

APPELLATE

State Court Jurisdiction Expanded to Allow for Permissive Appeals

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Interlocutory orders issued in Texas state district courts may now be immediately appealed, with the important requirement that the parties must agree to the appeal. While this requirement will significantly limit the application of the new statute, in appropriate situations the new statute will allow intermediate review of the district court's ruling without the expense of full discovery and the uncertainty of a trial on the merits.

The procedure will be most useful when a trial court 1) grants a partial summary judgment on a determinative issue of law; 2) decides some other preliminary matter on an issue of first impression; 3) violates clear precedent; or 4) must make a close call.

The 2001 Legislature added Texas Civil Practices & Remedies Code § 51.014(d)-(f) to provide for permissive appeals in district court civil actions not otherwise subject to interlocutory appeal. In addition to the requirement that the

parties agree, the statute requires that 1) the district court issue a written order for interlocutory appeal; 2) the parties agree that the order involves "a controlling question of law as to which there is a substantial ground of difference of opinion," and 3) the parties agree that the immediate appeal "may materially

advance the ultimate termination of the litigation." *Id.* § 51.014(d).

An application to appeal must be filed within 10 days of the date of the order being appealed. The court of appeals then has discretion to permit the appeal. *Id.* § 51.014(f). The appeal does not stay proceedings in the district court, unless the parties agree and the trial court or appellate court orders a stay of the proceedings. *Id.* § 51.014(e). The state statute applies only to those cases filed after its effective date of Sept. 1, 2001.

The provision is parallel, though not identical, to federal practice. Under 28 U.S.C. § 1292(b), the district judge shall be of the opinion that the otherwise non-appealable inter-



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locutory order 1) involves a controlling question of law as to which there is substantial ground for difference of opinion, and 2) an immediate appeal may materially advance the ultimate termination of the litigation. The parties, however, need not agree. Federal permissive appeals must only be approved by the trial judge and the appellate court. The federal district court must find in its order allowing the immediate appeal that the requirements of the statute were met. *Id.* There appears to be no such similar requirement in the state statute. The federal rules also provide that the district court may later amend its order, either on its own motion or in response to a party's motion, to include the statement required by Section 1292(b). Fed. R. App. P. 5(a)(3).

Because there is not yet a similar provision in the state rules governing the mechanics of filing the petition for permission to appeal, the federal rule can provide guidance for the practitioner in filing an application for permission to appeal under new Section 51.014(d)-(f). Under the federal rules, the appealing party must file a petition for permission to appeal with the clerk of the court of appeals. Fed. R. App. P. 5(a)(1). A notice of appeal is not a substitute for a petition for permission to appeal. *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985).

The federal petition for permission to appeal must include: (1) a statement of facts necessary to understand the question presented; (2) the question presented; (3) the relief sought; (4) the reasons why the appeal should be allowed and is authorized by statute or rule; and (5) an attached copy of the order complained of, any related opinion or memorandum, and the order stating the district court's permission to appeal and finding that the necessary conditions are met. Fed. R. App. P. 5(b)(1). If the court of appeals grants permission to appeal, a notice of appeal need not be filed; the date of the order granting permission to appeal serves

as the date of the notice of appeal for calculating time under the rules. Fed. R. App. P. 5(d)(2). In state court, until a rule or the courts determine that a notice of appeal is unnecessary, it is advisable to file a notice of appeal within the 10-day period for bringing the permissive appeal.

Because the court of appeals' decision to grant permission to appeal is discretionary, the application for permission to appeal should focus on why the court of appeals should grant permission to appeal, much as a party may convince the Texas Supreme Court to accept a petition for review. Judicial economy should be the central focus, showing that an immediate appeal has a good chance of preventing a full trial, an appeal, a remand for new trial, and possibly a later second appeal. The application should include citation to authority — which for the time being will be federal cases — showing that immediate appeals have been granted in similar circumstances. In short, the application should focus on the “controlling question of law,” the “substantial ground for difference of opinion,” and how the “immediate appeal from the order may materially advance the ultimate termination of the litigation.”

The new permissive appeal statute should be a useful tool to seek interlocutory review of orders and prevent unnecessary trials.

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