Focus | *Appellate Law/Business Litigation*

Can I Appeal? Now? How?

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You received an adverse ruling in a trial court. The case is not yet over, but your client would like to appeal. Your instinct might be to wait until the case is concluded and final judgment has been entered. But perhaps not. This article discusses four principles allowing "interlocutory" appellate review: (1) statutes that authorize interlocutory review as of right; (2) the judge-created collateral order doctrine; (3) statutes that authorize permissive appeal in the court's discretion; and (4) mandamus review.

Statutory Appeal as of Right

28 U.S.C. § 1292(a) permits interlocutory appeal in three circumstances. A litigant may take an immediate appeal of an order (1) "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"; (2) "appointing receivers, or refusing orders to wind up receiverships" or "directing sales or other disposals of property"; or (3) "determining the rights and liability of the parties to admiralty cases." In addition, Texas Civil Practice and Remedies Code § 51.014(a) enumerates 17 categories of orders from which immediate appeal may be taken to the Texas intermediate courts of appeal. Those orders include, but are not limited to, orders appointing a receiver or trustee; certifying or refusing to certify a class; denying a motion for summary judgment based on the assertion of immunity; and granting or denying a special appearance.

Collateral Order Doctrine

The collateral order doctrine recognizes there are important issues, distinct from the merits, which cannot be remedied by appeal if review were delayed until final judgment. Like statutory appeals as of right, a litigant does not have to seek leave to appeal a collateral order. An order is collateral, and thus immediately appealable, if it "(1) conclusively determine[s] the disputed question; (2) resolve[s] an issue that is completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment.

For example, an order denying a defendant sovereign immunity, , denying a defendant qualified immunity, , and deciding whether documents should be sealed, , are all collateral orders.

The collateral order doctrine is a creature of federal law. Texas Civil Practice and Remedies Code (CPRC) § 54.014, discussed above, provides the doctrine's state-law equivalent.

Permissive Appeal by Leave

In both federal and Texas state courts, a litigant may request "permissive appeal" if: (1) there is a controlling issue of law involved in the appeal; (2) on which there is substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation. Bringing a permissive appeal is a two-step process. First, a party must move the trial court for leave to pursue a permissive appeal (though a trial court also has *sua sponte* authority to certify a question for appeal even if no party moves for permissive appeal). If the request is granted, the party then must petition the appellate court to accept the appeal. If either court denies the request, other procedures, such as seeking mandamus review, might be available.

Mandamus Review

Finally, a writ of mandamus can be sought to correct an error of a lower court on a variety of issues. The Supreme Court of the United States has identified the standard for seeking mandamus: (1) "the party seeking issuance of the writ [must] have no other adequate means to obtain the relief he desires"; (2) the petitioner must show his "right to issuance of the writ is clear and indisputable"; and (3) the issuing court "must be satisfied that the writ is appropriate under the circumstances."

In state court, a mandamus petitioner must establish: (1) "the trial court clearly abused its discretion" and (2) he "has no adequate remedy by appeal.". In *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 468 (Tex. 2008), the Supreme Court of Texas enumerated examples of orders where mandamus was warranted. The Fifth Circuit did so in *In re Gee*, 941 F.3d 153, 166 (5th Cir. 2019).

These doctrines and cases are intended to give you a starting point in evaluating whether you may be able to invoke the appellate process before final judgment. **HN**

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