

PERMISSIVE INTERLOCUTORY APPEALS IN STATE COURT

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by Dana Livingston Cobb¹

I. INTRODUCTION

Last year, the Texas Legislature amended the general interlocutory appeal statute, section 51.014 of the Texas Civil Practice and Remedies Code. *See* Appendix A to this paper. These amendments enacted two changes to Texas interlocutory appeal practice. First, the 2001 legislative changes augmented the section 51.014 catalog of immediately appealable orders by adopting a permissive interlocutory appeal for interlocutory orders on controlling questions of law that are deemed central or pivotal to a case.

Second, the amendments altered the automatic stay provisions of section 51.014(b), which broadly applied to all interlocutory appeals of orders listed in section 51.014(a).

Now, the automatic stay no longer applies in appeals involving temporary injunctions under subsection (a)(4) and applies in appeals from the denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by subsections (a)(5), (7), or (8) only if certain time constraints are met. *See* Appendix A.

This paper addresses only the first change—the creation of the permissive appeal in Texas. The paper discusses the provision’s legislative history, lessons from the federal experience, procedural problems, open questions created by the new legislation, and practice tips for handling a permissive appeal.

The paper also appends a chart illustrating the types of questions federal courts have

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The views expressed in this paper are those of the author and do not necessarily represent the views of any of these individuals, the courts, or any of the Justices of the courts.

found reviewable under the federal permissive appeal statute and the procedural context in which the questions arose. *See* Appendix C.

II. THE NEW STATE PERMISSIVE APPEAL

A. Statutory language

The new interlocutory appeal provision providing for permissive or discretionary appeals in Texas is contained in newly added subsections (d), (e), and (f) of the Civil Practices and Remedies Code section 51.014:

§ 51.014. Appeal From Interlocutory Order

....

(d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)-(f) (Vernon Supp. 1992).

This new permissive appeal provision applies only to a suit that is commenced on or after the effective date of the 2001 amendments, September 1, 2001. Acts 2001, 77th Leg., R.S., ch. 1389, § 3 (“This Act applies only to a suit that is commenced on or after the effective date of this Act. A suit that is commenced before the effective date of this Act is governed by the law applicable to the suit immediately before the effective date of this Act, and that law is continued in effect for that purpose.”).

B. Legislative history

The new permissive appeal provision in section 51.014(d)-(f) was based on 28 U.S.C. § 1292(b). *See Hearings on Tex. H.B. 978 Before the House Comm. on Civil Practices*, 77th Leg., R.S. (Feb. 21, 2001) (statement of Rep. Craig Eiland) (untranscribed audiotape). Section 1292(b), which has made permissive appeals available in the federal system since its adoption in 1958, provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the

order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b); *see Tidewater Oil Co. v. United States*, 409 U.S. 151, 154 (1972) (citing Interlocutory Appeals Act of Sept. 2, 1958, Pub.L. 85-919, 72 Stat. 1770, which enacted § 1292(b)). Indeed, when House Bill 978, which ultimately became section 51.014(d)-(f), was originally introduced to the House, its substantive provisions were nearly identical to those in section 1292(b). *See* Tex. H.B. 978, 77th Leg., R.S. (2001).

When House Bill 978 was first considered in public hearing, the Bill's author described its purpose:

One other thing that is in here that we may want to tighten up just a little bit from last—something that we did add from last session was a provision from 28 U.S.C. [§ 1292(b)] or something—federal district court authority where if a judge determines that there is an issue that is central to the case that essentially will decide the case one way or another, he can certify that, he essentially certifies a question and sends it to the court of appeals, much like the Fifth Circuit often time sends over to the Supreme Court and says, “Hey, answer this issue for us.” The problem here is, as Judge Lindsay can tell us, what we do today is if there is an issue that is central to a case that both parties want to be decided, there is a way to do this and that is you either sever out everything that's not part of that central issue and create a separate case name, you know “cause of action

A” and “cause of action B,” leave it dormant, let the judge rule, and you take that up on appeal and then bring it back down, and reconsolidate them. That's kind of cumbersome. The other thing you can do is you can simply agree to submit that issue, dismiss all other causes of actions with an agreement not to plead the statute of limitations, but it's all an exercise that shouldn't be all that necessary.

Hearings on Tex. H.B. 978 Before the House Comm. on Civil Practices, 77th Leg., R.S. (Feb. 21, 2001) (statement of Rep. Craig Eiland) (untranscribed audiotape; portions unofficially transcribed by the author of this paper).

Immediately following this discussion of House Bill 978, however, the Bill's author suggested that changes be made to the Bill to protect against feared abuses of the new permissive appeal by trial judges:

The one thing that I do have concern about, I have heard of some judges who might use this as just, you know, everything might be a central question that they want to send up to just kind of delay the case—“Well, I don't want to hear this case . . . at all, ever, so I'm going to just keep certifying questions to go to the court of appeals.”

. . . .

So I'm going to take a look at that so maybe in those situations in state court maybe you need the parties to agree before the judge sends it up, or something like that, and I'll look at that and bring back some language as well.

. . . .

Under (e), where it says “an appeal of this section,” which is where we adopt the federal language, we might just say “an appeal under subsection (d) does not stay proceedings in the district court unless the parties agree, the court of appeals or a judge of the court of appeals issues an order to stay the proceedings” and maybe that will solve concerns of litigants of getting sent up multiple times on multiple issues.

Id. (statement of Rep. Craig Eiland). Tommy Fibich, individually and on behalf of the Texas Trial Lawyers Association, echoed Rep. Eiland’s concerns during the same hearing:

... I have talked with Judge Lindsay and other judges from Harris County and Rep. Eiland concerning the language that gives a right for additional interlocutory appeal where there is a controlling question. I’m aware of cases in which the parties have agreed to summary judgments so that they could get a matter before the appellate court. Unfortunately, that really imposes upon that party that has a judgment agreed to be taken against them a burden that they shouldn’t have to sustain in the appellate courts. But like Rep. Eiland, I am a little bit concerned about the language that created the opportunity for the court to send any matter that it deems controlling up. And we would like to continue to work with him on that language.

Id. (statement of Tommy Fibich).

No one at this or any other committee hearing or debate on the floor of the House or Senate inquired about or mentioned whether the federal courts had experienced any difficulties with trial judges abusing or overusing section

1292(b). Any concerns that a permissive appeal statute might be abused by state trial court judges might have been calmed by the experience of federal courts under section 1292(b). For instance, In fiscal year 1999, 27 petitions for permission to appeal under section 1292(b) were filed with the Fifth Circuit. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CLERK’S ANNUAL REPORT, JUDICIAL WORKLOAD STATISTICS app. F (1999). Similarly, in fiscal year 2001, only 19 petitions for permission were filed with the Fifth Circuit. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CLERK’S ANNUAL REPORT, JUDICIAL WORKLOAD STATISTICS app. F (2001). Compared to the total number of appeals filed with the court annually, which exceeded 8500 in both of these fiscal years, the number of section 1292(b) petitions being presented to the court is minuscule. *Id.* at i. Likewise, compared to the total number of federal district-court-level judges in the Fifth Circuit with authority to certify orders for appeal under section 1292(b), the numbers of petitions for permission filed in the Fifth Circuit show that on average, a judge in the Fifth Circuit is using section 1292(b) far fewer than once every few years. And, when the procedure is used by federal district courts, the Fifth Circuit is frequently agreeing with its use, a fact demonstrated by the Fifth Circuit granting a significant percentage of the petitions.²

Despite the fact that the experience in the federal system demonstrates that section 1292(b) has not been abused, but instead is

²Section 1292(b) itself was a compromise between those who would permit interlocutory appeals at the sole discretion of the appellate courts and those who were opposed to any broadening of interlocutory review. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 154 (1972).

only sparingly used by district court judges, after House Bill 978 was initially heard before the House Civil Practices Committee, the Bill author altered the language in House Bill 978 and substituted a new version that restricted the use of permissive appeals to only those cases in which the parties agree to go up on an immediate interlocutory appeal:

COMPARISON OF ORIGINAL TO
SUBSTITUTE

. . . . The substitute authorizes a district court to issue a written order for an interlocutory appeal if the parties rather than the [trial] court agree that the order involves a controlling question of law and the parties agree to the order. The substitute also provides that such an appeal does not stay proceedings in the district court unless the parties agree.

HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Comm. Substitute for H.B. 978, 77th Leg., R.S. (2001). The language creating the permissive appeal in the committee substituted version of House Bill 978 is the version that the Legislature eventually enacted into section 51.014(d)-(f) without any further changes. This part of House Bill 978 was scarcely even mentioned in any other public hearing.

C. Differences between the federal and Texas statutes

The Texas permissive interlocutory appeal statutory provision varies in at least three respects from section 1292(b). Under the state statute:

(1) all parties must agree that the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) all parties must agree to the trial court's order certifying an order for interlocutory appeal under this section; and
(3) district court proceedings cannot be stayed by order of the trial court or the court of appeals unless the parties also agree to the stay.

In addition, one article on the new state provision has noted that the state statute, unlike its federal counterpart, does not appear to require that the district court "find in its order allowing the immediate appeal that the requirements of the statute were met." Warren W. Harris & Lynne Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31 (2002). This view finds support both from differences in the wording of the state and federal statutes and from the bill analysis of the committee substituted version of House Bill 978. HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Comm. Substitute for H.B. 978, 77th Leg., R.S. (2001) (" . . . if the parties *rather than* the [trial] court agree that the order involves a controlling question of law" (emphasis added)).

The state statute, like its federal counterpart, though, still conditions the filing of an application for permission to appeal on first having secured an order from the district court authorizing the parties to pursue the permissive appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(f) ("If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day *after the date an interlocutory order under Subsection (d) is entered . . .*" (emphasis added)). And, it appears clear from the face of the state statute that the district court has discretion to decline to sign an order authorizing a permissive appeal even if the parties are in agreement and the other provisions of the statute are met. *Id.*

§ 51.104(d) (“A district court *may* issue a written order for interlocutory appeal” (emphasis added)). The point made in the Harris and Liberato article is that, unlike in federal practice, *if* the state district court signs an order under subsection (d) authorizing a permissive appeal, the district court’s order need not recite that the district court found that the requirements of the statute were met. As a practical matter, however, a state district court properly exercising the discretion conferred by the statute is unlikely to sign such an order without first having been persuaded that the requirements were met. The state statute does not appear to require recitation of that finding on the face of the order authorizing pursuing a permissive appeal.

D. The Texas experience

A number of practitioners have predicted that requiring agreement of the parties to the trial court order authorizing a permissive appeal makes the state statute virtually unusable. Indeed, a quick perusal through federal appellate decisions in which permission to appeal has been granted under section 1292(b) demonstrates how unlikely it will be that all parties in some lawsuits will or can reach agreement to take an immediate appeal. *See generally* Appendix C to this paper. For instance, section 1292(b) has been used in tobacco litigation involving numerous parties separately represented by numerous lawyers. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The logistics of obtaining agreement of so many parties makes the statute nearly useless in the cases that arguably might benefit the most from the enactment of the state statute. Even in cases involving relatively few parties or lawyers, many times the party who has prevailed on a “controlling issue” in the trial court is not highly motivated to give up such a valuable bargaining chip—especially when the ruling tangibly affects settlement value—by

agreeing to immediate appellate court review. That is why, of the motions filed in federal court to certify an order under section 1292(b)—even ones that are granted by the district court and accepted by the appellate court—very few are *unopposed*.

The predictions of practitioners concerning the usefulness of the new state statute are certainly reinforced by the number of permissive appeals that have been presented to the appellate courts in Texas thus far. Although the Office of Court Administration is not tracking permissive appeals under the new state statute, in preparing this paper, I contacted all 14 courts of appeals by telephone to inquire how many permissive appeals had been sought since the statute went into effect last September 1. Based on this survey, only two petitions or applications for permission to appeal under section 51.014(d)-(f) have been presented to the courts of appeals (as of the date of this paper): one in Fort Worth and one in Waco.

Of the two applications or petitions for permission to appeal, one apparently did not have the appropriate district court order authorizing a permissive appeal and was thus denied. The other one was granted. The only application or petition for permission that we know of that has been granted under this statute thus far is currently pending in the Fort Worth Court of Appeals. Although the court granted *permission* to appeal, the merits of the appeal are still pending before the court, and the permissive appeal has been consolidated for consideration with another related, pending interlocutory appeal with a separate docket number that appears to have its own, independent basis for appellate jurisdiction under one of the enumerated subsections of section 51.014(a). *City of Arlington v. Scalf*, No. 2-02-082-CV (Tex. App.—Fort Worth Apr. 9, 2002) (not designated for publication).

There is no published opinion in Texas under the new statute.

Although the new permissive appeal statute applies only to those cases filed after its effective date of September 1, 2001, that fact alone does not explain the strikingly low number of applications or petitions for permission filed in state appellate courts to date. Indeed, a permissive appeal is frequently most useful at the outset of litigation when a controlling question or pivotal issue can be resolved without the expense of full discovery and the uncertainty of a trial on the merits. Other reasons also explain the low number: (1) unawareness of the availability of the new provision or relative unfamiliarity with it; (2) the difficulty of persuading a district court to sign an order authorizing a permissive appeal; and (3) the difficulty of obtaining the agreement of the parties.

E. Procedure for pursuing a permissive appeal in Texas: “*In the land of the blind, the one-eyed man is king.*”

1. Texas needs a TRAP provision governing the procedure for permissive interlocutory appeals.

The Legislature’s adoption the *statutory half* of the federal permissive appeal practice created a procedural lacuna in Texas appellate practice for interlocutory appeals. In federal court, a party wishing to use section 1292(b) is guided by Federal Rule of Appellate Procedure 5, which spells out in great detail exactly when, where, and how a permissive appeal is sought by parties and processed by the courts. Unfortunately, in Texas, we do not have a companion appellate rule for section 51.014’s new permissive appeal provision. Instead, the only rules in the current Texas Rules of Appellate Procedure that appear to apply to the new permissive interlocutory appeal are the

existing provisions that were drafted for what in federal court are called appeals “as of right.” Compare FED. R. APP. P. 3 & 4 (governing appeals “as of right,” including interlocutory appeals) with FED. R. APP. P. 5 (by contrast, governing permissive appeals). The reason why the current Texas appellate rules make no distinction between appeals “as of right” and permissive appeals is simple—when the current rules were revamped in 1997, there was no Texas statute of general applicability creating a permissive appeal.³

So what is the procedure for pursuing a permissive interlocutory appeal in Texas? Your guess is probably as good as anyone else’s. In fact, when I asked the Staff Attorneys at the 14 appellate courts how they anticipated the new permissive appeal would work from a procedural standpoint, the need for the Texas Supreme Court to consider adopting some version of the other half of the federal permissive appeal practice—the *procedural half* of that practice—became even more apparent.⁴ Some of the Staff Attorneys

³In the administrative law context, the Legislature in 1999 enacted at least two statutes allowing the *transfer* of certain actions from the Travis County district courts to the Third Court of Appeals at the *discretion* of both the trial court and the court of appeals if certain statutory standards are met. See, e.g., TEX. GOV’T CODE §§ 2001.176(c), 2001.038(f). The Third Court has had one attempted transfer under section 2001.038(f), but it denied permission to transfer in a simple, nonexplanatory opinion. See *In re Continental Cas. v. Tex. Workers’ Comp. Comm’n*, No. 03-01-612-CV (Tex. App.—Austin Nov. 7, 2001) (not designated for publication).

⁴The one state appellate court that has had and granted a permissive appeal sensibly looked to the procedure followed in federal court in determining its own procedure for handling that pending case.

indicated that they would probably be inclined to look to the federal procedure for guidance, while other Staff Attorneys indicated that strict adherence to the current Texas Rules of Appellate Procedure for interlocutory appeals would be expected.

Without a specific appellate rule governing permissive appeals in place, parties wishing to pursue a permissive appeal, should consult and follow most if not all of the existing rules governing interlocutory appeals, unless instructed otherwise by a court. Unfortunately, doing so creates a number of procedural problems. Some of the procedural problems caused by following the procedures in the existing Texas Rules of Appellate Procedure in a permissive appeal under section 51.014(d)-(f) may be alleviated by orders of the appellate court in individual cases.

2. Procedural lessons from the federal model

By way of background, and to better appreciate the procedural problems in strictly following the existing Texas Rules of Appellate Procedure for interlocutory appeals, some discussion of how federal courts process permissive appeals is helpful. *See generally* Dana Livingston Cobb, *Federal Interlocutory Appeals and Mandamus*, in UNIV. OF TEX. 10TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS (2000).

a. Obtaining section 1292(b) certification from the district court

Because of the peculiar posture of that permissive interlocutory appeal and its companion, non-permissive interlocutory appeal, even that appellate court was not confronted with some of the procedural problems created by requiring practitioners to follow the existing appellate rules for interlocutory appeals.

To pursue an appeal under section 1292(b), a party must first obtain a written order containing the statement that the district court has resolved a controlling 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. 28 U.S.C. § 1292(b). That language may appear in the order resolving the controlling issue of law, or the district court may amend its order, either on its own or in response to a party's motion, to include the statement required by section 1292(b). FED. R. APP. P. 5(a)(3). In that event, the time to petition runs from entry of the amended order. FED. R. APP. P. 5(a)(3).

b. Filing the petition for permission under section 1292(b) in the court of appeals within 10 days; notice of appeal is not used in section 1292(b) appeals.

Once a written order containing the required statement is entered, the party wishing to appeal has 10 days to file a petition for permission to appeal with the clerk of the court of appeals. 28 U.S.C. § 1292(b); *see* FED. R. APP. P. 5(a)(1)-(2). The 10-day limit is jurisdictional. *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981).

A notice of appeal will not substitute for a petition for permission to appeal. *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180 (5th Cir. 1985) (holding that it lacked jurisdiction to consider granting discretionary appeal because although the district court had entered the requisite certificate for appealability, the plaintiff timely filed notice of appeal but did not file with court of appeals a request for permissive appeal within 10 days). Indeed, the federal appellate courts do not want the parties to file notices of appeal when seeking

permission to appeal because doing so triggers a district court clerk's duty to prepare and forward the record to the court of appeals. Unless and until the federal appellate court decides to grant permission to appeal, it does *not* want a record on appeal prepared or forwarded by the district clerk.

c. Required contents and form of petition for permission to appeal under section 1292(b)

A petition for permission to appeal must include the following:

- (A) the facts necessary to understand the question presented;
- (B) the question itself;
- (C) the relief sought;
- (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
- (E) an attached copy of:
 - (i) the order, decree, or judgment complained of and any related opinion or memorandum, and
 - (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

FED. R. APP. P. 5(b)(1). The petition for permission is limited to 20 pages, excluding the corporate disclosure statement, certificate of interested persons, certificate of service, and any documents the rules require to be attached. 5TH CIR. R. 5; Proposed Amendment to FED. R. APP. P. 5(c). The petition must be in no smaller than 14 point, proportionally spaced typeface. *See* Proposed Amendment to FED. R. APP. P. 5(c).

A party may file an answer in opposition or a cross-petition within 7 days after the petition is served. FED. R. APP. P. 5(b)(2). The answer is limited to 10 pages and must also be in no

smaller than 14 point, proportionally spaced typeface. 5TH CIR. R. 5; Proposed Amendment to FED. R. APP. P. 5(c). The clerk's office will send a letter to all counsel stating the due date for the response.

d. Internal processing of petition and procedure if the court of appeals grants permission to appeal under section 1292(b)

When a petition for permission to appeal is received by the Fifth Circuit clerk's office, it will be assigned a miscellaneous docket number, and then it will be distributed to a motions panel. The petition is submitted without oral argument unless the court of appeals orders otherwise. FED. R. APP. P. 5(b)(3).

If the court of appeals grants permission to appeal, then, within 10 days after the entry of the court of appeals' order granting permission to appeal, the appellant must pay the district clerk all required fees and file a cost bond, if required, under Federal Rule of Appellate Procedure 7. FED. R. APP. P. 5(d)(1). The required fee that must be paid to the district court clerk if the court of appeals grants the petition for permission to appeal is \$100 payable to the district court clerk. (If you were filing a regular appeal, the fee payable to the district court clerk upon filing a notice of appeal would be a \$105 fee, \$100 of which is a court of appeals' docketing fee, and \$5 of which is a district court filing fee. *See* FED. R. APP. P. 3(e); 5TH CIR. R. 3; *see* 28 U.S.C. §§ 1913, 1917.)

Even upon the granting of permission to appeal and the payment of filing fees in the district court, a notice of appeal need not be filed. FED. R. APP. P. 5(d)(2). The date when the order granting permission to appeal is

entered serves as the date of the notice of appeal for calculating time under the rules. FED. R. APP. P. 5(d)(2).

Once the appealing party has paid the required fees, the district clerk must notify the circuit clerk, and, upon receiving this notice, the circuit clerk will convert the petition to a regular appeal and change its miscellaneous docket number to a regular docket number for an appeal. FED. R. APP. P. 5(d)(3). The record will be forwarded and filed in accordance with Federal Rules of Appellate Procedure 11 and 12(c). The parties will then prepare full-length briefs as they would in any other appeal as of right.

3. Problems arising from not having a TRAP provision that specifically governs permissive appeals; interim advice.

a. Is a notice of appeal required?

In federal court, a notice of appeal plays no part in the permissive appeal practice. *Compare* FED. R. APP. P. 3(a)(1) (“An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk.”) *with* FED. R. APP. P. 5(a) (“To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk . . .”) *and* FED. R. APP. P. 5(d) (setting out the procedure if the court of appeals grants permission to appeal and specifying that “[a] notice of appeal need not be filed”).

Although a notice of appeal plays no part—by design—in the federal permissive appeal practice, because the current Texas Rules of Appellate Procedure do not distinguish between appeals “as of right” and permissive

appeals, but instead are broadly worded to govern any “appeal,” it appears that a notice of appeal must be filed to confer jurisdiction on the court of appeals over any “appeal,” including permissive appeals:

RULE 25. PERFECTING APPEAL

25.1 Civil Cases.

(a) *Notice of Appeal.* An appeal is perfected when a written notice of appeal is filed with the trial court clerk. . . .

(b) *Jurisdiction of Appellate Court.* The filing of a notice of appeal by any party invokes the appellate court’s jurisdiction over all parties to the trial court’s final judgment or order appealed from. . . .

TEX. R. APP. P. 25.1 (a)-(b).

Under the current rules, the deadline for filing a notice of appeal in an interlocutory appeal is “within 20 days after the judgment or order is signed.” TEX. R. APP. P. 26.1(b). The problem, of course, is that the petition for permission must be filed within 10 days in the court of appeals, which will apparently not have jurisdiction over the appeal until a notice of appeal is filed in the trial court. Thus, “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.” Harris & Liberato, *supra*, at 31; *see also* Jane M.N. Webre, *Mandamus, Interlocutory Appeals, and Other Short-Fuse Appellate Scenarios*, Speech to the Travis County Bar Association Civil Appellate Law Section Luncheon (Jan. 17, 2002) (also advising the filing of a notice of appeal). This advice is consistent with the virtually uniform reaction from the Staff Attorneys around the state with whom I spoke in preparing this paper.

Filing a notice of appeal before filing a petition for permission in the appellate court is especially important if you are proceeding to the First or Fourteenth Courts of Appeals because appeals are assigned to one of those two courts by the trial court clerk's office upon the filing of the notice of appeal. Without a notice of appeal, an appellant seeking a permissive appeal in Houston would have no way of being assigned to one of those two courts under the current rules for *appeals*. (Of course, these two courts have a procedure for assigning original proceedings, but a permissive appeal is an "appeal," not an original proceeding, so you would undoubtedly run into trouble getting a petition for permission to appeal accepted for filing as an original proceeding by the person in the clerk's office doing intake of original proceedings.)

What's the big deal about filing a notice of appeal any way? Referring back to the federal model, the reason the federal appellate courts do not want the parties to file notices of appeal when seeking permission to appeal is because doing so triggers the district court clerk's duties to prepare and forward the record to the court of appeals in many circuits, such as the Fifth Circuit. *See* FED. R. APP. P. 11(a). Unless and until the federal appellate court decides to grant permission to appeal, it does *not* want a record on appeal prepared or forwarded by the district clerk. Similarly, in state court, the filing of a notice of appeal triggers the trial court clerk's duty to prepare a clerk's record—even in the absence of a request—under Texas Rule of Appellate Procedure 34.5(a). The gut reaction of most of the Staff Attorneys with whom I spoke in preparing this paper was that a clerk's record, whether it was a full-blown requested record or the bare-bones record mandated by Rule 34.5(a), was unnecessary for deciding a petition for permission to appeal and that the federal model made more sense. Nonetheless, if a notice of appeal is filed, the trial court clerk

is required to prepare at least a bare bones clerk's record containing the items enumerated in Rule 34.5(a).

The timing of the preparation of the clerk's record itself creates another set of procedural problems. Under the current rules, a request for additional items should be made "[a]t any time before the clerk's record is prepared." TEX. R. APP. P. 34.5. Of course, because interlocutory appeals are accelerated appeals, the appellate record is due in the court of appeals "within 10 days after the notice of appeal is filed." TEX. R. APP. P. 35.1(b). Even if a notice of appeal in a permissive appeal is filed the same day that the trial court signs the order permitting the appeal, the appellate record is not due to be filed in the court of appeals until the same day that the petition for permission is due in the court of appeals. Unless the appellate record beats its 10-day deadline by any significant measure, there will be insufficient time to include citations to the record in the petition for permission (even if you did file a notice of appeal the first day possible).

b. Do I request a clerk's record?

As discussed in the preceding section, upon the filing of the notice of appeal, the trial court clerk's duty to prepare at least a bare-bones clerk's record is triggered, even in the absence of a request. The question is whether you should submit your request for additional items in compliance with the rules, which sets the time for filing such a request "[a]t any time before the clerk's record is prepared," TEX. R. APP. P. 34.1(b)(1), or whether you wait until such time as the appellate court might grant permission to appeal. Although the rules appear to require that a request for additional items be made before the clerk's record is prepared, the rules also include liberal provisions for supplementing items

omitted from the clerk's record, TEX. R. APP. P. 34.1(c), and also provide that "[a]n appellate court must not refuse to file the clerk's record or a supplemental clerk's record because of a failure to timely request items to be included in the clerk's record." TEX. R. APP. P. 34.1(b)(4).

Of course, no one really wants to be the test case for the appellate court to determine whether you can sit on your hands and not request a clerk's record until after you learn whether permission will be granted. At the same time, it is clear from the federal practice and from my conversations with practitioners and Staff Attorneys that the appellate court probably does not really want a full-blown requested clerk's record at the petition-for-permission stage, even if the record might make its way to the appellate court before you had to file your petition. One practitioner went so far as to suggest that requesting a full clerk's record as you normally would when you perfect an appeal would be "insane" for permissive appeals when you are still at the petition-for-permission stage. Then again, at least one Staff Attorney with whom I spoke was adamant that permissive appeals will be treated like any other interlocutory appeal and that counsel will be responsible for ensuring that a full clerk's record with every document needed to pursue the appeal is brought forward to the appellate court and a reporter's record, if necessary. Be especially cautious if you are in a court of appeals that has a reputation for strictly construing the appellate rules or one that is prone to dismiss an appeal for want of prosecution.

Another Staff Attorney suggested that, unless and until a Texas Rule of Appellate Procedure is adopted governing permissive appeals, practitioners might consider filing a notice of appeal in the trial court as soon as possible, and then a copy to the court of appeals attached to a Docketing Statement accompanied by a motion to the court of appeals "for

clarification of procedures" requesting that the court clarify whether it wants a complete record at the petition-for-permission stage.

c. Do I request a reporter's record?

Unlike the clerk's record, the filing of a notice of appeal does not automatically trigger any analogous duty on the part of the court reporter to prepare a reporter's record, so application of the current TRAP rules do not create the odd situation of the court reporter being required in the absence of a request to prepare and transmit a reporter's record to the appellate court. If a reporter's record is desired, however, similar timing issues arise because the reporter's record may not arrive in the court of appeals in time to include any citations to it in the petition for permission. The question is whether you should submit your request for a reporter's record in compliance with the rules, which set the time for filing a request "[a]t or before the time for perfecting the appeal." TEX. R. APP. P. 34.6(b)(1). Again, the rules include liberal provisions for supplementation, TEX. R. APP. P. 34.6(d), and provide that "[a]n appellate court must not refuse to file a reporter's record or a supplemental reporter's record because of a failure to timely request it." TEX. R. APP. P. 34.6(b)(3).

Do you even need a reporter's record for a permissive appeal since a permissive appeal is only proper when there is a "controlling question of law"? TEX. CIV. PRAC. & REM. CODE § 51.014(d). Keep in mind that even the application of law to facts (which might have been established at an evidentiary hearing) is a question of law. By analogy to the mandamus context, while the resolution of disputed factual matters is likewise inappropriate on mandamus review, the reporter's record from any relevant evidentiary hearing is required to be made part of the

relator's mandamus record (even relevant nonevidentiary hearings should be included).

For example, orders denying a motion to disqualify counsel, which are traditionally reviewable by mandamus in both state and federal court, are very likely to involve a reporter's record from an evidentiary hearing. *In re Am. Airlines, Inc.*, 972 F.2d 605, 605 (5th Cir.1992) (reviewing denial of motion to disqualify by mandamus); *In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir.1992) (same); *In re Nitla S.A. de C.V.*, 45 Tex. Sup. Ct. J. 571 (Apr. 11, 2002) (orig. proceeding) ("A party generally lacks an adequate appellate remedy if its counsel is disqualified."). Even though an evidentiary hearing was likely part of the trial court proceedings, an order denying a motion to disqualify could nevertheless involve a "controlling question of law" making a permissive appeal proper. *See, e.g., Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261 (5th Cir. 2001) (granting permission to appeal from an order denying a motion to disqualify); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 338 (1981) (suggesting in dicta the availability of 1292(b), as an alternate to mandamus, to review an order denying a motion to disqualify).

d. Do I file a docketing statement?

Not only is the docketing statement required for all "appeals" under the current rules, filing a docketing statement as you would in any other appeal, including an interlocutory appeal, will make the filing of the petition for permission go more smoothly. Most if not all of the docketing-statement forms used around the state require counsel to: (1) state whether the appeal is interlocutory; (2) if so, specify the statutory basis for the interlocutory appeal; and (3) attach a copy of the trial court's judgment or order being appealed and a copy of the notice of appeal. Filing the docketing statement as soon

as possible after filing the notice of appeal serves an especially important function for the new permissive appeal since most of the clerk's offices are still unfamiliar with the permissive appeal and how to intake it. Once the docketing statement is filed, but before filing the petition for permission, I would call the clerk's office to pave the way for a smooth filing, ask how many copies the court wants, and ask what the filing fee is. Having already filed a docketing statement will make this conversation much easier.

e. What do I call the document requesting the court of appeals' permission to appeal?

In federal court, the instrument filed in the appellate court requesting permission to appeal is called a "petition for permission to appeal." FED. R. APP. P. 5. Section 51.014(f) uses the term "application." TEX. CIV. PRAC. & REM. CODE § 51.014(f) ("If *application* is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order." (emphasis added)). The fact that the state statute uses the term "application," however, should not be given undue weight in deciding whether the instrument should be called a petition or an application; section 1292(b) likewise uses the term "application," but the instrument in federal court for permissive appeals is nevertheless called a "petition" for permission. 28 U.S.C. § 1292(b) ("The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if *application* is made to it within ten days after the entry of the order . . ." (emphasis added)); FED. R. APP. P. 5 ("To request permission to appeal when an appeal is within the court of

appeals' discretion, a party must file a petition for permission to appeal.”). Thus, it would be appropriate to call the document either a “petition for permission to appeal” or an “application for permission to appeal.” Because state appellate practice uses the term “petition” for mandamus proceedings and for petitions for review, my preference is to stick with this terminology and the federal terminology and call it a “petition for permission to appeal.”

f. How long is it? What is in it? Will I get a chance to rebrief on the merits if permission to appeal is granted?

In federal court, because the court permits full briefing if it grants permission to appeal, the petition for permission is a shorter document, limited to 20 pages in 14 point font size, and is not intended to be a brief on the merits. 5TH CIR. R. 5; FED. R. APP. P. 5(b); Proposed Amendment to FED. R. APP. P. 5(c). Without a TRAP provision governing the procedure for permissive appeals, no one really knows whether a court of appeals that grants permission to appeal will permit “rebriefing” or regular full merits briefing if a shorter application or petition for permission is filed at the outset instead of a regular-length appellant’s brief.

I think it would be sensible to file a shorter petition for permission within the 10-day statutory deadline, more in keeping with the length and content of a federal petition for permission or a petition for review to the Supreme Court of Texas, with a specific request in the prayer asking for the court to permit full briefing and set a briefing schedule if the court grants permission to appeal. Looking to the federal two-step model, the one court of appeals in Texas that has granted permission to appeal under section 51.014(d)-(f) permitted rebriefing on the merits after it granted permission.

Another sensible approach is one suggested by a couple of the state court appellate Staff Attorneys, which is to file a notice of appeal the same day, if possible, as the district court signs the order authorizing the permissive appeal so that the appeal can be assigned an appellate court docket number early in the 10-day period, and then file a motion for a scheduling order or a “motion for clarification of procedures” in the court of appeals as soon as possible. Such a motion should include a brief explanation regarding the absence of guidance in the Texas Rules of Appellate Procedure and may wish to point to the procedures detailed in Federal Rule of Appellate Procedure 5.

Some of the Staff Attorneys, however, were adamant that the permissive interlocutory appeal be treated like any other interlocutory appeal, so cautious practitioners should consider filing a full-blown merits brief as their petition for permission to appeal, even though, as discussed above, the appellate record is unlikely to have been filed in the appellate court in time to include record citations in the brief. Counsel choosing to proceed in this way may want to consider requesting permission to amend the petition for permission to include record citations. Additionally, a significant portion of a full-blown merits brief filed as the petition for permission should be devoted to persuading the court why it ought to exercise its discretion to grant permission, much like a pre-grant brief on the merits filed in the Texas Supreme Court should continue to persuade the Court to grant the petition for review.

g. What should be in the appendix?

I recommend following the rule governing the appendix for a regular appellate brief (exercising good judgment to not overload the appendix with optional items). *Compare* TEX.

R. APP. P. 38.1(j) *with* FED. R. APP. P. 5(b)(1)(E). Counsel should also consider attaching a copy of section 51.014(d)-(f) until the appellate courts, staff, and clerk's offices become more familiar with it.

h. What is the filing fee? When is it payable? Is there an additional fee if the petition is granted?

The short answer to this question is you should pay whatever fee the court of appeals tells you to pay, and that the fee is probably \$125 payable as in any other appeal, regardless of whether permission to appeal is granted. The proper fee and when that fee is payable is a little bit of a headscratcher though. The petition for permission has characteristics of a motion, which is \$10; an original proceeding or a petition for review, both of which are \$75 (and which, in the Supreme Court, require an additional \$75 fee if additional briefing is requested or if granted); and an appeal, which is \$125. At least one of the two courts of appeals in which petitions for permission have been filed has charged the \$125 fee for an appeal, although the court considered whether the fee was properly payable only if permission to appeal was granted. Some of the Staff Attorneys at other courts speculated that the fee for the petition for permission might be the \$10 motion fee, and that, if granted, the fee would be the \$75 fee for an original proceeding.

F. Regardless of the procedure, how should a petition for permission to appeal be pitched?

The Fifth Circuit grants permission to appeal in a surprisingly high percentage of the section 1292(b) petitions filed each year. Perhaps the high percentage of petitions granted is a reflection of the fact that very few petitions are filed each year and that a party petitioning the court of appeals has already convinced at least

one judge (the district court) that an issue in the case meets the standards in section 1292(b) for a permissive appeal.

Nevertheless, persuading the district court, and, in state court, also all other parties, is only half of the task since the appellate court must also agree that the permissive appeal is appropriate. In federal practice, it is well-settled that the court of appeals' decision to grant permission to appeal is completely discretionary. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (court of appeals' has discretion to deny petition for permission for nonmerits-related reasons, such as docket congestion); *Gallimore v. Mo. Pac. R.R.*, 635 F.2d 1165, 1168-69 (5th Cir. 1981) (denial of 1292(b) petitions often have little or nothing to do with the merits of the case). For that reason, the petition for permission to appeal should be focused on explaining why the court of appeals should exercise its discretion to grant permission to appeal.

In drafting the petition for permission to appeal under section 51.014(d)-(f), two appellate practitioners have made the following observations:

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.”

Harris & Liberato, *supra*, at 31. That advice is consistent with the advice for pitching a section 1292(b) petition for permission:

[J]udicial economy is the central determinant in either granting or denying the appeal. On the one hand the court is fundamentally opposed to piecemeal litigation. On the other, an interlocutory appeal may stand a good chance of eliminating the occurrence of a full trial, an appeal, and a remand for new trial. The latter situation will usually arise when a determinative issue of law, decided by the district court on a motion for summary judgment, dismissal, or in some other preliminary manner, is an issue of law of first impression in the Fifth Circuit, is wrongly decided according to Fifth Circuit or Supreme Court precedent, or is in some other respect a close question. It will be more persuasive if the petition includes citation to authority which shows that interlocutory appeals have been granted in similar circumstances.

1 GEORGE K. RAHDERT & LARRY M. ROTH, APPEALS TO THE FIFTH CIRCUIT MANUAL ch. 5, at 5 (1993), *cited in* Dana Livingston Cobb, *Federal Interlocutory Appeals and Mandamus*, in UNIV. OF TEX. 10TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS 21-22 (2000) (observing that the advice for pitching a section

1292(b) appeal “should sound strikingly similar to advice on how to pitch a petition for review to the Supreme Court of Texas”). Indeed, in persuading the court that there is a “substantial ground for difference of opinion,” the participation of amici, attention to national trends and the Restatement, and reference to debate among legal scholars may be extremely helpful in permissive appeal practice.

There is one wrinkle—a significant wrinkle—affecting Texas state court permissive appeal practice that merits careful consideration by both courts and practitioners looking at permissive appeals. In attempting to establish that the order involves a “controlling question of law,” as to which there is “substantial ground for difference of opinion,” counsel are essentially arguing that the case is supreme-court worthy. It should come as no surprise that the United States Supreme Court has granted certiorari to review several cases that were reviewed by circuit courts in section 1292(b) permissive appeals. *See generally* Appendix C to this paper. Similarly, en banc rehearing is frequently granted from section 1292(b) panel decisions.

Unlike supreme-court review in the federal system, the Texas Supreme Court’s jurisdiction to review the merits of an interlocutory order is restricted by the Government Code. TEX. GOV’T CODE § 22.225(b); *see* Pamela Stanton Baron, *Pre-Judgment Fast Track Part I: Interlocutory Appeals in Texas State Courts*, in STATE BAR OF TEX., ADVANCED CIVIL TRIAL COURSE P (2000).⁵ Again, to even

⁵There are four statutory exceptions to Government Code section 22.225(b)’s limitation on the Texas Supreme Court’s jurisdiction over interlocutory orders:

(1) when the court of appeals’ decision

obtain a district court order authorizing the filing of a petition for permission in Texas, all parties have essentially agreed that the case is worthy of the Texas Supreme Court's attention. But, the question is whether a state intermediate appellate court's decision will provide the definitive ruling the parties are seeking on such a "controlling issue of law as to which there is substantial ground for difference of opinion." TEX. CIV. PRAC. & REM. CODE § 51.014(d); 28 U.S.C. § 1292(b). What if the appellate court grants permission to appeal, but there is no statutory basis for the Texas Supreme Court to exercise jurisdiction to review the interlocutory appeal, and, on remand, the case is tried after full discovery, appealed again where law of the case from the prior (permissive interlocutory) appeal will bind the court of appeals, but not the Texas Supreme Court? If a truly definitive pronouncement on such an unsettled and controlling legal issue must await Texas Supreme Court review upon appeal from a final judgment, will immediate appeal really

conflicts with a prior decision of another court of appeals or the Supreme Court on a question of law material to the decision of the case;

- (2) there is a dissent in the court of appeals;
- (3) the case involves a member of the media's summary judgment motion under TEX. CIV. PRAC. & REM. CODE § 51.014(6); and
- (4) the appeal relates to class certification and involves car dealers.

Baron, *supra*, at 30. There are also three judicially created exceptions:

- (1) when the issue presented relates to whether the court of appeals properly exercised jurisdiction over the interlocutory appeal;
- (2) when the court of appeals issues an order interfering with the Supreme Court's jurisdiction; and
- (3) when the court of appeals' opinion is so wrong that extraordinary circumstances require the Supreme Court to correct the error through mandamus review.

Id.

"materially advance the ultimate termination of the litigation"? TEX. CIV. PRAC. & REM. CODE § 51.014(d); 28 U.S.C. § 1292(b). Consistent with the rationale of the statutory exceptions to the limitation on the Texas Supreme Court's jurisdiction over interlocutory orders for decisions creating a conflict and those involving a dissenting opinion, the Texas Legislature should consider carving out a similar statutory exception on supreme court jurisdiction to review appellate court decisions in permissive appeals. This issue is further discussed *infra* pp. 20-21.

Thus, in pitching the case to the appellate court, making the question of law look important can be a double-edged sword in state court permissive appeal practice. It remains to be seen whether any state appellate courts will shy away from an important issue for fear that resolution of the issue at the appellate court level on a permissive appeal will be wasted if final resolution by the Supreme Court of Texas is unlikely to occur until after a second appeal on final judgment. Despite no similar limitation on the United States Supreme Court's jurisdiction to review permissive appeals, even some federal appellate courts have been reluctant to grant permission to appeal when the issue is too important:

This intriguing question, "certified" to us under the provisions of 28 U.S.C. § 1292(b) has been briefed not only by the opposing parties but by three amici curiae, each of which has taken a different position in response not only to the "certified" question but to related questions. The case itself has tremendous implications both for the securities industry and the investing public, as it involves questions some resolutions of which Judge Carter recognized in his Memorandum

Opinion of March 18, 1974, could make it “exceedingly difficult for any (brokerage firm) to function as an investment banker for a company and at the same time function as a broker-dealer in that company’s securities.” And, too, a decision in this case might possibly even have impacts in the banking business where bank trust departments are effectuating transactions in securities of companies with which the bank has a commercial banking relationship.

Slade v. Shearson, Hammill & Co., 517 F.2d 398, 399-400 (1st Cir. 1974) (footnote omitted) (deciding to withdraw the order granting permission to appeal as having been improvidently granted).

G. Issues to watch for under the state permissive appeal statute

Because of the absence of a specific TRAP provision governing permissive appeals and because there are no reported decisions on the new permissive appeal statute, there are a number of other unanswered questions under section 51.014(d)-(f) that have been resolved in federal court either through the adoption of Federal Rule of Appellate Procedure 5 or through appellate decisions. Practitioners should keep an eye out for the following issues:

1. Is a notice of appeal required for a permissive appeal in Texas?

As discussed earlier in this paper, although a notice of appeal plays no part—by design—in the federal permissive appeal practice, because the current Texas Rules of Appellate Procedure do not distinguish between appeals “as of right” and permissive appeals, but instead are broadly worded to govern any “appeal,” it appears that a notice of appeal must be filed to invoke the

jurisdiction of the court of appeals over any “appeal,” including permissive appeals. TEX. R. APP. P. 25.1 (a)-(b); *see supra* pp. 10-11. Compare FED. R. APP. P. 3(a)(1) with FED. R. APP. P. 5(a), (d).

Could a petition for permission to appeal filed in the court of appeals be liberally construed as a notice of appeal mistakenly filed in the court of appeals under the second sentence of Rule 25.1(a)?

If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate court clerk must immediately send the trial court clerk a copy of the notice.

TEX. R. APP. P. 25.1(a). Stranger things have happened, *see, e.g., Verburgt v. Dorner*, 959 S.W.2d 654 (Tex. 1997), but I would have to say that a petition for permission intentionally filed in the court of appeals should not be construed as a notice of appeal “mistakenly” filed in the court of appeals instead of the trial court.

If a petition for permission is filed in the court of appeals within the 10-day statutory period before a notice of appeal is filed in the trial court, can any jurisdictional defect be cured by subsequently filing a notice of appeal in the trial court within the 20-day period for accelerated appeals provided in TEX. R. APP. P. 26.1(b)? Texas Rule of Appellate Procedure 27, which governs premature filings, does not appear to provide any help. It governs notices of appeal filed before an appealable order is signed or other premature actions taken before the signing of an appealable order. If, on the other hand, a state trial court is permitted to recertify an order and thus restart the time for pursuing a permissive appeal, like some federal courts

allow, then any jurisdictional defect could be cured by the trial court's recertification, in which case a notice of appeal could be filed, and the petition for permission could be refiled once jurisdiction is invoked by the filing of the notice of appeal. In that situation, an appellant might wish to request that the appellate court treat the previously filed petition for permission as relating to the new order under the authority of Rule 27.3.

2. When is certification proper? At any time?

A district court is frequently first approached about signing an order authorizing the filing of a petition for permission to appeal after the trial court has resolved a controlling question of law in some other order. The federal practice therefore expressly contemplates that a district court will amend an order to include the required authority to pursue a permissive appeal. Federal Rule of Appellate Procedure 5 used to expressly state that an amendment to include the required language for a permissive appeal may be made "at any time." Former Fed. R. App. P. 5 ("An order may be amended to include the prescribed statement at any time . . ."). The current version of Rule 5 no longer contains the phrase "at any time" and is silent on a time limit for amending an order to include the required statement. See FED. R. APP. P. 5(a)(3). Despite the deletion of the phrase, "at any time," federal courts have held that "there is no time limit in the statute or in any applicable rules for seeking the district judge's permission to appeal under 1292(b)." *Richardson Elecs., Ltd. v. Panache Broadcasting of Pa, Inc.*, 202 F.3d 957, 958-59 (7th Cir. 2000). Section 51.014(d) is similarly silent on any time limit for signing an order authorizing the filing of a petition for permission.

Although neither the federal statute nor rule contain any time limitation on when an order

may be amended to include the required statement, some federal courts of appeals have declined to grant the petition for permission to appeal on the basis of delay in seeking an amended order. See, e.g., *Richardson Elecs.*, 202 F.3d at 958-59 ("A district judge should not grant an inexcusably dilatory request, as this appears to be; if he does, we'll refuse our permission to appeal. In any event, no excuse for the defendants' taking two months to appeal has been offered except the patently inadequate one that the case had been 'largely dormant' for nine years, requiring the defendants' lawyer to refamiliarize himself with it in the face of a 'pre-existing, conflicting commitment to meet a deadline in another case.' In these circumstances, the delay alone was sufficient grounds for us to refuse our permission to appeal."); *Weir v. Propst*, 915 F.2d 283 (7th Cir. 1990) (holding that it was an abuse of discretion to grant a motion to amend an interlocutory order denying immunity in a civil rights action to certify it for appeal when the amendment was sought three months after the order was entered, and there was no showing of any reason for the delay).

3. If the 10-day period for petitioning for permission lapses, can the 10-day period be restarted by trial court recertification, as is true in some federal circuits? Will a motion for extension of time be permitted?

There is a split among the federal circuits as to whether an order certified for appeal may be recertified if the 10-day period to petition for permission to appeal lapses. See *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 162 (1984) (Stevens, J., dissenting) (noting circuit conflict, and, although the majority was silent on whether recertification was proper, explaining that he was "persuaded by the view, supported by the commentators, that

interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will”); *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110-13 (5th Cir. 1981) (holding that a district court may freely recertify an interlocutory order as long as the requirements for certification under § 1292(b)—a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the litigation—continue to exist when the would-be appellant seeks recertification); 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929, at 395-96 (2d ed. 1996 & Supp. 2000) (describing the Fifth Circuit’s approach as the “better view”); see also *Marisol ex rel. Forbes v. Giuliani*, 104 F.3d 524, 527-28 (2d Cir. 1997) (collecting cases).

The state statute is silent on this issue. Allowing a district court to restart the 10-day time period for filing a petition for permission in federal court is arguably consistent with other parts of federal appellate practice. For instance, although Federal Rule of Appellate Procedure 5 governing permissive appeals is silent on the issue of extensions of time, Rule 4(a)(5) governing appeals as of right permits a federal *district court* (but not the court of appeals) to extend the time for filing a notice of appeal. The problem with allowing a district court in state court to restart the 10-day time period—in essence to grant a motion for extension of time (at any time) to file a petition for permission to appeal—is that in state court, unlike federal practice—it is the court of appeals, not the trial court, that possesses the authority to grant a motion for extension of time to file a notice of appeal. TEX. R. APP. P. 26.3. Presumably, agreement of the parties would be required for any recertification by the district court, but

would agreement of the parties also be required for any motion for extension of time (if one is permitted) from the court of appeals?

4. Will review be limited to the question identified, or will it extend to any issue fairly included within the certified order?

In federal practice, review is not limited to the particular question identified by the district court, but may extend to “any issue fairly included within the certified order[s].” *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). A recent Fifth Circuit decision provides an example of how this rule works:

In its June 28, 2000, certification order, the district court identified the controlling question as whether Reserve had a sufficient proprietary interest in the mooring facility to sustain a claim for economic damages. . . . [W]e may review the issue of whether Reserve suffered physical damage as well as whether Reserve possessed a sufficient proprietary interest.

Reserve Mooring Inc. v. Am. Commercial Barge Line, LLC, 251 F.3d 1069 (5th Cir. 2001). Like the federal statute, the state statute appears to confer jurisdiction over an “order” involving a controlling question of law, and not merely over the particular question identified, so the result is likely to be the same. See TEX. CIV. PRAC. & REM. CODE § 51.014(d),(f).

5. Do the limitations on the Texas Supreme Court’s jurisdiction to review interlocutory appeals apply to permissive interlocutory appeals?

Will the Texas Supreme Court’s ability to review a court of appeals’ decision in a permissive appeal be limited as it is in other interlocutory appeals? The restriction on the Supreme Court’s jurisdiction to review interlocutory appeals is found in Section 22.225(b) of the Texas Government Code:

(b) Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in the following civil cases:

-
- (3) an appeal from an interlocutory order appointing a receiver or trustee or from other interlocutory appeals that are allowed by law;
-

TEX. GOV’T CODE § 22.225(b)(3) (emphasis added). Although this section appears to broadly apply to all interlocutory appeals, including presumably permissive interlocutory appeals, an argument could be made that the phrase “allowed by law” should be construed to apply only to what in federal practice are called appeals “as of right” and that permissive appeals are not appeals that are “allowed by law” since they may only be taken at the *discretion* of the trial court and the court of appeals and upon the agreement of all parties.

If, on the other hand, a permissive appeal is to be treated like other interlocutory appeals under section 22.225(b)(3), the Supreme Court can still review them if the case fits within any of the exceptions to that section. There are four statutory exceptions to section 22.225(b)(3):

- (1) when the court of appeals’ decision conflicts with a prior decision of another court of appeals or the Supreme Court on a question of law material to the decision of the case;
- (2) there is a dissent in the court of appeals;
- (3) the case involves a member of the media’s summary judgment motion under TEX. CIV. PRAC. & REM. CODE § 51.014(6); and
- (4) the appeal relates to class certification and involves car dealers.

Baron, *supra*, at 30. There are also three judicially created exceptions:

- (1) when the issue presented relates to whether the court of appeals properly exercised jurisdiction over the interlocutory appeal;
- (2) when the court of appeals issues an order interfering with the Supreme Court’s jurisdiction; and
- (3) when the court of appeals’ opinion is so wrong that extraordinary circumstances require the Supreme Court to correct the error through mandamus review.

Id. While the Supreme Court may be able to review a court of appeals’ decision in a permissive appeal under the first judicially created exception—when the issue presented relates to whether the court of appeals properly exercised or properly refused to exercise jurisdiction over the interlocutory appeal—the Supreme Court’s review will not extend to the merits of the decision.⁶

⁶*See, e.g., Univ. of Tex. Southwestern Med. Ctr. v. Margulis*, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam) (“Even if we assume that the motion should not have been granted because it was not

6. Must a party seeking mandamus in state court show that a permissive appeal was not available to demonstrate the inadequacy of any appellate remedy, as is true in federal court mandamus practice?

In federal mandamus practice, like Texas mandamus practice, a relator is not entitled to mandamus relief unless the relator can demonstrate the inadequacy of alternate means of relief, including an appeal after final judgment and any interlocutory appeal. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 309 (1989); see *Deloitte & Touche, LLP v. Fourteenth Ct. of Appeals*, 951 S.W.2d 394, 397 (Tex. 1997) (orig. proceeding) (for mandamus purposes, holding that “an interlocutory appellate remedy concluding in the court of appeals is adequate”). Even though a federal permissive appeal is discretionary with both the trial court and the appellate court, the Fifth Circuit will deny mandamus relief if the relator could have sought certification to take a permissive appeal under section 1292(b):

supported by evidence, a question that we do not decide on this interlocutory appeal, the motion was ‘based on an assertion of immunity.’ The court of appeals has jurisdiction to consider whether the trial court erred in denying that motion. . . . [We] reverse the judgment of the court of appeals and remand this case to that court for consideration of the merits of the interlocutory appeal.”); *Qwest Communications Corp. v. AT&T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000) (per curiam) (“We hold that, in character and function, the trial court’s order grants a temporary injunction and is appealable under Texas Civil Practice and Remedies Code section 51.014(a)(4). We do not express any opinion, however, on the merits of the appeal. Accordingly, the Court grants petitioner’s petition for review and, without hearing oral argument, reverses the judgment of the court of appeals and remands the case to that court for consideration of the merits of the appeal.”).

[W]e conclude that El Paso could have sought certification [under § 1292(b)] from the district court of its order denying withdrawal of the reference. Consequently, we conclude that El Paso does not lack an “adequate alternative means to obtain the relief they seek” and is therefore not entitled to the extraordinary remedy of mandamus.

In re El Paso Elec. Co., 77 F.3d 793, 795 (5th Cir. 1996) (quoting *Mallard*, 490 U.S. at 309); see also *Dayton Indep. Sch. Dist. v. U.S. Minerals Prods. Co.*, 906 F.2d 1059, 1061 (5th Cir. 1990) (“This Court denied the [mandamus] petition and held that National Gypsum first must seek certification from the district court in accordance with 28 U.S.C. § 1292(b).”).

The question is whether Texas appellate courts will follow suit and require relators in mandamus actions to show that the new permissive appeal statute was not an available alternative remedy. Before widespread panic sets in, let me outline a number of ways in which a relator can avoid application of this rule.

First, the new state permissive appeal statute applies only to cases filed after September 1, 2001. If your case was filed prior to that date, you’re safe even if Texas decides to follow the approach in federal mandamus decisions.

Second, the state permissive appeal statute requires that all parties agree to the permissive appeal. There may be any number of ways to demonstrate that the real parties in interest did not agree or, if you didn’t ask before filing a mandamus, that they would not have agreed to a permissive appeal. If you have not yet filed a mandamus, you could file a motion in the

trial court requesting that the order be certified. If the other side opposes your motion, you have your proof. If you must complete a certificate of conference by local rule before filing a motion and learn at that time that you cannot get agreement of the parties, can you still file your motion? Sure; the other parties might come around; if they don't, you have still papered the file with your proof. If all else fails, include a statement in your affidavit verifying the mandamus petition that a permissive appeal was unavailable because you could not obtain the required agreement of the parties.

If you have already filed your mandamus, there are still other ways to show that the real parties in interest would not have agreed to a permissive appeal. If, for example, the real parties vigorously oppose the mandamus by complaining that the mandamus was unnecessary, expensive, and time consuming, the court of appeals can take note that the real parties probably would not have agreed to a permissive appeal. Additionally, many mandamus actions from *discovery orders* are not likely to involve controlling questions of law that will materially advance the ultimate termination of the litigation.⁷ Additionally, if your case involves numerous parties separately represented by numerous lawyers, the appellate court may be willing to observe the unlikelihood of obtaining the agreement of all parties required for a permissive appeal under the state statute.

⁷There is, however, overlap between the types of orders reviewable by mandamus and those reviewable by permissive appeal. For instance, in *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261 (5th Cir. 2001), the Fifth Circuit reviewed on a permissive appeal a district court's refusal to disqualify counsel, an issue the Fifth Circuit has previously reviewed by mandamus. *In re Am. Airlines, Inc.*, 972 F.2d 605, 605 (5th Cir.1992); *In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir.1992).

In any event, if your opponent in a mandamus action raises the argument that you should have at least attempted to pursue a permissive appeal, that argument is not likely to be successful if your opponent is just being coy and does not intend to agree to a permissive appeal. You should not be required to engage in the useless act of abating or dismissing your mandamus to go back down to the trial court to attempt to get an order authorizing a permissive appeal if your opponent will ultimately not agree to it. If, however, appellate decisions under the state permissive appeal statute hold that there is some time limit or laches problem in seeking certification, your opponent may be able to successfully raise this type of argument without being cornered into agreeing to a permissive appeal.

Third, in mandamus cases, the relator is usually arguing that the law *clearly* required the trial court to take a particular action, which is inconsistent with arguing that the parties are all in agreement that there is a substantial ground for difference of opinion concerning the controlling question of law. Indeed, the real parties in interest are likely also arguing that the law is clear (but that the trial court followed it), *i.e.*, that there is *no* substantial ground for difference of opinion. If so, you can argue that it does not appear that your opponent would have agreed that the order involved a controlling question of law about which there is substantial ground for difference of opinion.

III. CONCLUSION

Applying the current Texas Rules of Appellate Procedure to the new state permissive appeal created by section 51.014(d)-(f) of the Civil Practice and Remedies Code creates a number of

procedural problems and uncertainties for practitioners and the appellate courts. The Supreme Court Rules Advisory Committee should consider amending the Texas Rules of Appellate Procedure to provide guidance to the courts and practitioners concerning how a permissive appeal is to be pursued and handled in Texas. In the meantime, practitioners should follow the existing appellate rules for interlocutory appeals, unless a court instructs otherwise.

The Texas Legislature should also consider amending the permissive appeal statute to remove the requirement that the parties agree to the permissive appeal because that requirement unnecessarily restricts the usefulness of the permissive appeal device. The Legislature should also consider creating an express exception to the limitation on the jurisdiction of the Supreme Court of Texas to review permissive appeals given that the type of questions appropriately certified for a permissive appeal are also worthy of a definitive pronouncement from Supreme Court of Texas.

APPENDIX A

2001 AMENDMENTS TO TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 51.014 *(amendments are in italics)*

§ 51.014. Appeal From Interlocutory Order

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

- (1) appoints a receiver or trustee;
- (2) overrules a motion to vacate an order that appoints a receiver or trustee;
- (3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;
- (4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;
- (5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;
- (6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;
- (7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code; or
- (8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.

(b) An interlocutory appeal under Subsection (a), *other than an appeal under Subsection (a)(4)*, shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay of the commencement of trial under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

(d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

APPENDIX B
FEDERAL RULE OF APPELLATE PROCEDURE 5
AND FIFTH CIRCUIT RULE 5

FRAP 5. APPEAL BY PERMISSION

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

- (A) the facts necessary to understand the question presented;
- (B) the question itself;
- (C) the relief sought;
- (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
- (E) an attached copy of:
 - (i) the order, decree, or judgment complained of and any related opinion or memorandum, and
 - (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.⁸

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

- (A) pay the district clerk all required fees; and
- (B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

FIFTH CIRCUIT RULE 5

Length. A petition for permission to appeal must not exceed 20 pages and any answer to the petition must not exceed 10 pages. The certificate of interested persons, corporate disclosure statement, proof of service and the accompanying documents required by FED. R. APP. P. 5(b)(1)(E) do not count toward the page limit.⁹

⁸There is a proposed amendment to FED. R. APP. P. 5(c) that will specify a page limitation for petitions for permission and close a gap in the existing rules concerning what font size is to be used for petitions for permission to appeal, responses, and replies:

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule ~~32(a)(1)~~32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

⁹The proposed amendment to Fifth Circuit Rule 5 is necessitated because of proposed changes to the FRAP which adopt these page limits:

Length. ~~A petition for permission to appeal must not exceed 20 pages and any answer to the petition must not exceed 10 pages.~~ The certificate of interested persons, corporate disclosure statement, proof of service and the accompanying documents required by FED. R. APP. P. 5(b)(1)(E) ~~do~~ required by 5TH CIR. R. 28.2.1 does not count toward the page limit.

APPENDIX C
EXAMPLES OF CASES REVIEWABLE
UNDER SECTION 1292(B)

Because section 1292(b) appeals must involve a “controlling question of law,” the examples of the type of questions taken on section 1292(b) appeals are extremely diverse. Nevertheless, the following examples show the type of questions federal courts have considered important enough to permit a discretionary appeal, as well as the procedural posture of the case.

Note the extraordinarily high number of section 1292(b) appeals that presented issues that were ultimately considered certworthy by the United States Supreme Court.

Controlling Questions of Law	Procedural Posture	Cite
(1) Whether imposition of liability on media defendants under wiretapping statutes solely for broadcasting a newsworthy tape on public affairs radio programming, when tape was illegally intercepted and recorded by unknown persons not agents of defendants, violates the First Amendment; and (2) Whether imposition of liability under wiretapping statutes on one defendant solely for providing the anonymously intercepted and recorded tape to the media defendants violates the First Amendment.	Reviewing the court of appeals’ reversal of the district court’s denial of a motion for summary judgment	<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001)
Whether ERISA provides a private cause of action against nonfiduciaries who participate in a prohibited transaction.	Reviewing the court of appeals’ reversal of the district court’s denial of a motion for summary judgment	<i>Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.</i> , 530 U.S. 238 (2000)
Whether service of process is a prerequisite for the running of the 30-day removal period under § 1446(b).	Reviewing the court of appeals’ reversal of the district court’s denial of a motion to remand	<i>Murphy Bros. v. Michetti Pipe Stringing, Inc.</i> , 526 U.S. 344 (1999)

<p>Whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983.</p>	<p>Reviewing the court of appeals' reversal of the district court's stay of action pending filing and resolution of state court action for restoration of good-time credits</p>	<p><i>Edwards v. Balisok</i>, 520 U.S. 641 (1997)</p>
<p>Whether the standard of care that defendants owed to a federally chartered, federally insured institution was controlled by state law, federal common law, or a special federal statute (12 U.S.C. § 1821(k)) that speaks of "gross negligence."</p>	<p>Reviewing the court of appeals' reversal of the district court's partial denial of a motion to dismiss</p>	<p><i>Atherton v. FDIC</i>, 519 U.S. 213 (1997)</p>
<p>Whether the federal maritime claim for wrongful death recognized in <i>Moragne</i> supplies the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters.</p>	<p>Reviewing the court of appeals' reversal in part and affirmance in part of the district court's denial of a motion for summary judgment</p>	<p><i>Yamaha Motor Corp., U.S.A. v. Calhoun</i>, 516 U.S. 199 (1996)</p>
<p>Whether section 3(8) of the Carriage of Goods by Sea Act nullifies an arbitration clause contained in a bill of lading governed by COGSA.</p>	<p>Reviewing the court of appeals' affirmance of the district court's grant of a motion to compel arbitration</p>	<p><i>Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER</i>, 515 U.S. 528 (1995)</p>
<p>Whether the district court's refusal to enforce a privately negotiated settlement agreement claimed to shelter a party from suit was immediately appealable under § 1291 as depriving defendant to "immunity from suit"</p>	<p>Noting the availability of review under § 1292(b) in reviewing the court of appeals' decision to dismiss an appeal for lack of appellate jurisdiction over district court's decision to vacate order granting voluntary dismissal</p>	<p><i>Digital Equip. Corp. v. Desktop Direct, Inc.</i>, 511 U.S. 863 (1994)</p>
<p>Whether an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under the Comprehensive Drug Abuse Prevention and Control Act of 1970.</p>	<p>Reviewing the court of appeals' reversal of the district court's denial of a motion for summary judgment</p>	<p><i>U.S. v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.</i>, 507 U.S. 111 (1993)</p>

<p>Whether common-law claims against cigarette manufacturers were preempted by the Public Health Cigarette Smoking Act of 1969, which required a warning (that the Surgeon General has determined that cigarette smoking is dangerous to health) appear in a conspicuous place on every package of cigarettes sold in the United States, or by the Act's 1965 predecessor, which required a less alarming label.</p>	<p>Reviewing the court of appeals' reversal of the district court's grant of a motion to strike preemption defense</p>	<p><i>Cipollone v. Liggett Group, Inc.</i>, 505 U.S. 504 (1992)</p>
<p>Whether, in a private antitrust action under 15 U.S.C. § 15 involving claims of price fixing against the producers of natural gas, a State is a proper plaintiff as <i>parens patriae</i> for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State.</p>	<p>Reviewing the court of appeals' affirmance of the district court's partial dismissal of claims</p>	<p><i>Kansas v. UtiliCorp United, Inc.</i>, 497 U.S. 199 (1990)</p>
<p>Whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from named plaintiffs to potential members of a class on whose behalf the collective action has been brought.</p>	<p>Reviewing the court of appeals' affirmance of the district court's orders regarding discovery and further notice to potential class members</p>	<p><i>Hoffmann-La Roche Inc. v. Sperling</i>, 493 U.S. 165 (1989)</p>
<p>Whether the Federal Tort Claims Act permits the exercise of pendent party jurisdiction over additional parties as to which no basis for federal jurisdiction existed.</p>	<p>Reviewing the court of appeals' reversal of the district court's grant of plaintiff's motion to amend the complaint and assertion of pendent-party jurisdiction</p>	<p><i>Finley v. United States</i>, 490 U.S. 545 (1989)</p>

Whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue specified in a contractual forum-selection clause.	Reviewing the court of appeals' reversal of the district court's denial of motions to transfer venue or dismiss for improper venue	<i>Stewart Org., Inc. v. Ricoh Corp.</i> , 487 U.S. 22 (1988)
In holding that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, the court stated, "Section 1292(b) therefore provides an avenue for review of forum non conveniens determinations in appropriate cases."	Reviewing the court of appeals' decision to exercise appellate jurisdiction under section § 1291 and noting that review under § 1292(b) was available	<i>Van Cauwenberghe v. Baird</i> , 486 U.S. 517 (1988)
Whether the Clean Water Act preempted state nuisance law.	Reviewing the court of appeals' affirmance of the district court's denial of a motion to dismiss	<i>Int'l Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)
Whether state or federal law governs characterization of a section 1983 claim for limitations purposes.	Reviewing the court of appeals' affirmance of the district court's denial of a motion to dismiss	<i>Wilson v. Garcia</i> , 471 U.S. 261 (1985)
Whether the Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements regardless of the legal theory of recovery asserted.	Reviewing order denying summary judgment in part	<i>Jesco Constr. Corp. v. NationsBank Corp.</i> , 278 F.3d 444 (5th Cir. 2001)
Whether an enforceable contract existed under the statute of frauds.	Reviewing grant of partial summary judgment	<i>Conner v. Lavaca Hosp. Dist.</i> , 267 F.3d 426 (5th Cir. 2001)
Whether a state-law claim for wrongful termination of employment contract to prevent plaintiff from becoming eligible for pension benefits at age 65 was preempted by ERISA.	Reviewing order denying pre-emption	<i>Bullock v. Equitable Life Assur. Soc. of U.S.</i> , 259 F.3d 395 (5th Cir. 2001)
Whether the district court erred in refusing to disqualify counsel.	Reviewing denial of a motion to disqualify counsel	<i>Horaist v. Doctor's Hosp. of Opelousas</i> , 255 F.3d 261 (5th Cir. 2001)

<p>Whether the district court erred in its Rule 23(b)(2) certification of a “Race Discrimination Class” and a “Process Class” in a class action lawsuit involving alleged racially discriminatory demolition of repairable single-family homes without proper notice or judicial warrant.</p>	<p>Reviewing order certifying class action</p>	<p><i>James v. City of Dallas</i>, 254 F.3d 551 (5th Cir. 2001)</p>
<p>Whether the plaintiff could recover purely economic losses under maritime law resulting from defendants’ negligence.</p>	<p>Reviewing denial of a motion for summary judgment</p>	<p><i>Reserve Mooring Inc. v. Am. Commercial Barge Line, LLC</i>, 251 F.3d 1069 (5th Cir. 2001)</p>
<p>Whether removal was proper on the basis of diversity of citizenship in light of allegations that nondiverse defendants were fraudulently joined</p>	<p>Reviewing denial of a motion to remand</p>	<p><i>Badon v. RJR Nabisco Inc.</i>, 236 F.3d 282 (5th Cir. 2000)</p>
<p>Whether detrimental reliance must be proven to recover damages for a disclosure violation arising under the Truth in Lending Act, 15 U.S.C. § 1601, and the Consumer Leasing Act, 15 U.S.C. § 1667.</p>	<p>Reviewing refusal to certify a class action as to actual damages claim</p>	<p><i>Perrone v. Gen. Motors Acceptance Corp.</i>, 232 F.3d 433 (5th Cir. 2000)</p>
<p>Whether there was standing in an interlocutory appeal from a class certification.</p>	<p>Reviewing order certifying class action</p>	<p><i>Wash. v. CSC Credit Servs. Inc.</i>, 199 F.3d 263 (5th Cir.), cert. denied, 530 U.S. 1261 (2000)</p>
<p>Whether the district court’s in limine order excluding evidence of profits that one party allegedly derived from the alleged misappropriation of a trade secret was erroneous.</p>	<p>Reviewing grant of a motion in limine excluding evidence</p>	<p><i>Reingold v. Swiftships Inc.</i>, 210 F.3d 320 (5th Cir. 2000)</p>
<p>Whether a case should be transferred under 28 U.S.C. § 1404(a) on the basis of a finding that Alabama law would govern the dispute and that Alabama therefore has the most interest in the outcome of the litigation.</p>	<p>Reviewing grant of a motion to transfer case</p>	<p><i>Snyder Oil Corp. v. Samedan Oil Corp.</i>, 208 F.3d 521 (5th Cir. 2000)</p>

<p>Whether the only defense available to employer in suit under the ADA challenging employer’s policy of permanently removing employees who had undergone treatment for substance abuse from certain safety-sensitive, little-supervised positions, was to prove that employees subject to policy posed “direct threat.”</p>	<p>Reviewing grant of partial summary judgment</p>	<p><i>EEOC v. Exxon Corp.</i>, 203 F.3d 871 (5th Cir. 2000)</p>
<p>Whether defendant’s activities were protected under <i>Noerr-Pennington</i> doctrine when the issues were: (1) whether the artful pleading doctrine could not be applied to allow removal, and (2) whether plaintiff waived its right to challenge federal jurisdiction by amending its complaint to state federal claim.</p>	<p>Reviewing denial of a motion to remand and dismissal of complaint</p>	<p><i>Waste Control Specialists, LLC v. Envirocare of Tex., Inc.</i>, 199 F.3d 781, modified in part on rehearing, 207 F.3d 225 (5th Cir.), cert. denied, 531 U.S. 956 (2000)</p>
<p>Whether, for purposes of determining if the plaintiff has a disability under the Americans with Disabilities Act, the plaintiff’s condition should be evaluated in its unmedicated or medicated state.</p>	<p>Reviewing denial of a motion for summary judgment</p>	<p><i>Washington v. HCA Health Servs. of Tex., Inc.</i>, 199 F.3d 192 (5th Cir. 1999)</p>
<p>(1) Whether employee was seaman entitled to bring action under Jones Act; (2) Whether employee’s claim was nonmaritime claim arising under Outer Continental Shelf Lands Act and thus removable without regard to citizenship of any of the parties; and (3) Whether accident was subject to admiralty jurisdiction.</p>	<p>Reviewing denial of a motion to remand to state court</p>	<p><i>Hufnagel v. Omega Serv. Indus., Inc.</i>, 182 F.3d 340 (5th Cir. 1999)</p>
<p>Whether the LMRA or ERISA completely preempted the request for an injunction and thus gave rise to federal question jurisdiction as a basis for removal.</p>	<p>Reviewing denial of a motion to remand to state court</p>	<p><i>McClelland v. Gronwaldt</i>, 155 F.3d 507 (5th Cir. 1998)</p>

Whether physician was an employee of the United States under the Federal Tort Claims Act operating in course and scope of her employment when treating plaintiff.	Reviewing denial of a motion to dismiss	<i>Linkous v. United States</i> , 142 F.3d 271 (5th Cir. 1998)
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