp***., 337 U.S. 541 (1949)
- "Collateral orders" treated as final and appealable under 28 U.S.C. § 1291

"(1) the order must conclusively determine the disputed question; (2) it must resolve an important issue completely separate from the merits of the case; and (3) it must be effectively unreviewable on appeal from a final judgment." ***NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C***., 745 F.3d 742, 747 (5th Cir. 2014); *accord,* ***Digital Equip. Corp. v. Desktop Direct, Inc.***, 511 U.S. 863, 867 (1994)

APPEAL BY RIGHT – COLLATERAL ORDER

Supposedly Narrow Doctrine

***Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009)**

- Doctrine limited to "small" class of rulings and has "narrow" application. *Id*. at 105-06.
- "Decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Id*. at 107.

How to Decide

To make this decision, a court should focus on "the entire category to which a claim belongs," not the individual case before it. ***Mohawk***, 558 U.S. at 107.

"In other words, instead of making these decisions on a case-by-case basis, we make them on a type-of-order-by-type-of-order basis."
Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164, 173 (5th Cir. 2009).

APPEAL BY RIGHT – COLLATERAL ORDER

But it's not that cut and dried …

"There exists in each of [the three *Cohen* criteria] ***substantial nuance***, and …. although we sometimes speak of the three *Cohen* criteria as strict preconditions for appellate review, even a brief exploration of the case law reveals that they might better be regarded as guidelines in making the pragmatic determination of whether to allow an order to be immediately appealed."

> ***Henry v. Lake Charles***, 566 F.3d at 172-73 (5th Cir. 2009) (emphasis added).

APPEAL BY RIGHT – COLLATERAL ORDER

Consequently, courts have described the case law applying these criteria as

"hopelessly complicated," "legal gymnastics," dazzling in its complexity," "unconscionable intricacy" with "overlapping exceptions, each less lucid than the next," "an unacceptable morass," "dizzying," "tortured," "a jurisprudence of unbelievable impenetrability," "helter-skelter," "a crazy quilt," "a near-chaotic state of affairs," and "sorely in in need of limiting principles."

D. Livingston, ***Federal Interlocutory Appeals and Mandamus*** 8 (June 2013) (quoting A. Steinman, ***Reinventing Appellate Jurisdiction***, 48 B.C. L. Rev. 1237, 1238-39 (2007))

APPEAL BY RIGHT – COLLATERAL ORDER

Collateral Order Doctrine in Texas?

Nope:

"Rogers does not direct us to any authority applying the doctrine [in Texas], nor have we located any, and *we decline to engraft the federal exception upon the statute in the absence of any indication that our legislature intended to do so itself*."

Rogers v. Orr, 408 S.W.3d 640, 644 (Tex. App. – Ft. Worth 2013, pet. denied);***Taylor v. State***, 268 S.W.3d 752, 754 (Tex. App. – Waco 2008, pet. denied) (collateral order doctrine is federal doctrine of appellate jurisdiction for certain collateral orders, but not recognized in Texas)

APPEAL BY RIGHT – COLLATERAL ORDER

EXAMPLES

- Orders denying claims of immunity from suit that turn on issues of law. ***Troice v. Proskauer Rose LLP***, 816 F.3d 341 (5th Cir. 2016) (attorney immunity).

  But not, e.g.,

- Orders denying immunity that turn on factual determinations or orders denying immunity from liability, as opposed to suit. ***Id***.; ***Gragert v. Waybright***, 423 Fed. Appx. 428, 429-31 (5th Cir. 2011).
- Orders denying MTD for lack of personal jurisdiction, proper service. ***Jefferson v. Delgado Cmty. Coll. Charity Sch. of Nursing***, 602 Fed. Appx. 595, 597 (5th Cir. 2015).

Appeal by Right – Other Judge-Made Doctrines

Remand Orders

28 U.S.C. § 1447(d) precludes review of remand based on lack of subject-matter jurisdiction or procedural defects in removal.

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)

But …

Where remand based on other grounds, § 1447(d) does not bar appeal. ***Id***.

So …

Appeal by Right – Other Judge-Made Doctrines

Remand Orders (cont'd)

Remand based on **abstention** is appealable under 28 U.S.C. § 1291, as a "final judgment" or collateral order.

> ***Quackenbush v. Allstate Ins. Co***., 517 U.S. 706 (1996) (remand); ***Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp***., 460 U.S. 1 (1983) (stay)

Appeal by Right – Other Judge-Made Doctrines

Remand Orders (cont'd)

Remand based on **declining to exercise supplemental jurisdiction,** 28 U.S.C. § 1367, also appealable under 28 U.S.C. § 1291.

> ***Carlsbad Tech., Inc. v. HIF Bio, Inc.***, 556 U.S. 635 (2009)
>
> ***With an interesting corollary …***

Appeal by Right – Other Judge-Made Doctrines

Remand Orders (cont'd)

Pre-remand substantive orders that (1) are "separable" from the remand order and (2) precede it "in logic and in fact" are final and subject to immediate federal court appeal.

> ***City of Waco v. United States Fidelity & Guaranty Co***., 293 U.S. 140 (1934); ***Regan v. Starcraft Marine LLC***, 524 F.3d 627 (5th Cir. 2008); ***Morris v. TE Marine Corp***., 344 F.3d 439 (5th Cir. 2003)

Appeal by Right – Other Judge-Made Doctrines

- "***Perlman* doctrine**" – Discovery order directed at disinterested third party treated as immediately appealable final order because third party lacks sufficient stake to risk contempt by refusing compliance. ***Perlman v. United States***, 247 U.S. 7 (1918).
- "**Pragmatic or Practical Finality doctrine**"/ "**Death Knell doctrine**" – ***Gillespie v. U.S. Steel Corp***., 379 U.S. 148 (1964); ***Idlewild Bon Voyage Liquor Corp. v. Epstein***, 370 U.S. 713 (1962).
- "***Forgay* doctrine**" – Hardship, irreparable injury, immediate delivery of property. ***Forgay v. Conrad***, 47 U.S. 201 (1848).

APPEAL BY RIGHT – PROCEDURE

IN TEXAS

Interlocutory Appeal = "Accelerated Appeal," TRAP 28.1(a), with shortened deadlines

- TRAP 26.1(b): NOA due in 20 days, not 30
- TRAP 35.1(b): ROA due in 10 days, not 120
- TRAP 38.6(a) & (b): shortened briefing schedule

APPEAL BY RIGHT – PROCEDURE

Federal: Not so much …

- Standard rules, deadlines (e.g., 30 days to file NOA), and procedures apply, *see* ***Kenyatta v. Moore***, 744 F.2d 1179, 1186-87 (5th Cir. 1984), *except that …*
  - Parties may move for expedited treatment, or court may order it sua sponte. 5th Cir. R. 27.5.
  - 5th Cir. R. 47.7 accords "calendaring priority"—"preference in processing and disposition"—to injunction cases, and any others for which good cause is shown.
  - Parties may move for "emergency" treatment where relief is needed "before the expiration of 14 days after filing." 5th Cir. R. 27.3.

APPEAL BY RIGHT

BUT WHAT IF I DON'T WANT TO APPEAL — Federal?

"If application of Appellate Rule 4 to collateral orders [or other appeals by right] is to have any force, it must mean that the right to take [an immediate] appeal is lost upon expiration of appeal time. That conclusion does not mean that review also should be denied on appeal from a truly final judgment, or for that matter on appeal by certification under 28 U.S.C. § 1292(b) or perhaps by extraordinary writ."

15A C. Wright, A. Miller, E. Cooper, **FEDERAL PRACTICE AND PROCEDURE** § 3911 at 359 (2d ed. 1992) (but caution regarding truly final orders)

APPEAL BY RIGHT

BUT WHAT IF I DON'T WANT TO APPEAL — STATE?

Where interlocutory appeal is permissive (and most are), you may defer appeal until after final judgment, unless the issue in question is rendered moot by subsequent events.

- ***Hernandez v. Ebrom***, 289 S.W.3d 316, 317-18 (Tex. 2009) (healthcare claim)
- ***Am. Heritage Capital, LP v. Gonzalez***, 436 S.W.3d 865, 873 (Tex. App.—Dallas July 1, 2014, no pet.) (anti-SLAPP statute)

APPEALS BY PERMISSION

TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f)

- Controlling question of law, substantial ground for disagreement, may materially advance termination of case
- Requires certification by trial court and permission from court of appeals
- Modeled after …

28 U.S.C. § 1292(b) (same)

But also see

- **FED. R. CIV. P. 54(b)**
- **FED. R. CIV. P. 23(f)**
- **CAFA, 28 U.S.C. § 1453(c)**

APPEALS BY PERMISSION – 54(b)

FED. R. CIV. P. 54(b)

When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

See ***Gelboim v. Bank of Am. Corp***., 135 S. Ct. 897, 902-03, 906 (2015)

APPEALS BY PERMISSION – 54(b)

- District court must both (1) certify "no just reason for delay" and (2) "direct entry of a final judgment" on the claim or party at issue. ***Quinn v. Miller***, 535 Fed. Appx. 412, 414-15 (5th Cir. 2013)

- Decision must finally dispose of a party or a "claim"—not an issue or a defense. ***Tetra Techs. v. Continental Ins***., 755 F.3d 222, 230 (5th Cir. 2014)

APPEALS BY PERMISSION – 54(b)

- If judgment properly certified, appeal is under 28 U.S.C. § 1291 and Rule 4. So …
  - Court of Appeals has no discretion whether to accept appeal.
  - *But* Court of Appeals can and will review whether district court's certification was proper. ***Eldredge v. Martin Marietta Corp***., 207 F.3d 737, 740 (5th Cir. 2000)
  - *And* failure to take timely appeal of judgment certified under Rule 54(b) waives appeal permanently. ***Patel v. Haro***, 470 Fed. Appx. 240, 243 (5th Cir. 2012)

APPEALS BY PERMISSION – 54(b)

EXAMPLES

- Dismissal of fewer than all parties for lack of personal jurisdiction. ***Patterson v. Aker Solutions Inc.***, 826 F.3d 231, 233 (5th Cir. 2016).
- Declaratory order finding liquidated damages covenant enforceable. ***Int'l Marine, LLC v. Delta Towing, LLC***, 704 F.3d 350, 353 (5th Cir. 2013).

But not, e.g.,

- Order ruling on threshold legal issue, but not disposing of "claim." ***Halliburton Co. Benefits Comm. v. Graves***, 191 Fed. Appx. 248, 250 (5th Cir. 2006).

APPEALS BY PERMISSION – 1292(b)

"A district court may certify an interlocutory appeal from an order [not otherwise appealable] if the court is 'of the opinion that [1] such order involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and that [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation.'"

Nguyen v. Am. Comm. Lines, LLC, 805 F.3d 134, 137-38 (5th Cir. 2015) (quoting 28 U.S.C. § 1292(b))

APPEALS BY PERMISSION – 1292(b)

- Decision whether to certify under § 1292(b) is subject to district court discretion, and is largely unreviewable. *But see* ***In re McClelland Eng'rs, Inc***., 742 F.2d 837 (5th Cir. 1984) (mandamus review of refusal to certify).
- District court certification of the three § 1292(b) factors is jurisdictional for Court of Appeals. ***Southwestern Elec. Power Co. v. Certain Underwriters at Lloyds***, 772 F.3d 384, 386 n.4 (5th Cir. 2014).
- 5th Circuit "strongly suggest[s] to district judges the advisability of stating more than an abstract description of the legal questions involved or a bare finding that the statutory requirements of section 1292(b) have been met." ***Linton v. Shell Oil Co***., 563 F.3d 556, 558 (5th Cir. 2009)(per curiam).

APPEALS BY PERMISSION – 1292(b)

- "Interlocutory review under § 1292(b) is not mandatory; rather, it is discretionary"—both for the party and for the Court of Appeals. ***Castellanos-Contreras v. Decatur Hotels LLC***, 622 F.3d 393, 399 (5th Cir. 2010)(en banc); ***Caterpillar, Inc. v. Lewis***, 519 U.S. 61, 74 (1996).
- If the district court's certification is accepted, an "appellate court may address any issue fairly included within [a] certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" ***Cazorla v. Koch Foods of Miss., LLC***, 838 F.3d 540, 548 (5th Cir. 2016)(quoting ***Yamaha Motor Corp., U.S.A. v. Calhoun***, 516 U.S. 199, 205 (1996)).

APPEALS BY PERMISSION – 1292(b)

PROCEDURE

- District court may certify under § 1292(b) "at any time"—no deadline, ***mostly***.
- Application or "petition" must be made to Court of Appeals within 10 days after entry of order certifying the appeal. Jurisdictional. Can't extend. Circuit split whether order can be ***re***-certified to restart clock. 5th Cir. says yes. *E.g.,* ***Tenn. Gas Pipeline Co. v. Houston Cas. Ins. Co.***, 1995 U.S. App. LEXIS 41286 (5th Cir. 1995).
- FED. R. APP. P. 5 prescribes procedure for pursuing the application in the Court of Appeals:
    - Contents of application, length (5200 words), schedule, no argument
    - If application granted, within 14 days pay all fees, no need to file notice of appeal

APPEALS BY PERMISSION – 1292(b)

EXAMPLES

- Order addressing federal preemption. ***Greenwich Ins. Co. v. Miss. Windstorm Underwriting Ass'n***, 808 F.3d 652 (5th Cir. 2015).
- Order allowing amended pleading and denying MTD for failure to state a claim. ***Whitley v. BP, PLC***, 838 F.3d 523, 525-26 (5th Cir. 2016).
- Whether 30-day removal clock begins to run upon actual notice or upon service of process. ***Murphy Bros. v. Michetti Pipe Stringing, Inc.***, 526 U.S. 344 (1999).

APPEALS BY PERMISSION – 23(f)

CLASS ACTIONS: FED. R. CIV. P. 23(f)

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

APPEALS BY PERMISSION – 23(f)

- No certification required from district court
- Procedures for seeking permission to appeal are prescribed by FED. R. APP. P. 5.
- Advisory Ctte. Note provides: "Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals …. unfettered discretion …, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."

APPEALS BY PERMISSION – 23(f)

Multiple variations on appeals courts' standards for deciding whether to allow 23(f) appeal, e.g.:

"(1) death-knell situation for either [party], … coupled with a class certification decision by the district court that is questionable …; (2) certification decision presents an unsettled and fundamental issue of law relating to class actions, important to both the specific litigation and generally, … likely to evade end-of-the-case review; [or] (3) … class certification decision is manifestly erroneous."

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 99-100 (D.C. Cir. 2002)

APPEALS BY PERMISSION – 23(f)

No 5th Circuit decision expressly adopting or articulating standards for 23(f) appeal, but

"[I]t is appropriate to grant leave to appeal an adverse determination where (1) a 'certification decision turns on a novel or unsettled question of law' or (2) '[a]n order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'"

Regents v. Credit Suisse First Boston (USA) Inc., 482 F.3d 372, 379 (5th Cir. 2007)(quoting Advisory Ctte. Note)

APPEALS BY PERMISSION – CAFA

CLASS ACTION FAIRNESS ACT

- 28 U.S.C. § 1332(d) – Federal jurisdiction over interstate class actions with (1) more than 100 members, (2) minimal diversity, (3) amount in controversy > $5mm.

- 28 U.S.C. § 1453(b) – removal of CAFA class actions

- 28 U.S.C. § 1453(c) – discretionary appeal of orders granting or denying remand

APPEALS BY PERMISSION – CAFA

28 U.S.C. § 1453(c) – discretionary appeal

- No district court certification
- Application governed by FED. R. APP. P. 5
- Strict time limits under § 1453(c) –
  - Rule 5 application must be filed within 10 days after remand order.
  - Court of Appeals must resolve appeal within 60 days after accepting it, subject to agreed extension or 10-day extension for good cause, or appeal denied.
  - Deadline calculated from date Court of Appeals grants application to appeal. ***Patterson v. Dean Morris, LLP***, 444 F.3d 365, 368-69 (5th Cir. 2006).

EFFECT OF INTERLOCUTORY APPEAL

STATE

Varies, per § 51.014(b)-(e)

- Most appeals stay commencement of trial, per § 51.014(b)
- *All* proceedings stayed during interlocutory appeal of class certification, official immunity, special appearance, plea to jurisdiction by governmental unit, MTD on anti-SLAPP, per § 51.014(b) & (c)
- Discretionary, on discretionary appeals, per § 51.014(e)

EFFECT OF INTERLOCUTORY APPEAL

FEDERAL

Interlocutory: Stay Is Discretionary

- FED. R. APP. P. 8
  - Must ordinarily apply first in district court, or explain why
  - Be prepared to bond

FED. R. CIV. P. 54(b) : Regular rules apply

- FED. R. CIV. P. 62(h) – grants district court discretion to stay judgment certified under Rule 54(b). Be prepared to bond.

APPEAL – STATUTORY AUTHORITY

BE SURE TO CHECK FOR OTHER SUBJECT-SPECIFIC STATUTES, FOR EXAMPLE …

EVEN IN TEXAS

- TEX. CIV. PRAC. & REM. CODE § 51.016 (arbitration orders under FAA)
- TEX. CIV. PRAC. & REM. CODE § 171.098 (arbitration orders under TAA)

FEDERAL

- 28 U.S.C. § 16(a) (arbitration orders under the FAA)
- 28 U.S.C. § 2342 (appeals from administrative actions of federal agencies)

51.014 Federal Analogs

51.014(a)(1) & (2)	Receiver or trustee orders	28 U.S.C. § 1292 (a)(2)
51.014(a)(3)	Order grants or denies class action certification	Fed. R. Civ. P. 23(f)
51.014(a)(4)	Order grants or denies temporary injunction	28 U.S.C. § 1292(a)(1)
51.014(a)(5)	Denial of official immunity	Collateral order – e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
51.014(a)(6)	Media/First Amendment	Collateral order – e.g., *Helstoski v. Meanor*, 442 U.S. 500 (1979); *United States v. Aldawsar*, 683 F.3d 660 (5th Cir. 2012)
51.014(a)(7)	Order grants or denies special appearance; personal jurisdiction	28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b) – e.g., *Taishan Gypsum Co. v. Gross*, 753 F.3d 521 (5th Cir. 2014)

51.014 Federal Analogs

51.014(a)(8)	Order denies governmental unit plea to jurisdiction	Collateral order – e.g., *Lampton v. Diaz*, 661 F.3d 897, 899 (5th Cir. 2011)
51.014(a)(9)-(11)	Order denies relief regarding healthcare claim, expert report	Expert report requirement not applicable in federal court. *Passmore v. Baylor Health Care Sys.*, 823 F.3d 292 (5th Cir.), *en banc denied*, 841 F.3d 284 (5th Cir. 2016) (Jones, dissenting)
51.014(a)(12)	Order denies MTD under anti-SLAPP statute	Collateral order doctrine – e.g., *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016); *but see Ernst v. Carrigan*, 814 F.3d 116, 122 (2d Cir. 2016)
51.014(d)-(f)	Discretionary appeal if certified by trial court	28 U.S.C. § 1292(b)


Thats All Folks!

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THE "ANDERS BRIEF"— IT'S NOT JUST FOR CRIMINAL APPEALS ANY MORE

In re N.A., a child
Dallas Court of Appeals, No. 05-15-01220-CV (January 25, 2016)
Chief Justice Wright and Justices Fillmore (Opinion) and Stoddart

Ken Carroll

Earlier this week the Dallas Court of Appeals followed the procedures established in *Anders v. California*, 386 U.S. 738 (1967), to affirm an order terminating parental rights in the face of the mother's baseless appeal. The decision is the latest reminder that *Anders* is not confined to the criminal context in which it was born.

In *Anders*, the United States Supreme Court fashioned a protocol to balance the right of a criminal defendant to appeal a conviction against the ethical obligations of appointed counsel and the attendant considerations of judicial economy and efficiency with respect to a frivolous appeal. Pursuant to *Anders*, if a criminal defendant insists on pursuing an appeal, but appointed counsel believes that appeal to be without merit, counsel must thoroughly review the record and the law, file a brief detailing that review and explaining why an appeal would be frivolous, and move to withdraw as counsel. Counsel must provide a copy of the brief and motion to the client. Faced with an "*Anders*

CARRINGTON COLEMAN

ABOUT US

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